Chapter 13
Pure Formalism? Kelsenian Interpretative Theory between Textualism and Realism

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13.1 Back to School

As a graduate student in the United States I was quite surprised at how often I found myself in a position defending my positivist theoretical approach. A surprise, it may be argued, owed to a quite guileless view: "The faculty of Yale," as Frank Easterbrook stated in 1998, "little loves positivists" (Easterbrook 1998: 119). At least to a certain extent, this proved to be true still 10 years later. I guess some of my professors had fun bantering me that some of my remarks in class were owed to me being a positivist of the Kelsenian variety. And the discussions following such attributions proved to be quite entertaining, particularly as I, an Austrian lawyer, trained in a Kelsenian perspective on law, never really saw the problem.

Perhaps that was naïve, undertheorized even, given the tradition of the law school I attended: Yale Law School, so closely related to the realist movement,[1] was at least not destined to be eager to embrace arguments suspicious of being based on Kelsen's pure theory of law (see, in particular, Telman 2010: 362); as legal positivism and legal realism, so often described as opposing views in legal scholarship, would just not match.[2]

[1] See the classical account by Myres McDougal (1947). For the interesting background of the establishment of legal realism at Yale in opposition to "formalism […] practiced most successfully at Harvard" by former YLS Dean Harry Wellington, see Posner (1980: 1118–1119).

[2] And, of course, the Kelsenian seems to be particularly opposed to realist ideas:

> [P]ositivists, especially those of the Kelsen school, have adopted an extreme conceptualism: Consistency of legal norms is for them the only criterion of legality once a sovereign lawmaker is postulated. At the opposite pole of positivist jurisprudence, self-styled American legal realists and many adherents of the Critical Legal Studies movement treat

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Thus, many of my assigned readings implied that things were not as simple as I thought. And the consequences of positivist deficiency, it seemed, were crucial; in particular with regard to method: A formalist, or even "hyperformalist" theory, positivism, it was suggested in one of my favorite assigned readings, was destined to entail a "hypertextualist" approach to interpretation.[3]

Such assumptions, to borrow from Frederick Schauer, are generally based on the following consideration:

> Formalism merges into ruleness, and both are inextricably intertwined with literalism, i.e., the willingness to make decisions according to the literal meaning of the words or phrases or sentences or paragraphs on a printed page, even if the consequences of that decision seem either to frustrate the purpose behind those words or to diverge significantly from what the decisionmaker thinks—the rule aside—should be done. (Schauer 1988: 538)

Such a reception of positivist theory seems to be, if not common, widespread in U.S. academia,[4] even among quite prominent jurists who taught or teach at quite prominent law schools.[5] To make matters worse, among the positivist theories of law, the Kelsenian variety seems especially prone to a diehard textualist method, or so writers like Ronald Dworkin obviously tried to convince their readers.[6]

All this made me wonder: Is Kelsenian thought based on a "hyperformalist," or at least a "formalist" theory? And even if so: Does such a theory entail a "hypertextualist," or at least a "textualist" method of interpretation? An answer to this needs to be developed in several steps in order to avoid the confusions and misapprehensions that seem to dominate at least some parts of the discourse.

> legal rules as rationalizations of the empirical behavior of legal officials and find the sources of that behavior in economic, political, and other non-legal factors. (Berman 1998: 781) (footnote omitted)

See, for further references of the wide spread claim that positivism and realism are opposing theories, Leiter (2001).

[3] Ackerman (1998: 92): "[M]y hypertextualist interlocutor builds on a jurisprudential school that has been (more or less) dominant throughout the twentieth century: legal positivism."

[4] Hardly a novel claim, of course. See, ie, Gardner (2001: 518) or Schauer (1996: 32).

[5] See, for example, Ely (1980: 1): "'interpretivism' […] indicating that judges deciding constitutional cases should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." Continuing in the annotation to this remark: "Interpretivism *is* about the same thing as positivism."

[6] Dworkin states:

> Could the advocate of the 'text' do better by appealing, not to political theory, but to the concept of law? None of the standing philosophical theories of law supplies the necessary arguments. Not even positivist theories, which seem the most likely. Neither Bentham's nor Austin's theory of positivism will do. Nor even Kelsen's (Dworkin 1985: 37).

A belief held not only in U.S. academia of course—see, for example, Brugger (1994: 405 n.22): "Positivism, formalism, and textualism form the main elements of Begriffsjurisprudenz and Hans Kelsen's Reine Rechtslehre." For further references as to the allegation in European academia that Kelsen's theory of law was particularly formalist, see Paulson (2005: 213–214).

13.2 First Things First

The question that needs to be raised in order to address the problems outlined above in the first place is, of course: What does the appreciation of a lawyer or a method as "formalist" actually mean? It hardly comes as surprise that it is far from simple to answer this, as the term "formalism does not really have an identity of its own" (Sebok 1998: 57). It does rather exist as a target to be attacked than a goal to be achieved. It has opponents rather than proponents.[7] And it thus, generally speaking, serves as an umbrella term for a plurality of intermingled reproaches, differing, while not in their core, still at least on their fringe—and quite a fringe that is[8]: "Formalist," Richard Posner (1986" 180–181) found nearly 30 years ago, "can mean narrow, conservative, hypocritical, resistant to change, casuistic, descriptively inaccurate (that is, 'unrealistic' in the ordinary-language sense of the word), ivory-towered, fallacious, callow, authoritarian—but also," focusing on the political stance underlying a formalist position,[9] "rigorous, modest, reasoned, faithful, self-denying, restrained."

