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## The Political Element in Legal Theory: A Look at Kelsen's Pure Theory\*

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In the literature of legal theory, considerable attention has been devoted to debating whether valuational considerations<sup>1</sup> should be outside the bounds of legal theory. This controversy appears in the continuing bouts between natural law theorists and legal positivists.<sup>2</sup> The question to be raised in this article is not whether such valuational elements *should* be excluded from legal theory, but whether they ever *can* be kept off-limits. This issue comes into sharp focus in what is perhaps the most extreme and uncompromising expression of legal positivism, Hans Kelsen's Pure Theory of Law. For the Pure

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1. The term "valuation" is used here in a broad sense to include desires, aims, strivings, approvals and disapprovals, purposes, and ideals.

2. The terms "natural law" and "positivism" are often assumed to carry precisely defined meanings, yet on careful inspection they appear to designate a surprising number of different approaches and logically distinct doctrines. A variety of positions are said to be in the "natural law tradition." These range from the notion that there are ethical principles about rights and duties that inhere in our natural faculties to the notion that human institutions and laws may be evaluated in light of overarching principles. See Frankena, *On Defining and Defending Natural Law*, in *LAW AND PHILOSOPHY* 200-09 (S. Hook ed. 1964) (adherents of natural law refer to laws of the physical sciences, general norms of conduct, natural standards of conduct, laws known by natural human faculties, God's commands discerned by human faculties, and other formulations).

The complexity of the label "legal positivism" was the subject of a conference by a group of distinguished legal theorists. See Falk & Shuman, *The Bellagio Conference on Legal Positivism*, 14 *J. LEGAL EDUC.* 213-28 (1961) (noting multiple historical and contemporary uses of label "legal positivism"). For the purposes of this study, the term is meant to include the work of such theorists as Bentham, Austin, Kelsen, and Hart, whose focus is on actual rather than ideal legal systems. These theorists have isolated for study such problems as the meaning and validity of law, its structural elements, and its conceptual apparatus. They insist that these analytic inquiries be undertaken without consideration of moral and political implications.

Theory argues that the "legal" must be distinguished from both the "moral" and the "factual," and that the description and analysis of its special autonomous properties must proceed without any valuational accompaniment.

Many critics have attacked the Pure Theory's claim to "purity."<sup>3</sup> Often, they try to detect fine cracks in the structure of the theory in order to expose the particular values lurking within it. These criticisms, however, leave the impression that the uncovered values were implanted, either by stealth or inadvertence, and were therefore improprieties in the execution of the theory. As a result, these evaluations of the Pure Theory implicitly honor the claim of value-free analysis by simply exposing and reporting instances in which it has fallen short. Other critics of the Pure Theory take it to task for not paying attention to problems of greater social concern. Yet these critics also assume that "purity" can be attained by the theory, however unworthy they consider that goal.<sup>4</sup>

The purpose of this study is to suggest that the Pure Theory fails to live up to its claim of value-free analysis not because it occasionally loses its purity but because valuational elements are unavoidably a constituent part of its structure. It will be argued that the Pure Theory does not succeed in constructing a formal skeletal account of essential characteristics common to all legal orders<sup>5</sup> because the theory reflects particular historical configurations. Kelsen's claim that his analysis is universal and ahistorical may hide from view the particular values that inhere in the theory, but it cannot eliminate them. It will also be argued that the valuational element in the Pure Theory may be blocked from sight by an inherent defect in the lens that Kelsen has fashioned for viewing the theory. This discussion of the Pure Theory is meant to function as an illustration in the tradition of case-method pedagogy; the conclusions produced here may serve to heighten our understanding of other positivist theories.

An examination of the points of entry to the theory—those features that are readily apparent to one who initially approaches its analytic constructs—reveals choices made by the theorist from among a range of competing formulations, definitions, and concepts. These choices

3. One of the most trenchant and unrelenting critiques is contained in J. STONE, *LEGAL SYSTEM AND LAWYERS' REASONING* 98-136 (1964).

4. See p. 5 & notes 12-14 *infra*.

5. See H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 19 (A. Wedberg trans. 1945) (claim that social technique of coercive order is common to all legal systems) [hereinafter cited without cross-reference as *GENERAL THEORY*].

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reflect valuations and indicate the political nature of the theory—that is, the extent to which the theory is shaped, consciously or not, by attitudes and preferences regarding commitment to and conduct under a legal order. Because the theory in turn shapes attitudes concerning commitment to and conduct under the legal order, it also has an active political function.

The entry-points to the theory that will be examined are (1) the stated tasks of the theory; (2) its methodological assumptions; (3) the meanings ascribed to key terms; (4) the conceptual apparatus; (5) the role assignments under the theory; and (6) the assumptions concerning the functions of a legal order. Discussion of these entry-points will lead to consideration of factual assumptions, conceptions of international law, and other components of the Pure Theory.

### I. The Tasks of the Pure Theory

A theory is defined by the tasks it selects, the problems it addresses, and the kind of yield it expects. In the tradition of the positive sciences, the tasks of legal theory as proposed by Kelsen are to secure and organize knowledge about the *existing* structure of any legal order in any place or time. Although the Pure Theory differs from the positive sciences because it addresses a complex of norms, not facts, the Theory also resembles the sciences because it offers guidance for recognizing a given subject matter, not for directing its course. The Pure Theory does not seek to provide a method of interpretation for judicial decisionmakers, nor does it intend to guide the legal order toward some ideal substantive goals.

Instead, Kelsen sets forth these three major tasks:<sup>6</sup> (1) to establish the distinguishing marks of the “legal” and provide law with an ascertainable identity, purified of such “alien” elements as “psychology, sociology, ethics and political theory;”<sup>7</sup> (2) to establish a method for validating judgments as “legal;” and (3) to formulate and systematize the conceptual apparatus for the legal order.

This selection of tasks implies, in itself, that identification and validation are important and valuable enterprises. Perhaps a search for the identifying marks of the theory’s subject matter—in this case, the marks of the “legal”—seems to be a neutral endeavor, common

6. Kelsen’s Pure Theory is developed in *GENERAL THEORY*; H. KELSEN, *PURE THEORY OF LAW* (M. Knight trans. 1967) [hereinafter cited without cross-reference as *PURE THEORY*]; and H. KELSEN, *WHAT IS JUSTICE?* (1957) [hereinafter cited without cross reference as *WHAT IS JUSTICE?*].

7. *PURE THEORY* at 1.

to general scientific inquiry. Yet the effort to locate what is distinctly "legal," as opposed to "moral," reflects a judgment that the two are and should be separable.<sup>8</sup> When this task of identification is guided by the desire to purify the "legal" from any "alien" elements, the theory selects among multiple formulations of its task in a way that has consequences for the kinds of obligations and attitudes toward the subject matter that will emerge. By contrast, a theorist might choose to see elements that are not strictly "legal" as essential ingredients that contribute to the existence of the theory's subject matter. Different perceptions of the relation between moral and legal obligations would emerge from this alternate perspective.

The second task, that of providing a test for legal validity, places at the center of importance the problem of identifying the credentials of legal authority. Instead of seeking to stress the social consequences, the goals, or the ideal elements of a legal order, the Pure Theory focuses on the validation of what is legal and thereby draws attention to the formal limits of legal authority. This is a response to a felt need for certitude and security in planning one's conduct within the framework of a legal order.<sup>9</sup> Singling out this task for special emphasis has valuational implications that reflect select needs, presumably needs felt at a given time and place.

The third task of organizing a system of concepts, which operates as the "conceptual apparatus" of the theory, may appear to be detached from valuational considerations. Yet this enterprise suggests an implicit preference for order and system. In addition, the selection and arrangement of categories for constructing the system necessarily result in a *kind* of order that bears on attitudes and conduct. If the conceptual apparatus is systematized in terms of formal procedure rather than content,<sup>10</sup> or if the concept of "duty" is made prime and "right" derivative,<sup>11</sup> a different valuational texture is created than when contrasting arrangements are proposed by a theory.

8. Kelsen's effort to free the "legal" from moral elements and to ascribe only formal procedural properties to the "legal" is summed up in his notion that "legal norms may have any kind of content." *GENERAL THEORY* at 113. Similarly, he asserted that "a social order that is not moral (which means: just) may nevertheless be law." *PURE THEORY* at 63. Separating the two realms does not mean ascribing normative qualities to one and descriptive qualities to the other; rather, law and morality each comprise logically independent normative systems. Weinreb, *Law as Order*, 91 *HARV. L. REV.* 909, 910 (1978) (describing Hart and Kelsen).

9. "[F]or modern bureaucracy, the element of 'calculability of its rules' has really been of decisive significance. The nature of modern civilization, especially its technical-economic substructure, requires this 'calculability' of consequences." M. WELBER, *ON LAW IN ECONOMY AND SOCIETY* 350 (E. Shils & M. Rheinstein trans. 1954).

10. See pp. 8-10 *infra*.

11. See pp. 25-26 *infra*.

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Thus the selection of tasks for the theory reflects and shapes attitudes towards its subject, and therein serves a political function. The extent to which the tasks selected by the Pure Theory convey choices that have political consequences is apparent in the criticisms of the theory. One critic observed: "Granted its postulates, I believe the pure theory of law to be unanswerable, but I believe also that its substance is an exercise in logic and not in life."<sup>12</sup> Similar criticism has challenged the undertaking of any formalistic theory like the Pure Theory that seeks to identify legal concepts in logical arrangements apart from moral or social considerations: "Without the examination not only of law, but of the *implications* of law as a function of society, the 'pure' essence distilled by the jurist is a colourless, tasteless, and unnutritious food which soon evaporates."<sup>13</sup> Here a theorist like Kelsen is not taken to task for failing to meet the aims he set for himself; instead, the worthiness of those aims themselves is debated.<sup>14</sup> The tone of such criticism suggests that what is involved is something other than an exercise in scholarly one-upmanship, in which the theory is criticized for having overlooked some salient fact, for containing a logical inconsistency, or for not recognizing an esoteric nuance. Because it is the core, not the details, of the theory that is challenged, the thrust of such criticism is to raise the question of what should have priority in theorizing—the impact of forms and procedures, social needs and functions, the logic of formal structure, or definitions of legal validity. At issue ultimately is the shaping and influencing of attitudes concerning conduct under a legal order. Even when the details of a theory are attacked, ostensibly for errors of fact or logic or for lack of clarity, the valuational perspectives that accompany the alleged deficiencies are often at the center of the controversy.

## II. Methodological Assumptions

Gleaned from a model of the positive sciences, Kelsen's assumptions concerning the nature of proof, rationality, and objectivity serve a dual valuational function. First, these assumptions direct the execution of the theory's central tasks and fulfill the valuations im-

12. H. LASKI, *GRAMMAR OF POLITICS* vi (4th ed. 1938).

13. C. ALLEN, *LAW IN THE MAKING* 57 (1964).

14. See J. SHKLAR, *LEGALISM* 33-34 (1964) ("The idea of treating law as a self-contained system of norms that is 'there,' identifiable without any reference to the content, aim, and development of the rules that compose it, is the very essence of formalism . . . . There is . . . no particular reason to assume that [the question of validating the "legal"] is the only intellectually worthwhile question to be asked about law.")

plicit in their selection. Next, as incorporated within the framework of the Pure Theory, these methodological assumptions shape and guide attitudes toward the subject of the theory, especially with regard to the role of morality in relation to law.

At the core of Kelsen's inquiry is the problem of establishing the validity of a legal judgment. Indeed, for Kelsen, the problem of validity is as important to normative legal theory as the problem of factual existence is to positive scientific theory. Central to both undertakings are the criteria for establishing the truth of claims concerning their respective subject matters. A judgment that a prescription is legally valid is treated by Kelsen as the equivalent of a judgment that the prescription exists as law and as truth.

### A. *Objective Verification*

One element involved in proof of legal validity in the Pure Theory is the requirement of objective verification. This requirement reflects and guides attitudes toward the legal order and toward conduct within it by legitimating certain kinds of judgment and rejecting others. Kelsen admits that the procedures that must be followed in order to produce objectively verifiable judgments of legal validity are capable of yielding only judgments about particular factual contexts or existing national and international orders.<sup>15</sup> In spite of this basic relativism, Kelsen maintains that positive legal norms can be verified objectively because they are

conditioned by the existence of facts. These facts are the acts by which the legal norm is created, such as custom, a legislative, judicial, or administrative act, a legal transaction, together with the effectiveness of the total legal order to which the legal norm belongs.<sup>16</sup>

Because legal prescriptions may be traced to the official acts that established them, there are procedures to verify their existence. Moral judgments, on the other hand, can never be verified objectively,<sup>17</sup>

15. WHAT IS JUSTICE? at 210, 329, 361, 365.

16. *Id.* at 361. Kelsen also observed that legal judgments "are true or false, and their truth or falsehood may be tested." *Id.* at 210.