In any case: "[a]ccording to the Realists," Jeremy Telman (2010: 361) tells us, "[f]ormalist legal theorists […] believed that judges mechanically applied the law without reference to their own policy preferences or ideological beliefs."[10] Still it does obviously come in nuances: "At its most extreme," so Jim Chen (1995: 1270) stipulates, "formalist dogma posits that identifying all of the 'established' canons of interpretation and subjecting them to brute Euclidian logic will yield one and only one answer to every legal problem." Finally, "Pure Formalists," to refer back to the title of this essay, as Burt Neuborne (1992: 421) explains, "view the judicial system as if it were a giant syllogism machine with a determinate, externally-mandated legal rule supplying the major premise, and objectively 'true' pre-existing facts providing the minor premise."

It may suffice to leave it with those impressions that allow for a general idea of the direction the diverse criticism of the formalist approach takes. Against that backdrop it seems preferable, rather than to give another definition of formalism, to sum up by again quoting Frederick Schauer's approximation to the problem (1988: 510): "whatever formalism [actually] is, it is not good." I think all the critics of a formalist

[7] Even though there obviously are, (few) "self-described formalists in America today" (Leiter 2010: 131).

[8] To give just a few examples of the variety of definition in legal scholarship: While Malkan (1998, 1393) holds that "formalism usually refers to the claim that wellcrafted rules embodied in authoritative texts will constrain the choice of an impartial decisionmaker" (For a quite similar appreciation, see, ie, Eskridge 1990: 646); "Formalism," according to Burton (2007: 3), "insists that legal reasoning should determine all specific actions required by the law based only on objective facts, unambiguous rules, and logic." According to Strauss (1987: 488) the formalist approach is thus essentially anti-functionalist. For a further display of a wide number of different accounts of formalism, see Leiter (1999: 1144–1145) or Schauer (1988: 510).

[9] For these arguments, see Hayek (1944: 117–123).

[10] On this approach, see in particular Kennedy (1973: 359).

approach to legal interpretation can agree on that, whatever their particular position or quarrel might be. In fact, one has to add, it is *so not good*, that even those authors like Ernest Weinrib, who try to defend an approach closer to one or another definition of formalism, feel obliged to justify their endeavor as "not merely a perverse theoretical indulgence" (Weinrib 1988: 951).

Fighting formalism, broad coalitions had been formed in the first half of the twentieth century to tackle legal positivism: "Both the natural lawyer and the realist said they disavowed legal positivism" (Sebok 1995: 2068). Little one has to wonder then, why even non-realist academics like Morris Cohen (1927: 237–38) already back in 1927 sneered at "formalists like Kelsen" and their "fiction that the law is a complete and closed system, and that judges and jurists are mere automata to record its will or phonographs to pronounce its provisions." And little one has to wonder then, why "'Formalism' is, like 'Positivism' frequently used as an ephithet" (Leiter 1999: 1144).

One has to wonder, however, how all this adds up: H.L.A. Hart dedicated a whole chapter of his seminal *Concept of Law* to battle formalist simplifications (Hart 1961: 121–150),[11] which seems strange, not only because Hart is arguably the most important representative of legal positivism in the English-speaking world, not only because Hart evidently drew on Kelsenian thought (see, ie, Summers 1963: 631), but also because Kelsen himself on the other hand, openly remarked that he agreed with Hart's general position (Hart 1963: 710).

This is quite confusing, taking into account what has been stated before: How can positivism join the choir of critics of formalist approaches and at the same time stand accused of having forged the archetype of formalism?

But is Kelsen's pure theory of law actually a formalistic theory? And does that make Kelsen actually a formalist according to the definition provided above? The correct answer needs to be twofold: yes, of course, but no. Such an ominous statement evidently is in need of specification.

13.3 A Formalistic Theory

Let us start with the affirmative part of the answer. When Ota Weinberger (1982: 31) weighed, as the title of the essay here referred to states, "the Pros and Cons of the Pure Theory of Law" back in 1979, he described its method as "anti-ideological and formalistic"; candidly, one may add, as this appraisal did not refer to the allegations sketched above nor to the "methods" of interpretation some critics construe from them.

[11] See in particular Hart's critique: "The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and minimize the need for […] choice, once the general rule has been laid down" (Hart 1961: 126). Also see Hart (1958: 606–615).

Obviously Kelsen's approach to law is formalistic.[12] It needs to be, as this formalistic approach roots deep in his positivist perception of what law is and what legal science can achieve.[13] As Kelsen himself put it:

> As a general theory of law the Pure Theory of Law establishes the fundamental concepts by which every positive law can be conceived and described. Consequently, the Pure Theory of Law must disregard the contents of the legal norms insofar as they differ in time and space. In this sense the Pure Theory of Law has—and by its very nature must have—a formalistic character. This […] means […] that the concepts defined by the theory must hold what is common to all positive legal orders, not what separates them from each other (Kelsen 1966: 4).

These thoughts—albeit translated—evidently reproduce parts of two prior essays, the first of which was published already in 1929. In both texts, however, Kelsen had supplemented this statement by the remark that

> it is self-evident that a system of concepts must have a relatively formal character because by these very concepts the ample material of positive law is to be coped with cognitively. Like any cognition, the cognition of law has to formalize its object. And nobody may hold this kind of formalism against it. As in this formalism lies what virtuously counters the vice of the 'formalist' method generally frowned upon: Its objectivity (Kelsen 1929, 1723).[14]

Jeremy Telman (2008: 17–18) surely is correct when he observes that against that backdrop Kelsen's "legal positivism could only have struck his Legal Realist colleagues as a return to the naïve formalism of […] previous generations."[15] But it becomes clearer now that the ample and variant use of the term "formalism" may be one of the chief causes for some confusion,[16] as "[i]t has to be ascertained whether the derogatory value judgment implied in the claim of formalism is directed at the conception of law and consequently against a theory of law or whether this claim is intended to apply to the generation of law, its creation and evolution, ie, legal practice." (Kelsen 1929: 1723).

Depending on the perspective, the allegation that the pure theory of law takes a formal/formalist/formalistic approach is either a presumably unwarranted accusation or a truism, both of which—this is important to note—are not necessarily connected to one another. The formalism Kelsen talks about is a necessary precondition to define the object of his pure theory, "confining jurisprudence to a structural analysis of positive law" (Kelsen 1961: XV). Kelsen argues in favor of a formalistic

[12] For a short account focusing on this "formalistic" character, see Stewart (1990: 273).

[13] See, for a more recent account, Kammerhofer (2011): 147–148).

[14] My—quite literal—translation. Kelsen continues by referring verbatim to Hermann Cohen (1922, 587): "Nur das Formale ist sachlich[;] je formaler eine Methodik ist, desto sachlicher kann sie werden. Und je sachlicher in der ganzen Tiefe der Sache ein Problem formuliert wird, desto formaler muß es fundamentiert sein." [Only what is formal is objective; the more formal a method, the more objective it can be. And the more objective a problem is defined in its depth, the more formal it has to be founded]. Kelsen then continues by stating: "Whoever does not grasp that, does not know what science is about." For the second essay mentioned above, see Kelsen (1953: 512).

[15] For the historical background of this claim, see Tamaha (2010: 60–62).

[16] My—quite literal—translation.

theory of *law*, not a formalist theory of *legal interpretation*.[17] His approach is about formalizing the concept of law, not its content (see Schreier 1927: III). Thus, because, as Kelsen (1929: 1723) explicitly stated, "the allegation of formalism as a negative value judgment is directed at some specific legal practice,"[18] "'[f]ormalism' can be no objection to a general theory of law, although, as a matter of fact, it is frequently brought forward against the Pure Theory of Law." (Kelsen 1966: 4).

This argument, however, has another edge: "Realism," as Brian Leiter (2001: 301) pointed out, itself "a […] theory of adjudication,"[19] does not *per se* have to be an objection to a general theory of the Kelsenian variety: "[T]he typical interest of a genuine legal positivist is in logic and form, while the interest of the legal realists in these aspects of law is in a degree incidental to their interest in the function, operation, and consequences or, in other words, the substance, of law." (Yntema 1941: 1164).

13.4 A Formalist Theory?

Specifically addressing the allegation he would argue in favor of a formalist approach to interpretation, Kelsen did not tire of pointing at this misapprehension, which he already tried to refute in the preface to his "Hauptprobleme der Staatsrechtslehre" in 1911 (VIII–X).[20] In the aforementioned essay from 1929, he eventually took a broad (perhaps even the broadest, in any case the most passionate) stand against it (Kelsen 1929: 1723–1726). The essay, additionally, is particularly interesting for the topic at hand, as Kelsen, as he himself points out,[21] at that time

[17] Which is, of course, generally true for the relation of formalism and positivism—see, for example, Leiter (1999: 1150) "Positivism is a *theory of law*, while formalism is a *theory of adjudication*."

[18] My translation. Continuing: "Judgments or decisions by administrative bodies are referred to as formalist in order to point to some specific deficiency" [my translation], showing quite the same understanding as Posner or Schauer quoted above. For [nearly] the identical remark, see Kelsen (1953: 511).

[19] Also see Jeremy Telman (2013: 6).

[20] Kelsen, however, did later consider some of his remarks in that preface as "unfortunate" ["verunglückt"] (Kelsen 1929: 1725).

[21] In the essay mentioned above, however, Kelsen indicated that the "Pure Theory of Law had […] until recently not commented on the problem of interpretation" [my translation] (Kelsen 1929: 1725). For this "recent comment," Kelsen refers to Fritz Schreier (1927: III), who also points to the fact "that the Vienna School had disregarded the problems of interpretation to some extent" [my translation]. It seems worth noting that unlike Schreier (Schreier 1927: 6), Kelsen does not mention Adolf Merkl, Zum Interpretationsproblem, Grünhutsche Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart 1916, 535, even though later scholarship on this question (see Mayer 1992: 63 or Günther Winkler 1990: 208) treats this essay as starting point of the pure theory's stance on interpretation.

had not yet published his thoughts on interpretation.[22] Still, he remarks "the Pure Theory of Law [had] never opposed any of the possible methods of interpretation in the first place[; while at the same time] in no way arguments in favor of a formalist interpretation may be derived from the Pure Theory of Law." (Kelsen 1929: 1725).

Examined from the angle of his personal credibility—already at that time this claim is quite impressively corroborated by the way Kelsen acted as a member of the Austrian Constitutional Court[23] as well as by his doctrinal work[24]—Kelsen was emphatically not a representative of a dreary as well as short-witted mechanical approach to legal problems.[25]

And this is clearly reflected in his theoretical encounters with the problem of legal interpretation published from 1934.[26] Not to be misunderstood, Kelsen never actually did expound a theory of interpretation,[27] which scholars as intimately acquainted with his work as Robert Walter (1983: 189–190) or Stanley Paulson (1990: 136, 137) already emphasized (also see Thaler 1982: 18 n.38 or Mayer 1992: 61).[28] What Kelsen did was (merely) to point at the imponderabilia of the result of interpretation, which are—at least to a certain extent—inevitable according to his opinion.[29]

In order to be able to relate to this position, it is important to see that Kelsen's approach to interpretation is essentially based on the hierarchical perception of the legal system (see Bersier 2013: 53) originally developed by Adolf J. Merkl (1931: 252–294). "Interpretation," Kelsen (1934: 9) defines against this background, "is an intellectual activity accompanying the law-creating process as it moves from a

[22] Which he published separately for the first time 1934. For Kelsen's prior "phase on interpretation," see Paulson (1990: 141–143).

[23] Where he at one point was even defamed to act based on political motives—see Christian Neschwara (2005: 368) which, albeit quite simply put, eventually led to Kelsen not being reappointed to the Constitutional Court after the Constitutional reform of 1929 (BGBl 392/1929, 393/1929) in 1930. *Id.* at 374–382.