17. Ethical philosophers would probably categorize Kelsen's analysis of moral judgments as reflecting a meta-ethical relativism in accord with emotivist theories formulated by Ayer and Stevenson. See A. AYER, *On the Analysis of Moral Judgments*, in PHILOSOPHICAL ESSAYS 231 (1954); C. STEVENSON, *ETHICS AND LANGUAGE* (1944). Adherents of the emotive theory of ethics generally argue that although moral statements often are expressed in declarative form, they actually function not to assert any *truth*, but rather to express an *attitude* toward a state of affairs. Stevenson's formulation is: "(1) 'This

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even though it would seem that judgments of moral validity could be objectively verified by an analogous methodological requirement of relevant conditions creating or confirming them. Kelsen explains that the existence and contents of underlying normative references presupposed by a moral or a political judgment

cannot be verified by facts. [They are] determined only by the subjective wish of the subject making the judgment. Moral and political judgments of value and, in particular, judgments of justice, are based on ideologies which are not, as juristic judgments of value are, parallel to a definite social reality.<sup>18</sup>

The insistence on this distinction between legal and moral norms suggests contrasting attitudes toward the legal and moral orders. A legal judgment whose validity is objectively verifiable carries with it an aura of respect that attaches to something that can be "proved." In contrast, a moral judgment is a product of nothing more than "emotional factors, and therefore, subjective in character—valid only for the judging subject, and therefore relative only."<sup>19</sup>

A moral judgment not only eludes objective verification; it also cannot be established rationally. When moral judgments collide, "[i]t is impossible to decide between [them] in a rational scientific way. It is, in the last instance, our feeling, our will, and not our reason; the emotional, and not the rational element of our consciousness which decides this conflict."<sup>20</sup> Any attempt to search for ultimate moral principles by which competing moral claims may be proved true or false is futile because there are no such principles to be discovered.<sup>21</sup> Since, in Kelsen's view, no moral assertion can ever

is wrong' means *I disapprove of this; do so as well.* (2) 'He ought to do this' means *I disapprove of his leaving this undone; do so as well.* (3) 'This is good' means *I approve of this, do so as well.*" *Id.* at 21.

18. GENERAL THEORY at 49.

19. WHAT IS JUSTICE? at 4.

20. *Id.* at 5.

21. *Id.* at 21-22:

From the point of view of rational cognition, there are only interests of human beings and hence conflicts of interest. The solution of these conflicts can be brought about either by satisfying one interest at the expense of the other, or by a compromise between the conflicting interests. It is not possible to prove that only one or the other solution is just.

Kelsen's views bear a striking resemblance to observations made by Hobbes: whatsoever is the object of any man's Appetite or Desire, that is it, which he for his part calleth *Good*; And the object of his Hate, and Aversion, *Evill*; And of his Contempt, *Vile* and *Inconsiderable*. For these words of Good, Evill, and Contemptible, are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evill, to be taken from the nature of the objects themselves; but from the Person of the man

be tested or disproved by the procedures of the empirical sciences, moral criticism can never be founded on anything more secure or authoritative than matters of taste.

Kelsen's approach forecloses arguments that have widely been used in deliberative discourse—arguments that are "rational" in a different sense than that employed in the empirical sciences. Critical moral reasoning seeks to distinguish the good and bad reasons for imposing certain legal prescriptions on human conduct by referring to pervasive normative principles adhered to by a given community at a given time. In Kelsen's view, this moral, as opposed to legal, reasoning is merely arbitrary.<sup>22</sup> Unlike legal claims, moral claims cannot be objectively verified.<sup>23</sup> In the realm of authoritative reference points for human conduct, morality is made to appear as a second-class citizen.

### B. *Proof of Legal Validity*

To be legally valid according to the Pure Theory, judgments must not only be objectively verifiable but also must pass tests for proof of legal validity. First, the method for proving validity under Kelsen's model requires strict logical deduction of discrete judgments from a single synthesizing principle. This single principle, used in proving legal validity, must be one purified of "alien" elements such as psychology, sociology, or ethics. To permit an "uncritical mixture" of different disciplines would obscure the essence of a science of law and obliterate "the limits imposed upon it by the nature of its subject matter."<sup>24</sup>

This method of proof reflects a choice from among available techniques for determining validity. The requirement of one fundamental principle as the referent for proof of legal validity precludes consideration of other potential sources of validation. This methodological stricture forecloses the possibility that the notion of legal validity

(where there is no Common-wealth) or, (in a Common-wealth) from the Person that representeth it; or from an Arbitrator or Judge, whom men disagreeing shall by consent set up, and make his sentence the Rule thereof.

T. HOBBS, *LEVIATHAN* 41 (American Everyman's ed. 1950) (1st ed. London 1651).

22. *WHAT IS JUSTICE?* at 22.

23. Kelsen concludes that there is one moral principle that is an automatic corollary to a relativistic philosophy of justice: "the principle of tolerance, and that means the sympathetic understanding of the religious or political beliefs of others—without accepting them, but not preventing them from being freely expressed." *Id.* But if the source of this corollary is supposed to be pure logic, Kelsen would seem to be in error. A recognition that one's views are based on some among many possible fundamental assumptions does not require sympathetic tolerance of those whose assumptions sharply differ from one's own. See D. MONRO, *EMPIRICISM AND ETHICS* 114 (1967) ("[t]olerance does not really follow from relativism").

24. *PURE THEORY* at 1.

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might depend upon a conceptual alloy rather than a single pure element.

Relying on strict logical entailment from one fundamental principle as a requirement of proof is another selective choice incorporated into the Pure Theory. Strict logical entailment does not exhaust the rules or procedures of rational inquiry; instead, this methodological assumption is itself a valuational choice that rejects other kinds of reasoning. Moral reasoning, for example, permits support by factual arguments even when there may be no link of deductive logic.<sup>25</sup> Rational inquiry into the nature of physical things relies on support from statements concerning sensations, not on strict logic; judgments about character employ reasoning that derives substantiation from statements concerning behavior, even though there is no strictly logical connection between the judgments and the statements. By limiting the tests of legal validity to proof by strict logical entailment, the Pure Theory chooses from among competing methodological possibilities and frames its inquiry in such a way as to exclude moral and other "alien" elements from its methods of proof.

Kelsen argues that this decision saves legal theory from the logical fallacy of reductionism and guarantees it a purity and unity lacking in other theories. Although these benefits may indeed be produced by his formulation, his approach is selected, not compelled; other methods could also be employed to achieve the same benefits while at the same time communicating contrasting valuations and attitudes.

Kelsen criticizes competing formulations of proof in legal theory for reducing legality to the alien disciplines of behavioral science and ethics. To protect against the loss of identity for the legal realm that results from such reductionism, Kelsen admonishes against the commission of the "is-ought fallacy": the "oughts" of legality cannot be derived logically from behavioral fact because that would turn the question of legal validity into a determination of causes and predictions of power. Nor may proof of legal validity be established in reference to what the law morally ought to be, because this approach may support a claim that the existing law is, by definition, morally just. Kelsen's method for proving legal validity focuses on the meaning of a legal obligation in any legal system—a question that limits discussion to the objective verification of exclusively legal norms. This formulation protects against reductionism and also ensures that

25. Hampshire, *Fallacies in Moral Philosophy*, 58 *MIND* 466 (1949) (practical deliberation in moral reasoning depends on wide range of matters including empirical propositions, though conclusion not logically derived from them).

what is legally valid will be free from impurities: Relevant elements that are not identical to law are excluded from legal theorizing, and the possible connecting links between law and behavior<sup>26</sup> and between law and morality fall outside of the test for legal validity.