[24] To link both aspects of his professional life at that time (cf. the prior note), see, for example, Kelsen's defense of the Court's approach in a highly controversial question of jurisdiction (Kelsen 1928a: 105–110, 1928b: 583–599).

[25] To give just one example that proved to be particularly important for Austrian Constitutional doctrine: It was Hans Kelsen who drafted the Constitutional Court's judgment introducing the non-delegation doctrine to Austrian Constitutional Law (VfSlg 176/1923)—(Öhlinger 2008). The wording of Article 18 § 1, however, on which this judgment is based does not state any requirements to be observed by the legislator when providing a legal foundation of administrative action (also the earlier commentary by Kelsen, Fröhlich and Merkl (1922: 85) does not make any reference to such an assessment).

[26] These—generally speaking—do not differ significantly regarding their core assessment as to the "achievement potential" of legal interpretation (see Christoph Schwaighofer 1986: 233).

[27] Kelsen, overall, gave limited attention to the problem of interpretation as such (see Jackson 1985: 88 with further references).

[28] Which makes it pointless to elaborate on this here any further.

[29] This is not necessarily common to any positivist theory of law (see Leiter 1999: 1150).

higher level of the hierarchical structure to the lower level governed by this higher level."[30]

This may be confusing, at least at first glance, given the effort made in this essay to argue in favor of the non-formalist character of a Kelsenian view of interpretation, as to perceive interpretation embedded in this hierarchical system would indeed indicate a mere deductive process of legal reasoning typically proclaimed "formalist,"[31]; applying law "all the way down" as Elena Kagan put it during her confirmation hearings (see Leiter 2010: 128 and n.76).

However, this is not Kelsen's thinking. He explains:

> [t]he relation between a higher and a lower level of the legal system—as between constitution and statute, or between statute and judicial decision—is a relation of determining or binding. The higher-level norm governs the act whereby the lower-level norm is created. […] This determination, however, is never complete, for a norm cannot be binding with respect to every detail of the act putting it into practice. (Kelsen 1990: 127–128)

Indeterminacy is therefore inevitable (Grimm 1982: 151; also see Paulson 1990: 143); according to Kelsen "no legal decision is completely determined by the law" (see Schauer 2004: 1949). This, of course, may be intended by the lawmaker in the first place, granting discretion to whomever is to act based on his commands. Putting that aside, however, indeterminacy is owed to "the ambiguity of a word or a phrase used in expressing the norm," Kelsen (1990: 129) argues closely related to what H.L.A. Hart (1961: 124–125) should term later as the "open texture [as a general feature of human] language."[32]

In addition to that, Kelsen continues (1990: 129–130), "discrepancies between the linguistic expression of the form and the will of the norm-issuing authority are to be assumed," as "[i]n spite of every effort, traditional jurisprudence has not yet found an objectively plausible way to settle the conflict between will and the expression of will. Every method of interpretation developed thus far invariably leads merely to a possible result, never to a single correct result."[33]

One has not to wonder that theorists of the Dworkinian kind have their quarrel with such statements, particularly with regard to Kelsen's anticipative rejection of the right answer thesis. One has to wonder, however, why such statements should necessarily contravene realist thought, or at least some of its adepts of the less extreme kind; we shall get back to that after having finished the survey of Kelsen's thoughts on interpretation:

Given this predicament the "result [of interpretation]," so Kelsen continues:

> can only be the discovery of the frame that the norm to be interpreted represents and, within this frame, the cognition of several possibilities for implementation. Interpreting a statute,

[30] I will rely on and refer to the English translation by Bonnie Litschewski Paulson and Stanley L. Paulson (1990: 127–135) unless explicitly stated otherwise. *Id.* at 127.

[31] For the perception of "formalism" as a mere process of legal deduction, see Sebok (1998: 57–112).

[32] For a deeper discussion, see, ie, Brian Bix (1991: 51–72).

[33] Lastly, to give a full account, Kelsen argues, "purportedly valid norms [may] contradict one another wholly or in part" (Kelsen 1990: 129–130).

> then, leads not necessarily to a single decision as the only correct decision but possibly to several decisions, all of them of equal standing measured solely against the norm to be applied, even if only a single one of them becomes, in the act of the judicial decision, positive law. That a judicial decision is based on a statute means in truth only that the decision stays within the frame the statute represents, means only that the decision is one of the individual norms possible within the frame of the general norm, not that it is the only individual norm possible (Kelsen 1990: 129–130).

To be clear, the question whether the frame referred to has to or can be defined in the first place is subject to dispute,[34] even among his followers (Ringhofer 1971: 205; Paulson 1990: 151; Mayer 1992: 65–67; also see Jackson 1985: 86–88). It is not for this essay to address the rigor of Kelsen's approach.[35] For more important are the conclusions he draws from it, emphasizing that:

> [f]rom the standpoint of […] positive law […] there is no criterion on the basis of which one of the possibilities given within the frame of the norm to be applied could be favored over the other possibilities. In terms of […] positive law, there is simply no method according to which only one of the several readings of a norm could be distinguished as "correct"—assuming, of course, that several readings of the meaning of the norm are possible in the context of all other norms of the statute or of the legal system (Kelsen 1990: 130).

"For if a norm can be interpreted," Kelsen continues,[36] "then the question as to which is the 'correct' choice from among the possibilities given within the frame of the norm is hardly a question of cognition directed to the positive law; it is a problem not of legal theory but rather of legal policy." (Kelsen 1990: 131).