A corollary of Kelsen's method for proving legal validity is the requirement of monistic unity; a theory of law should not permit the validation of two duties that contradict one another.<sup>27</sup> Because it is "the task of science to describe its object in a system of consistent statements, that is, statements not contradicting each other,"<sup>28</sup> Kelsen's method of normative science requires that "two sets of valid norms must always be parts of one single system."<sup>29</sup> In addition to relying on logical derivation from a single fundamental norm, the Pure Theory achieves monistic unity by treating "ought" statements as scientific statements of knowledge, albeit knowledge of norms, not observable facts. By this approach, the theory ensures that the statement "*A* ought to be done" cannot coexist with the statement "*A* ought not to be done" because that would be tantamount to asserting in a physical science both that "*A* is" and that "*A* is not." Accordingly, it is logically impossible to consider a legal rule to be valid and at the same time to accept as valid a moral rule that forbids the very behavior that the legal rule prescribes.<sup>30</sup> By subscribing to monistic unity in the proof of legal validity, the Pure Theory determines that what may appear to be a genuine conflict between the dictates of law and the demands of morality could not logically exist.

The jurist ignores morality as a system of valid norms, just as the moralist ignores positive law as such a system. Neither from the one nor from the other point of view do there exist two duties simultaneously which contradict one another. And there is no third point of view.<sup>31</sup>

One could criticize this methodological stricture for confusing what may be factually opposite or *contrary* with a logical *contradiction*. On a different level, Kelsen's method has been criticized for favoring theoretical single-mindedness at the cost of seeming to exclude "the possibility of a moral criticism of law."<sup>32</sup>

26. Kelsen's formulation has one exception to this exclusion of behavioral considerations. This is the requirement that, as a condition for legal validity, the legal order must be "effective." See pp. 12-13 *infra*.

27. See GENERAL THEORY at 374.

28. *Id.*

29. *Id.* at 376.

30. *Id.* at 374-75, 408-10.

31. *Id.* at 374.

32. H.L.A. Hart, *Kelsen Visited*, 10 U.C.L.A. L. REV. 709, 723 (1963). Kelsen's doc-

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In contrast, H.L.A. Hart observes:

An intuitively acceptable meaning for "*A* ought to be done" is that "there are good reasons for doing *A*." If we give "ought" this meaning then "*A* ought legally to be done and *A* ought morally not be done" is equivalent to "There are good legal reasons for doing *A* and good moral reasons for not doing *A*." This expresses a conflict because it is logically impossible for one person at the same time to *do* both *A* and not *A*. But it does not, as far as I can see, assert anything contradictory or logically impossible.<sup>33</sup>

The effect of this interpretation is to suggest that a participant may be *bound* at the same time by two conflicting, yet genuinely valid norms, each emanating from different normative systems. The issue thus becomes not the validity of a conflicting norm, but rather the impossibility of complying with two conflicting valid norms at the same time; the result is the burden of human choice.

The consequences of Hart's approach contrast sharply with those of the Pure Theory in certain situations. Consider, for example, one who is legally bound to go to war, and therefore to kill, but who might feel morally bound to resist the legal prescription. Under Kelsen's method, the moral prescription could not be simultaneously valid. The choice here would be between a valid prescription and a psychological feeling, not between two valid but conflicting prescriptions. Kelsen would have us bound only to one normative master at a time. Hart, in contrast, would have us bound by at least two; the prescriptions of each, however conflicting, are recognized as bearing the stamp of simultaneous validity. Hart thus casts the decision as a choice between two different but equally legitimate sources of normative guidance. The existence of this alternate resolution of the "is-ought fallacy" indicates that Kelsen's approach is only one possibility, not an inevitable one.<sup>34</sup>

trine of validation that is only by reference to the basic norm has been criticized as "dangerous" and "silly"—"dangerous" because "it appears to invest effective coercion with disproportionate value" and "silly" "because no one has ever been persuaded that the mere presence of effective coercion is sufficient to answer all inquiries about the validity of an order." Cowan, *Law Without Force*, 59 CALIF. L. REV. 683, 713 (1971).

33. H.L.A. Hart, *supra* note 32, at 728.

34. Monistic unity has consequences for the relation between national and international law as well. A normative system of international law could not, under Kelsen's view, possibly be perceived as existing side by side with a national legal order. In the interest of monistic unity, either international law must provide the basis for the validity of national law, or national law must assume the validating position for international law. See pp. 29-30 *infra*.

### C. *The Procedures for Validation*

Incorporating Kelsen's views on objective verification, logical entailment, and monistic unity, the Pure Theory proposes procedures for resolving disputes about the bounds of legal authority. These procedures for validation introduce the valuational elements involved in the underlying method and also shape attitudes toward both the legal order and sources of authority.

The validating base proposed by Kelsen is the formal arrangement of authority embodied in the First Constitution, called the *Grundnorm*. Kelsen admits that there could be sources of authority beyond the formal constitutional authority of the *Grundnorm*: "Certainly one may ask why one has to respect the first constitution as a binding norm."<sup>35</sup> Yet for the purposes of the Pure Theory, the *Grundnorm* is presupposed to be binding as the basis for validating all law. Presupposing the *Grundnorm* has the advantage of satisfying the methodological requirement of a single synthesizing principle from which discrete judgments can be logically deduced. In addition, the adoption of this formal constitutional authority as the sole basis for validation reflects Kelsen's decision to join other positivists in repudiating "any natural law from which positive law would receive its validity."<sup>36</sup> The Pure Theory seeks to identify that which is strictly legal and rejects the claim of natural law that "some sort of ultimate end, and hence some sort of definite regulation of human behavior, proceeds from 'nature,' that is, from the nature of things or the nature of man, from human reason or the will of God."<sup>37</sup> The adoption of the *Grundnorm* as the single validating base ensures that norms not based on formal constitutional authority can receive no validation.

The second procedural element for validation does, however, introduce criteria that go beyond the formal provisions of the *Grundnorm*. This is the requirement that the legal order be "effective." In Kelsen's model, effectiveness is measured not only by the extent to which the legal order established by the *Grundnorm* is actually obeyed, but also by whether its restraints are, by and large, considered to be valid and binding by the citizenry.<sup>38</sup> For legal prescriptions to be valid, relations among individuals must be interpreted "as legal duties, legal rights, and legal responsibilities, and not as mere power relations."<sup>39</sup>

In sum, a prescription is valid if it meets only two tests: (1) if it

35. GENERAL THEORY at 116.

36. *Id.*

37. *Id.* at 8.

38. WHAT IS JUSTICE? at 262.

39. *Id.*

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is issued pursuant to the formal requirements of authority as prescribed in the *Grundnorm*; and (2) if the ongoing system of authority works "effectively" as a whole. So long as there is evidence that the community can survive under its legal system, these tests are indifferent to the kind of community and to the nature of the shared base of values sustained by the legal authority. A despotic legal order that maintains itself by maximum force and grants minimum benefits to most community members would be tested for effectiveness exactly as would a community characterized by widespread consent and approval. Each would be scrutinized to determine whether there is general acquiescence to the community's structure of roles, obligations, and expectations; if so, the test of effectiveness would be passed, and other characteristics of the legal order would be irrelevant.

Thus, Kelsen's proposed tests for legal validity seem to be (a) open-ended with respect to the kind and arrangement of authority that would formally validate a prescription; (b) open-ended with respect to the type of value-base to which a legal order is committed; and (c) conditioned only on the preponderance of power sufficient to ensure compliance with the legal authority by persuading or subduing those who may resist. Yet the seeming neutrality of this approach is belied by its constant focus on one value: order.<sup>40</sup> Order, for Kelsen, is the prerequisite for the realization of other values by the community. The demand for order does not itself determine whether the community will be based on private or on socialized property, nor whether it will rest on a system of castes or on democratic ideals. Order under law may be described as the neutral currency for authoritative power because legal order is initially indifferent to the types of structures that can be purchased with it.<sup>41</sup> Yet the primacy of order under Kelsen's procedures for validation is only one of many possible priorities for determining what is legal. One might want to require procedural fairness as a precondition of legal validity.<sup>42</sup> Another formulation might insist that all legal obligations comport with substantive moral standards.<sup>43</sup>

40. Without order, "legal order," as such, would have no meaning. According to Kelsen, the maintenance of order is the sole function shared by all legal systems. See p. 34 *infra*.

41. In this sense, the legal order may be considered "commodity-neutral," as the term is used by Ryle: "A coin is commodity-neutral, for I can buy any sort of commodity with it." G. RYLE, *DILEMMAS* 120 (1953). Similarly, the language that is used to describe legal arrangements is "topic-neutral." *Id.* at 120-21. The legal order described by Kelsen's terminology may incorporate any of a range of social and economic structures.

42. See L. FULLER, *THE MORALITY OF LAW* 97 (1964).

43. See d'Entrève, *The Case for Natural Law Re-Examined*, 1 *NAT. L. FORUM* 5, 45, 52 (1956). See also Weinreb, *supra* note 8, at 944 (under natural law, legal obligations are validated "by finding in the natural order an unfolding of what must be").

Since Kelsen's notion of legal validity looks only to the *Grundnorm* and to the dominant will of those who have the power to create and maintain an effective legal order, it is primarily a view from the top of the community structure that relies upon submissiveness from below. Under alternative approaches, sources such as custom, morality, historical development, and community needs and expectations would contribute to the authorization of valid legal prescriptions. Such sources would guide official interpretations of the law and would act as implicit restraints on the concept of authority itself. Under the Pure Theory, these sources function as restraints only to the extent that they are built into the *Grundnorm* itself, or to the extent that they appear in the calculus of effective power heeded by those in authority.

Kelsen excludes custom, morality, and community expectations from the explicit tests for legal validity in part because he hopes to avoid the danger of massive disobedience to law in the name of more fundamental obligations; he also wants to shield against the danger of moral absolutists who would employ government to impose their preferences on others. His placement of custom and community expectations outside of the basic norm, however, is not required by these concerns and has the effect of shaping a distinct political perspective on the legal order, rather than a neutral description of all legal systems.<sup>44</sup>

Hart's competing proposal that the "rule of recognition" rather than the "basic norm" be employed as the ultimate formal test for legal validity provides an alternate focus on community custom as the source of and standard for the validating ground.<sup>45</sup> In this respect, Hart joins forces with Ehrlich<sup>46</sup> and others who would urge that, at least during the early stages of formal legal development, prior social practice and custom should be the central points of reference for legal validation. The very language chosen by Hart to describe the validating principle causes a shift in attitude towards the legal order; he proposes the expression "rule of recognition" to replace

44. The absence of any moral component from the test of validity is a consequence of the effort to separate law and morals. This separation is just that—an effort, "not a matter of logical classification, of conceptual clarity, of 'science,' or of analytical coherence. It is an expression of the liberal desire to preserve individual autonomy, and to preserve the diversity of morals which is in constant danger of ideological and governmental interference." J. SHKLAR, *supra* note 14, at 42. In this way, Kelsen's formulation embodies and advances a particular political viewpoint, not a description with universal application.

45. See H.L.A. HART, *THE CONCEPT OF LAW* 97 (1961).

46. See E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (W. Moll trans. 1936).

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the "basic norm" partly in an effort "to avoid any commitment to Kelsen's view of the conflict between law and morals."<sup>47</sup> Rather than being universal, Kelsen's formulation of the test for legal validity presumes a conflict that is not inevitable.

Hart's "rule of recognition" permits a resolution of the problem posed by a morally repugnant law, a resolution that contrasts sharply with Kelsen's approach to the same problem. To both Kelsen and Hart, the "badness" of a putative law would provide no necessary ground for declaring the law invalid, as long as the law conformed to formal validating procedures. But Hart explicitly argues his position as if it were a policy choice and not a matter of immutable logic. Hart points out that to hold invalid a morally repugnant enactment would not be likely to lead to a stiffening resistance to evil; similarly to hold it to be valid would not require obedience.<sup>48</sup>

The consequence of Hart's construct is that he can defend the formal validity of an allegedly bad law so long as it conforms to the validating procedure, yet still recognize that the stamp of validity does not ultimately require obedience.<sup>49</sup> In accordance with his discussion of conflicts between moral and legal "oughts,"<sup>50</sup> Hart's view of the validating principle allows for consideration of the many possibly competing moral issues that the enforcement of a morally repugnant law might bring into play.

In addition to Hart's, a third point of view provides a contrast with Kelsen's approach to the problem of the morally bad law. This third perspective suggests that there might be extreme situations in which a putative law would so outrageously offend deeply held values within a community that it would not merit even a *prima facie* presumption of obedience. If Parliament were to prohibit marriage or the Supreme Court were to rule Queen Elizabeth II perpetual President of the United States,<sup>51</sup> the rigidity of the purely formal test of validity should give way to accommodate the unforeseen contingencies of the situation.

Each of these views carries different valuational tones and gen-

47. H.L.A. HART, *supra* note 45, at 246 n.4. The rule of recognition may be enlarged to include subsequent judicial custom as well.

48. *Id.* at 204-07.