Already these extracts show that Kelsen, far from advocating a formalist approach to interpretation, actually rejects it, has to reject it, as he—based on his formalistic conception of law—has to reject the notion of "ruleness" as a reliable indicator of correct solutions to legal problems. Thus, interestingly it was Kelsen's "formalist-pessimist" approach, as Günther Winkler (1990: 208) critically put it, that makes formalist interpretation incompatible with Kelsenian theory.

Just like Hart (1958: 611), or perhaps even more so, Kelsen emphatically argued against a mere mechanical view of jurisprudence—so emphatically, in fact one must add, that by some scholars he is accused of "methodological nihilism" (Adomeit and Hähnchen 2012: 57; see also Öhlinger 1978: 258), which is not only quite a

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[34] For more recent encounters, see, for example, Lindahl (2003: 769) or Kennedy (2007: 296).

[35] It is important to note, however, that in his later writings on interpretation Kelsen emphasized that in cases of authentic interpretation (ie interpretation by a law applying organ—see, for example, Kelsen (1960: 351)), norms—albeit cognitively outside the frame—are to be considered valid; also see Kelsen 1950: xv—for this argument see Paulson's (1990: 151–152) analysis.

Taking this into account, of course, Richard Posner (2003: 270) is correct in stating that in Kelsen's thought "law does not dictate the outcome of judicial decisions." See, for an earlier version of this argument, Posner (2001: 23) adding: "provided only the judge does not stay outside the boundaries of his jurisdiction. […] He may be mistaken, but he is not lawless."

[36] This was particularly emphasized by Kurt Ringhofer (1971: 205) who argued that "in order to interpret the norm its meaning must not be clear from the very outset." [my translation]

It is, however, not certain (or rather, far from certain) that Kelsen adhered to the principle "in claris non fit interpretatio." For this maxim, see Meder (2004: 17–21) or Tosato (2000: 157 n.94). For background and origin, see Masuelli (2002: 402).

distance from the claim he was a formalist, but also quite unfair. Kelsen—to draw from Feyerabend (2010)—was not "Against Method," and he would agree, it is to be assumed (see in particular Walter 1983: 191), that there are indeed "easy cases" (see Schauer 1985).

What he did was to emphasize the limited capacity of legal methodology when evaluated by a standard of cognition (Walter 1990: 51–52)—particularly so by taking a stand against embellishing interpretative arguments as focal point of objective discovery thereby often disguising mere political preferences:

> The conservative professor—strictly scientific, of course—deduces from the concept of the state that democracy is impossible and some kind of fascism or "corporate state" is necessitated; while the revolutionary Marxist argues—based on some equally "scientific" socialism—that the law of causality is to bring about the dictatorship of the proletariat." (Kelsen 1929: 1724).[37]

13.5 A Realist View on Kelsen

If, however, "[t]he most important of Realism's multiple facets is its denial of [the] traditional [formalist] view" (Schauer 2013: 754), not only is Kelsen's pure theory of law not in conflict with aim and scope of core arguments of the forerunners and members of the legal realist movement,[38] his views on interpretation and on what may be achieved by its means at some point take quite the same direction as their critique.

Of course this claim is bold as well as it is naïve, as most bold claims are, particularly because—as common wisdom has it—the term "Realism" is as much undefined, maybe even undefinable as the term "Formalism" proved to be.[39] It is perhaps even more so due to the fact that realism not only had opponents but—albeit quite diverse —proponents as well.[40] And, of course, as we have seen, Kelsen would not concur with the more extreme forms of rule-skepticism[41]; the claim, as Hart (1961: 133) describes it, "that talk of rules is a myth." He would not say that the outcome

[37] My translation. Hart's argument, analyzing the allegation of "formalism" takes the same direction. (Hart 1958: 611).

[38] As generally "[t]he pure theory of law by no means denies the validity of […] sociological jurisprudence" (Kelsen (1941: 52).

[39] See, for the classical account, Llewellyn (1931).

[40] Citing some of the more common definitions, Brian Leiter (1997: 267–268).

[41] Which—as Brian Leiter (2001: 294) explains—few realists would in the first place.

of a case may merely depended on "what the judge had for breakfast,"[42] even though it seems that nobody, not even Jerome Frank,[43] really assumed that.[44]

But, as we have seen, the critical view of how adjudication actually works, beyond what has been the formalist caricature, common to the Realist movement (Leiter 1999: 1147), is not alien to Kelsen. He would easily agree with Oliver Wendell Holmes that "general propositions do not decide concrete cases" (Lochner v. New York, 198 U.S. 45, 76 (1906) (Holmes, J., dissenting)—judges do, Kelsen would submit,[45] by their decisions effecting what he should term "authentic interpretation" in his later work (see, in particular, Kelsen 1960: 351–352). And Kelsen would agree that in adjudicating, there is indeed "a concealed half conscious battle on the question of legislative policy" that cannot "be settled deductively" (Holmes 1997: 999). "Even the judge," Kelsen would argue:

> creates law, even he is relatively free in his capacity.[…] In applying a statute, there may well be room for cognitive activity beyond discovering the frame within which the act of application is to be confined; this is not cognition of the positive law, however, but cognition of other norms that can now make their way into the law-creating process, the norms, namely, of morality, of justice—social value judgments customarily characterized with the catch-phrases "welfare of the people," "public interest," "progress." and the like (Kelsen 1990: 131).

Kelsen, therefore, would not be troubled by what Frederick Schauer describes as common denominator of a realist position, that "judges typically make decisions on the basis of something other than, or in addition to existing legal doctrine," (Schauer 2009: 134) as he would not be troubled, Jochen von Bernsdorff (2010: 215) pointed that out, by a realist critique as to the potential of legal interpretation, specifically such as by Karl Llewellyn's allegation that "the correct unchallengeable rules of how to read statutes […] lead in happily variant directions" (Llewellyn 1950: 399). And, as we have seen, he would not wrestle too hard with many of the issues raised in Llewellyn's *Theory of Rules* (2011) such as the inadequate determination of hard cases by the legal framework formally applied.