49. *Id.* at 206. There would, however, be a *prima facie* obligation to obey an enactment unless and until overriding moral principles came into play. "No doubt if nothing else is said, there is a presumption that one who speaks . . . of his or others' legal obligations, does not think that there is any moral or other reason against fulfilling them." *Id.* at 199.

50. See p. 11 *supra*.

51. See J. LUCAS, *THE PRINCIPLES OF POLITICS* 325 (1966) (examples of extreme cases unanticipated by criteria of legal validity).

erates different political perspectives toward the legal order. Each depends on different estimates of factual consequences and different assumptions about the relation between instrumental means and assumed ends. Furthermore, each view proceeds with different assumptions concerning what humans value in relation to one another and to legal authority. This exploration is not meant to criticize any one view; they can all be criticized for relying on the intelligent guess and the appeal to emotion. Instead, the existence of multiple procedures for validating putative laws and legal judgments suffices to call into question Kelsen's claims of neutrality. His approach, in fact, contrasts sharply with other possibilities, and pours meaning into words and concepts that, as used by others, carry different valuational overtones.

### III. The Meaning Ascribed to Key Terms

As was indicated earlier, the meaning one ascribes to "moral" conveys a set of attitudes about conduct and choice within the legal order.<sup>52</sup> The meaning attributed to the "legal" by the Pure Theory has similar consequences.<sup>53</sup> Perhaps less obvious are the complex value choices implicit in the definitions of other terms, such as "community" and "state," employed by the theory. These terms fall within the family of "essentially contested concepts":<sup>54</sup> concepts whose meanings are guided to some extent by diverse and competing goals and ideals that themselves are subject to change over time. These kinds of concepts lend themselves to rival uses and yet seldom are susceptible to "a definite or judicial knockout."<sup>55</sup> When Kelsen uses these terms, he selects particular meanings from a range of possible denotations and connotations. It will become apparent that he also relies on factual assumptions that reflect valuational choices with political consequences.

#### A. *Community*

The political consequences of a legal theory are often apparent in the conception of community adopted by the theory. The problem with identifying the political consequences of the concept of

52. See pp. 6-7 *supra*.

53. See pp. 23-25 *infra*.

54. See Gallie, *Essentially Contested Concepts*, in *THE IMPORTANCE OF LANGUAGE* 121 (M. Black ed. 1962) (certain concepts relating to organized human activity have widely varying uses and are so hotly contested that disclosure of multiple meanings cannot dispel conflict).

55. *Id.* at 130-31.

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community employed by the Pure Theory is that, at different points, the theory draws on significantly divergent traditions. There is some language in Kelsen's work that would place the theory in the tradition of Aristotle, who viewed the *polis* as a collective unity. This tradition identifies the community as an organic expression of the social side of individuals whose very human nature binds them together out of need, sympathetic concern, and respect for others. Basic individual commitments to deeply held and commonly shared group values give the community its own life and pattern of values that are distinct from the lives and patterns of each individual in the community.

In Kelsen's observations on the meaning of "community," there are expressions that, at first blush, would seem to be in tune with this tradition. He noted that "[a] community, in the long run, is possible only if each individual respects certain interests—life, health, freedom, and property of everyone else, that is to say, if each refrains from forcibly interfering in these spheres of interest of the others."<sup>56</sup> Yet Kelsen's further discussion of the nature of the "collective soul, as the fact that constitutes the community of the State" shows his ultimate disagreement with the collective view of community:

In reality, the population of a State is divided into various interest-groups which are more or less opposed to each other. The ideology of a collective State-interest is used to conceal this unavoidable conflict of interests. To call that interest which is expressed in the legal order the interest of all is a fiction even when the legal order represents a compromise between the interests of the most important groups.<sup>57</sup>

These and other observations locate Kelsen in the second tradition of "community." Kelsen adopts the lens of the rational egoist, perceiving "community" as no more than a prudent, contrived convention to implement selfish needs and interests of individuals.

With origins in the arguments of Thrasymachus and in the theories of Hobbes and Bentham, the starting point of this school of thought is the individual—his needs and interests, fears and selfishness. The individual is not innately good, but instead has aggressive urges and drives for power and self-preservation.<sup>58</sup> The community is not

56. GENERAL THEORY at 22; WHAT IS JUSTICE? at 238. It has been suggested that Kelsen is expressing natural law doctrine here or is close to the theory of *Interessenjurisprudenz*. See Gewirth, *The Quest for Specificity in Jurisprudence*, 69 ETHICS 155, 172-73 (1959).

57. GENERAL THEORY at 184-85.

58. "The illusion that it is possible to go 'back to nature' is based on the belief that man is 'by nature' good. It ignores the innate urge to aggression by man." WHAT IS JUSTICE? at 241.

founded on benevolent or sympathetic concern for others because there is no innate need for a social way of life. To the rational egoist, "community" is simply a means to realize individual interests, not an organic expression of the social side of man.<sup>59</sup> The individual, for prudential reasons, joins a group whose members share similar values; community values thus consist of nothing more than the ruling values of individuals organized into dominant groups backed by coercive power. The result is usually a "compromise of conflicting interests, which leaves none of them wholly satisfied."<sup>60</sup> According to Kelsen, "to say that individuals belong to a certain community, or form a certain community, mean only that the individuals are subject to a common order regulating their mutual behavior."<sup>61</sup> As a result, the community is no more than a formal construct with no independent existence:

the statement "individuals form a community," or "belong to a community," is nothing but a very figurative expression of the fact that their behavior is regulated by the legal order constituting the community. Besides that legal order, there is no community, no corporation, as little as there is a body of the corporation besides the bodies of its members.<sup>62</sup>

Under this view of community, the function of the legal order is to provide a basis for effective compromise between competing groups. Even in a community existing under a stable power structure, the

59. In the language of Tönnies, a community in the Pure Theory is a *Gesellschaft*—an "imaginary and mechanical structure"—rather than a *Gemeinschaft*—a "real and organic life." F. TÖNNIES, *COMMUNITY & SOCIETY* 33 (C. Loomis trans. 1957).

The two views of community also can be characterized as "organic" and "contractual" in that one presupposes natural bonds of the group that take priority over individual interests and form the foundation for the community, while the other posits deliberate agreements between essentially isolated individuals as the basis for the community. Each characterization has consequences for attitudes about government and human commitments under a legal order.

Those who view the community in terms of contract theory will stress the need for consent, mutual responsibility, and mutual agreement; they will reject orders to submit or to curtail personal freedom without receiving worthwhile benefits in exchange. As applied to political relations, this contract approach is accompanied by democratic, liberal, and unmystical values; similar emotional and intellectual values tend to coincide with a contract view of community. See Macdonald, *The Language of Political Theory*, in *LOGIC AND LANGUAGE* 173 (A. Flew ed. 1960).

Adherence to the organic view of community would entail willing submission to and reverence of the authority of the group. See *id.* at 174 (organic view of political relations entails humble submission to authority).