Kelsen's sympathy for such skeptical accounts—we may call them in accordance with Brian Leiter (2001: 293–300), "empirical rule skepticist"—comes hardly as a surprise. Already, in the aforementioned essay from 1929 (1726), he frankly

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[42] For a quasi-empirical take on this question, see Kozinski (1996): 993).

[43] See, however, Jerome Frank's statement:

> Out of my own experience as a trial lawyer, I can testify that a trial judge, because of overeating at lunch may be so somnolent in the afternoon court-session that he fails to hear an important item of testimony and so disregards it when deciding the case. "The hungry judges soon the sentence sign, And wretches hang that juryman may dine," wrote Pope. Dickens' lovers well remember Perker's advice to Pickwick: "A good, contented, well-breakfasted juryman, is a capital thing to get hold of. Discontented or hungry jurymen, my dear sir, always find for the plaintiff." (Frank 1973: 162)

[44] However, empirical evidence suggests that there is indeed some truth to this claim (see Danziger et al. 2011: 6889–6892).

[45] Even though judges, of course, would typically present the result as conclusion based on a "sophisticated formalist" manner (Brian Leiter 2010: 112).

considers "the Pure Theory of Law [was] not in conflict with the German Free Law Movement (Freirechtsschule),"[46] a movement related to (or rather, preceding) legal realism (see Herget and Wallace 1987). In fact, Fritz Schreier (1927) dedicated a whole book to the effort to realign the Free Law Movement and the pure theory of law, in order to complement one with the other. Kelsen (1929: 1725) approved.

All this is not to say that Kelsenian thinking and Realism are to be natural allies, they may be to some extent—possibly, to quote Frederick Schauer once more, in a rather "tamed version" (Schauer 2013: 774). They surely don't have to.

It is to say, however, that Kelsen shared many of the core concerns articulated by members of the realist movement and that the pure theory of law does provide the structure to act on them.[47] Let us not forget that, even if not natural allies, legal realism and legal positivism were fighting a common enemy of the formalist kind: "The view that interpretation is cognition of the positive law, and as such is a way of deriving new norms from prevailing norms," so Kelsen (1990: 132) explains, "is the foundation of the so-called jurisprudence of concepts (Begriffsjurisprudenz), which the Pure Theory of Law also rejects. […] The illusion of legal certainty is what traditional legal theory, wittingly or not, is striving to maintain."

Kelsen, however, sure was not.

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References

Ackerman, Bruce. 1998. *We the people*. Cambridge, MA: Transformations.

Adomeit, Klaus, and Susanne Hähnchen. 2012. *Rechtstheorie für Studenten*, 6th ed. Heidelberg: C.F. Müller.

Berman, Harold J. 1998. Toward an integrative jurisprudence: Politics, morality, history. *California Law Review* 76: 779–801.

Bersier Ladavac, Nicoletta. 2013. Zur Interpretationslehre von Hans Kelsen. In *Gedächtnisschrift für Robert Walter*, ed. Clemens Jabloner, 51–67. Vienna: Manz.

Bix, Brian. 1991. H. L. A. Hart and the "Open Texture of Language". *Law and Philosophy* 10: 51–72.

Brugger, Winfried. 1994. Legal interpretation, schools of jurisprudence, and anthropology: Some remarks from a German point of view. *American Journal of Comparative Law* 42: 395–421.

Burton, Steven. 2007. *An introduction to law and legal reasoning*, 3rd ed. New York: Aspen Publishers.

[46] For some of the core writings of the Free Law Movement, see Rümelin (1891) or Ehrlich (1903).

[47] On the compatibility of Legal Positivism and Legal Realism in general, see Brian Leiter (2001: 278).