60. *GENERAL THEORY* at 439.

61. *Id.* at 21.

62. *Id.* at 109. On this point, Kelsen's view is similar to Bentham's observation: "The community is a fictitious *body*, composed of individual persons who are considered as constituting as it were its *members*." J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 3 (Hafner ed. 1948) (1st ed. London 1789).

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law would reflect fundamental conflict between groups and individuals by expressing the values associated with those wielding the dominant power.<sup>63</sup> This assumption of conflict as a basic characteristic of community has political consequences. An adherent to this view of community acquires a specific perception of the political order as a non-utopian one of imposed constraint and continuing conflict.<sup>64</sup>

The function of law and the nature of politics are very different if the first view of community is adopted. In a community that is seen to have its own vital existence apart from the legal order, law "functions in the community, it is renewed and sustained by it, and it is directed toward the end which is the community."<sup>65</sup> Law then searches for and endeavors to implement those collective values that are claimed to be above and beyond the individual interests of those who happen to hold a preponderance of power.

Attitudes concerning the life-span of a given legal order are also profoundly influenced by the definition of community. In Kelsen's view, because the community is a contrived aggregation held together only by the cement of authority and power, revolution signals a new legal order and a complete break in ties to the legal order that preceded it. The new power base creates a new *Grundnorm*, determining de novo the structure and design of the legal community. The life of a legal order is discrete, not continuous. This perspective carries with it the belief that the human element in shaping the legal order is unlimited. In designing its new order, a revolutionary group is limited only by the extent of its power.<sup>66</sup>

Other theorists perceive revolution as a new—and relatively small—step in a continuum, rather than as a complete break with the

63. *But see* PURE THEORY at 47 (Kelsen distinguishes between legal order and order imposed by "gang of robbers," which lacks basic norm).

64. This model of society has been described using the concepts of change, conflict, and constraint:

We do not know what an ideal society looks like—and if we think we do, we are fortunately unable to realize our conception. Because there is no certainty (which, by definition, is shared by everybody in that condition), there has to be constraint to assure some livable minimum of coherence. Because we do not know all the answers, there has to be continuous conflict over values and policies. Because of uncertainty, there is always change and development. Quite apart from its merits as a tool of scientific analysis, the conflict model is essentially non-utopian; it is the model of an open society.

R. DAHRENDORF, *Out of Utopia*, in *ESSAYS IN THE THEORY OF SOCIETY* 128 (1968).

65. Cairns, *The Community as the Legal Order*, in *COMMUNITY* 29 (NOMOS II C. Friedrich ed. 1959). This is the core of Ehrlich's view that the key to an understanding of law is the community. *See* E. EHRLICH, *supra* note 46, at 39-82.

66. *See* GENERAL THEORY at 11 n.\* (natural law used as powerful but merely ideological instrument by revolutionaries).

past. For Olivecrona, "a revolution implies a partial altering of the law in an unconstitutional way. The legal system as a whole survives."<sup>67</sup> For Läserson, revolution represents a "hurtling together of the positive and natural laws."<sup>68</sup>

Indeed these competing understandings of the life-span of the legal order are off-shoots of the larger controversy over natural law. Those who have a sense of the continuum in legal order focus on the discoverable patterns of human expectations or the intrinsic ideals embedded in the social order. Those who deny the persistence of laws innate in man or in nature find in the willful acts of individuals great potential power to bring about abrupt, dramatic change. Thus, through its definition of community, a legal theory such as Kelsen's communicates a collection of attitudes about human conflict, social order, revolution, and conduct under law.

### B. *The State*

According to traditional formulations, a comprehensive social order includes the state, a political subsystem of which the legal system is only one part. Such a view contemplates the possibility of government without law and also recognizes a separate status for non-political groupings such as private associations.<sup>69</sup> The legal order is dependent upon and subservient to the state.

Kelsen rejects this formulation as "ideological." His claim is that conceptual separation of the state and the legal order conceals the unavoidable conflict of individual and group interests in the name of the collective interest of the state and encourages an illusion that the subsystem called the state is independent of the actual or potential control of the legal order. The only justification for the definitional separation is that "people will better fulfill their duties to the State if they are induced to believe the theory."<sup>70</sup>

Endeavoring to view the state "free of ideology," Kelsen puts forth the view that the state is simply the legal order, although he notes that not all legal orders are states.<sup>71</sup> The justification for obedience

67. K. OLIVECRONA, *LAW AS FACT* 71 (2d ed. 1971).

68. McBride, *The Essential Role of Models and Analogies in the Philosophy of Law*, 43 N.Y.U. L. REV. 53, 69 (1968) (citing Läserson, *Revolution und Recht*, 8 ZEITSCHRIFT FÜR ÖFFENLICHES RECHT 557 (1929)).

69. See Raz, *The Identity of Legal Systems*, 59 CALIF. L. REV. 795, 813 (1971) (criticizing Kelsen for neglecting interaction between political and nonpolitical subsystems of comprehensive social system).

70. GENERAL THEORY at 186.

71. PURE THEORY at 286. Primitive societies and the international legal order are not states; to be a state, a legal order must be centralized. *Id.*

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to the legal order is Hobbesian prudence accompanied by the threat of preponderant power. There is no independent reason to obey the state because, according to Kelsen, the state has no separate existence or ability to demand obedience. In the event of conflict between normative demands, the legal order ultimately overrides all other demands, including those of the state. To conceive of the state differently is to accept a fictional entity created and sustained only by tradition.

Support for this view is not drawn from sociology or other materials descriptive of human experience. Despite his claim that he is revealing truth hidden by tradition, Kelsen is merely asking the reader to make a value judgment concerning the state that is different from the traditional view.

### C. *Factual Assumptions*

Sustaining the meanings ascribed to key terms within the Pure Theory are factual assumptions about human nature. Kelsen's view of community as a collection of self-interested individuals reflects a basic belief in "the innate urge to aggression in man," and fundamental assumptions about conflicts between groups.<sup>72</sup> Identifying the state as another name for centralized legal orders in part depends on a view that monopolized, authoritative coercion is a prerequisite of order in human society. As will be developed later,<sup>73</sup> Kelsen also assumes that punishment, not reward, is the superior means of social control and that beneficence is unlikely to effectuate a social order.<sup>74</sup> Relying on assertions rather than evidence, Kelsen assumes that coercion always plays the paramount role in securing order within a legal community.

Although these views are presented as if they were a matter of common knowledge, they involve factual issues that have generated serious scientific controversy for some time. That Kelsen's factual assumptions lack empirical rigor might be damning enough to his claim to have constructed a universal, value-free theory. Even more damaging, however, are the valuational implications inherent in his assumed facts. Factual assumptions are often thought to be immune from valuational implications, but this conclusion is an unwarranted deduction from the truism that facts and values are *logically* distinct categories. The truism itself does not rule out the presence of sig-

72. *WHAT IS JUSTICE?* at 241.