Chen, Jim. 1995. Law as a species of language acquistition. *Washington Law Quarterly* 73: 1263–1309.
Cohen, Hermann. 1922. System der Philosophie Vol. I. In *Logik der Reinen Erkenntnis*, 3rd ed. Berlin: Cassirer.
Cohen, Morris. 1927. Positivism and the limits of idealism in the law. *Columbia Law Review* 27: 237–250.
Danziger, Shai, Jonathan Levav, and Liora Avnaim-Pesso. 2011. Extraneous factors in judicial decisions. *Proceedings of the National Academy of Sciences of the United States of America* 108: 6889–6892.
Dworkin, Ronald. 1985. *A matter of principle*. Cambridge, MA: Harvard University Press.
Easterbrook, Frank. 1998. Textualism and the dead hand. *George Washington Law Review* 66: 1119–1126.
Ehrlich, Eugen. 1903. *Freie Rechtsfindung und freie Rechtswissenschaft* (Reprint 1973). Leipzig: Scientia.
Ely, John Hart. 1980. *Democracy and distrust*. Cambridge, MA: Harvard University Press.
Eskridge, William. 1990. The new textualism. *UCLA Law Review* 37: 621–691.
Feyerabend, Paul. 2010. *Against method*, 4th ed. London: Verso.
Frank, Jerome. 1973. *Courts on trial*, 3rd ed. Princeton: Princeton University Press.
Gardner, John. 2001. Legal positivism: 5½ myths. *American Journal of Jurisprudence* 46: 199–227.
Grimm, Dieter. 1982. Zum Verhältnis von Interpretationslehre. *Verfassungsgerichtsbarkeit und Demokratieprinzip bei Kelsen, Rechtstheorie Beiheft* 4: 149–157.
Hart, H.L.A. 1958. Positivism and the separation of law and morals. *Harvard Law Review* 71: 593–629.
Hart, H.L.A. 1961. *The concept of law*. Oxford: Oxford University Press.
Hart, H.L.A. 1963. Kelsen visited. *UCLA Law Review* 10: 709–728.
Hayek, F.A. 1944. *The road to serfdom*. Ed. Bruce Caldwell 2007. Chicago: University of Chicago Press.
Herget, James, and Stephen Wallace. 1987. The German free law movement as the source of American legal realism. *Virginia Law Review* 73: 399–455.
Holmes Jr., Oliver Wendell. 1997. The path of the law (Reprint). *Harvard Law Review* 110: 991–1009.
Jackson, B.S. 1985. Kelsen between formalism and realism. *The Liverpool Law Review* 7: 79–93.
Kammerhofer, Jörg. 2011. Hans Kelsen's place in international legal theory. In *Research handbook on the theory and history of international law*, ed. Alexander Orakhelashvili, 143–167. Northhampton: Edward Elgar Publishing.
Kelsen, Hans. 1911. *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*. Tübingen: Mohr.
Kelsen, Hans. 1928a. Der Begriff des Kompetenzkonfliktes nach geltendem öffentlichem Recht. *Juristische Blätter* 57: 105–110.
Kelsen, Hans. 1928b. Zum Begriff des Kompetenzkonfliktes. *Zeitschrift für Öffentliches Recht* 7: 583–599.
Kelsen, Hans. 1929. Juristischer Formalismus und reine Rechtslehre. *Juristische Wochenschrift* 58: 1723–1726.
Kelsen, Hans. 1934. Zur Theorie der Interpretation. *Internationale Zeitschrift für Theorie des Rechts* 8:9–17. Trans. B.L. Paulson & S.L. Paulson 1990. On the Theory of Interpretation. *Legal Studies* 10:127–135.
Kelsen, Hans. 1941. The pure theory of law and analytical jurisprudence. *Harvard Law Review* 55: 44–70.
Kelsen, Hans. 1950. *The law of the United Nations*. New York: Praeger.
Kelsen, Hans. 1953. Was ist die Reine Rechtslehre? In *Demokratie und Rechtsstaat. Festgabe zum 60. Geburtstag von Zaccaria Giacometti*, 143–162. Zürich: Polygraphischer Verlag.
Kelsen, Hans. 1960. *Reine Rechtslehre* (2d ed—Reprint 2000). Vienna: Verlag Österreich.

Kelsen, Hans. 1961. *General theory of law and state*. New York: Russel & Russel.
Kelsen, Hans. 1966. On the pure theory of law. *Israel Law Review* 1: 1–7.
Kelsen, Hans, Georg Fröhlich, and Adolf Merkl. 1922. *Die Bundesverfassung vom 1. Oktober 1920*. Vienna: Deuticke.
Kennedy, Duncan. 1973. Legal formality. *Journal of Legal Studies* 2: 351–398.
Kennedy, Duncan. 2007. A left phenomenological critique of the Hart/Kelsen theory of legal interpretation. *Kritische Justiz, Vierteljahresschrift für Recht und Politik* 3: 296–305.
Kozinski, Alex. 1996. What I ate for breakfast and other mysteries of judicial decision making. *Loyola of Los Angeles Law Review* 26: 993–999.
Leiter, Brian. 1997. Rethinking legal realism: Toward a naturalized jurisprudence. *Texas Law Review* 76: 267–315.
Leiter, Brian. 1999. Positivism, formalism, realism. *Columbia Law Review* 99: 1138–1164.
Leiter, Brian. 2001. Legal realism and legal positivism reconsidered. *Ethics* 111: 278–301.
Leiter, Brian. 2010. Legal formalism and legal realism: What is the issue? *Legal Theory* 16: 111–133.
Lindahl, Hans. 2003. Dialectic and revolution: Confronting Kelsen and Gadamer on legal interpretation. *Cardozo Law Review* 24: 769–798.
Llewellyn, Karl. 1931. Some realism about realism—Responding to Dean Pound. *Harvard Law Review* 44: 1222–1264.
Llewellyn, Karl. 1950. Remarks on the theory of appellate decision and the rules and canons about statutes are to be construed. *Vanderbilt Law Review* 3: 395–406.
Llewellyn, Karl. 2011. *The theory of rules*. Ed. Frederick Schauer. Chicago: The University of Chicago Press.
Malkan, Jeffrey. 1998. Literary formalism, legal positivism. *Cardozo Law Review* 19: 1393–1439.
Masuelli, Saverio. 2002. In claris non fit interpretatio'—Alle Origini del brocardo'. *Rivista di Diritto Romano* 2: 401–424.
Mayer, Heinz. 1992. Die Interpretationstheorie der Reinen Rechtslehre. In *Schwerpunkte der Reinen Rechtslehre*, ed. Walter Robert, 61–70. Wien: Manz.
McDougal, Myres. 1947. The law school of the future: From legal realism to policy science in the world community. *The Yale Law Journal* 56: 1345–1355.
Meder, Stephan. 2004. *Mißverstehen und Verstehen—Savignys Grundlegung der juristischen Hermeneutik*. Tübingen: Mohr Siebeck.
Merkl, Adolf. 1916. Zum Interpretationsproblem. *Grünhutsche Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart* 42: 535–556.
Merkl, Adolf. 1931. Prolegomena einer Theorie des rechtlichen Stufenbaues. In *Festschrift für Hans Kelsen zum 50. Geburtstag*, 252–294. Vienna: Springer.
Neschwara, Christian. 2005. Kelsen als Verfassungsrichter. Seine Rolle in der Dispensehen-Kontroverse. In *Hans Kelsen—Staatsrechtler und Rechtstheoretiker des 20. Jahrhunderts*, ed. Stanley L. Paulson and Michael Stolleis, 353–384. Tübingen: Mohr Siebeck.
Neuborne, Burt. 1992. Of sausage factories and syllogism machines: Formalism, realism, and exclusionary selection techniques. *N.Y.U Law Review* 67: 419–450.
Öhlinger, Theo. 1978. Bemerkungen zur Verfassungsdogmatik. *Zeitschrift für Verkehrsrecht* 23: 257–261.
Öhlinger, Theo. 2008. Hans Kelsen—Vater der österreichischen Bundesverfassung? In *Festschrift für Wilhelm Brauneder zum 65. Geburtstag*, 407–424. Vienna: Manz.
Paulson, Stanley L. 1990. Kelsen on legal interpretation. *Legal Studies* 10: 136–152.
Paulson, Stanley L. 2005. Zwei radikale Objektivierungsprogramme in der Rechtslehre Hans Kelsens. In *Hans Kelsen—Staatsrechtler und Rechtstheoretiker des 20. Jahrhunderts*, ed. Stanley L. Paulson and Michael Stolleis, 191–220. Tübingen: Mohr Siebeck.
Posner, Richard. 1980. The present situation in legal scholarship. *The Yale Law Journal* 90: 1113–1130.
Posner, Richard. 1986. Legal formalism, legal realism, and the interpretation of statutes and the Constitution. *Case Western Reserve Law Review* 37: 179–217.

Posner, Richard. 2001. *Kelsen, Hayek, and the economic analysis of law*. Lecture at the XVIII. Annual meeting of the European Association of Law and Economics in Vienna, Sept 14.
Posner, Richard. 2003. *Law, pragmatism, and democracy*. Cambridge, MA: Harvard University Press.
Ringhofer, Kurt. 1971. Interpretation und Reine Rechtslehre—Gedanken zu einer Kritik. In *Festschrift für Hans Kelsen zum 90. Geburtstag*, 198–210. Vienna: Deuticke.
Rümelin, Gustav. 1891. *Werturteile und Willensentscheidungen im Civilrecht*. Freiburg: Lehmann.
Schauer, Frederick. 1985. Easy cases. *Southern California Law Review* 58: 399–440.
Schauer, Frederick. 1988. Formalism. *The Yale Law Journal* 97: 509–548.
Schauer, Frederick. 1996. Positivism as pariah. In *The autonomy of law* ed. Robert P. George (Reprint 2005) 31–56. Oxford: Oxford University Press.
Schauer, Frederick. 2004. The limited domain of the law. *Virginia Law Review* 90: 1909–1956.
Schauer, Frederick. 2009. *Thinking like a lawyer* (Paperback 2012). Cambridge, MA: Harvard University Press.
Schauer, Frederick. 2013. Legal realism untamed. *Texas Law Review* 91: 749–780.
Schreier, Fritz. 1927. *Die Interpretation der Gesetze und Rechtsgeschäfte*. Vienna: Deuticke.
Schwaighofer, Christoph. 1986. Kelsen zum Problem der Rechtsauslegung. In *Untersuchungen zur Reinen Rechtslehre*, ed. Stanley L. Paulson and Robert Walter, 232–251. Vienna: Manz.
Sebok, Anthony. 1995. Misunderstanding positivism. *Michigan Law Review* 93: 2054–2132.
Sebok, Anthony. 1998. *Legal positivism in American jurisprudence*. Cambridge: Cambridge University Press.
Stewart, Iain. 1990. The critical legal science of Hans Kelsen. *Journal of Law and Society* 17: 273–308.
Strauss, Peter. 1987. Formal and functional approaches to separation of powers—A foolish inconsistency? *Cornell Law Review* 72: 488–526.
Summers, Robert. 1963. Professor H. L. A. Hart's concept of law. *Duke Law Journal*: 629–670.
Tamaha, Brian. 2010. *Beyond the formalist-realist divide: The role of politics in judging*. Princeton: Princeton University Press.
Telman, Jeremy. 2008. The reception of Hans Kelsen's legal theory in the United States: A sociological model, *Valparaiso University Legal Studies Research Paper* No. 08–03.
Telman, Jeremy. 2010. A path not taken: Hans Kelsen's pure theory of law in the land of legal realists. In *Hans Kelsen Anderswo/Hans Kelsen Abroad*, ed. Robert Walter, Clemens Jabloner, and Klaus Zeleny, 353–376. Vienna: Manz.
Telman, Jeremy. 2013. International legal positivism and legal realism, *Valparaiso University Legal Studies Research Paper* No. 13–9.
Thaler, Michael. 1982. *Mehrdeutigkeit und juristische Auslegung*. Vienna: Springer.
Tosato, Angelo. 2000. The Catholic rule for interpreting the Bible. In *Journal of Legal Hermeneutics ed. Giuseppe Zaccharia*, 129–206. Münster: Lit.
von Bernsdorff, Jochen. 2010. *The public international law theory of Hans Kelsen: Believing in universal law*. Cambridge: Cambridge University Press.
Walter, Robert. 1983. Das Auslegungsproblem im Lichte der Reinen Rechtslehre. In *Festschrift für Ulrich Klug zum 70. Geburtstag*, 187–197. Cologne: Dr. Peter Deubner Verlag.
Walter, Robert. 1990. Philosophische Hermeneutik und Reine Rechtslehre. In *Beiträge zur juristischen Hermeneutik*, ed. Helmuth Vetter and Michael Potacs, 41–52. Vienna: Literas.
Weinberger, Ota. 1982. Reine Rechtslehre: Pro und Contra (Bilanz aus Anlaß eines Doppeljubiläums). In *Memoria del X. Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social Vol. VI, Symposia II*, 23–37. Mexico City: Universidad Nacional Autonoma de Mexico.
Weinrib, Ernest. 1988. Legal formalism: On the immanent rationality of law. *The Yale Law Journal* 97: 949–1016.
Winkler, Günther. 1990. *Rechtstheorie und Erkenntnislehre*. Vienna: Springer.
Yntema, Hessel. 1941. Jurisprudence on parade. *Michigan Law Review* 39: 1154–1181.