73. *See p. 27 infra.*

74. *E.g., WHAT IS JUSTICE?* at 234, 241-44.

nificant relationships between the two categories. Thus, Hobbes's recommendation that absolute sovereignty be chosen as the method for achieving order rests on his assumptions about the nature of the human animal. In contrast, programs for social reform commonly draw upon assumptions of human plasticity.

The structure emerging from Kelsen's assumptions about human nature resembles the Hobbesian state where there is no concern for the common good but instead an emphasis on protecting the interests of individuals or groups who vie with each other in a competitive struggle. Perhaps such a structure would instill fear of the legal order; perhaps it would induce passivity. As one author noted,

What could be more welcome to people who are frightened and feel impotent to change the course leading to destruction than a theory that assures us that violence stems from our animal nature, from an ungovernable drive for aggression, and that the best that we can do, as Lorenz asserts, is to understand the law of evolution that accounts for the power of this drive? This *theory* of an innate aggressiveness easily becomes an *ideology* that helps to soothe the fear of what is to happen and to rationalize the sense of impotence.<sup>75</sup>

Whether a sense of impotence, fear, or some other response would emerge under the structure designed by the Pure Theory, these attitudes are inextricably connected to the factual assumptions built into key definitions used in the theory. The valuational overtones of these assumptions thus are pervasive and indeed fundamental to the theory itself.

#### IV. The Conceptual Apparatus

The conceptual apparatus determines the relationship between basic components of the Pure Theory and prescribes how the legal order should operate. No less than the meanings ascribed to key terms, the conceptual apparatus incorporates factual assumptions and choices of meaning that have valuational consequences. The prime concept is that of legal obligation; integral conceptual arrangements govern the relationship between duty and right, sanction and delict, and public and private law. A separate set of concepts that contain a microcosm of the entire theory comprises the Pure Theory's approach to international law.

75. E. FROMM, *THE ANATOMY OF HUMAN DESTRUCTIVENESS 2* (1973).

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### A. *Legal Obligation*

Conceptual patterns within the Pure Theory rest on the notion of legal obligation. To seek an answer to the question of the meaning of the "legal" is, in Kelsen's view, not to probe for psychological or sociological data, or to predict patterns of judicial behavior, but rather to ascertain what certain conduct under a legal order *ought* to be. This "ought" has a peculiarly legal normative quality that emanates from obligatory commitment to a system of legitimate legal authority.

Under Kelsen's theory, a logical distinction is maintained between (1) whether one has a legal obligation and (2) whether, having one, one ought to act in compliance with it. "That somebody is legally obligated to certain conduct means that an [official] organ 'ought' to apply a sanction to him in case of contrary conduct."<sup>76</sup> The legal "ought," unlike the moral "ought," is not addressed directly to the subject as a standard of behavior to which the subject should conform. What is "binding" about the legal "ought," accordingly, is the coerciveness of externally imposed authoritative sanctions, not its inherent worth and not the subject's own conviction. From the subject's viewpoint, the legally obligatory "ought" could, without loss of meaning, be readily translated into the indicative mode. An example would be: "If you fail to conduct yourself in a certain way, then you will suffer an authorized sanction." This is, in effect, Holmes's "bad man" view of the law.<sup>77</sup> To *have* a legal obligation, it is thus not necessary that it be binding in the sense of moral obligation that the feeling of compulsion is internal and volitional; nor is it a condition for *having* a legal obligation that it be instrumental or contributory to the "good life."

The valuational perspective that this view generates may be seen when it is contrasted with the expectations that ordinarily accompany the notion of *moral* obligation. It would seem strange even to suggest a logical distinction between (1) having a *moral* obligation and (2) the issue of whether, having one, one *ought* to act in compliance with it. Having a moral obligation carries with it, as part of its very

76. GENERAL THEORY at 60. For a discussion of the connection between Kelsen's formulation of legal obligation and Kantian and neo-Kantian thought, see Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, 59 CALIF. L. REV. 617, 628 (1971).

77. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897), reprinted in COLLECTED LEGAL PAPERS 167, 173 (1921) ("But what does [the notion of legal duty] mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money.")

meaning, a prima facie presumption that one ought to act accordingly, because built into it is the notion that fulfilling the obligation is instrumental to what is right and good. Absent overriding considerations introduced by other moral values, the presumption ought to prevail; not to accord it prima facie status would be a moral "wrong."

By separating the existence of a *legal* obligation from the question of whether one ought to do what the obligation prescribes, Kelsen suggests that legal obligation be viewed as heteronomous, as nothing more than something externally imposed on the subjects of an existing legal order. Legal obligation, unlike moral obligation, is thus denied any prima facie notion of "wrongness" for failure to comply. It derives its power not from any moral considerations but by virtue of the fact that it flows from the basic rule conferring enforcement powers on those in positions of authority. In essence, there is no substantive difference between being obliged to comply with a gunman's order and being legally obligated to perform acts that are morally unjust. The difference between the two is primarily procedural. Under Kelsen's theory, the "legal" is authorized, and thus legitimate; the gunman's order is not.

Hart's view of legal obligation is somewhat similar. According to Hart,

Not only may vast numbers [of those who do not voluntarily accept the legal order itself] be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so, though the system will be more stable when they do so.<sup>78</sup>

The political function of this Kelsen-Hart position is underscored by those who offer practical reasons for supporting it and also by those who offer competing formulations that invite different attitudes about legal obligation. For example, it has been suggested that if legal obligation is viewed as carrying with it a prima facie duty to comply, this would give an unwarranted advantage to those who impose the obligatory prescriptions. This would place on the individual the burden of defending his decision not to obey, instead of placing on the authorities the burden of "making their decrees worthy of being obeyed."<sup>79</sup> An alternate formulation rests on a prima facie duty to obey the obligatory prescriptions of a legal order, which

78. H.L.A. HART, *supra* note 45, at 198.

79. Ladd, *Legal and Moral Obligation*, in *POLITICAL AND LEGAL OBLIGATION* 35-36 (NOMOS XII J. Pennock & J. Chapman eds. 1970).

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follows logically from the belief that almost any society is preferable to none.<sup>80</sup> The latter perspective regards legal obligation as a species of moral obligation only in the sense that, since any legal order is preferable to anarchy, there exists *prima facie* justification for obedience. These different perspectives clearly suggest that there are competing valuations at work here and the Pure Theory selects only one possible perspective on legal obligation.

### B. *Right and Duty*

Different perspectives, attitudes, and outlooks are generated by the alternate arrangements of rights and duties within a legal theory.<sup>81</sup> More than a linguistic convention by which one term can be readily translated into another, the arrangement of right and duty may place duty as prime with right derivative, or the roles of the two concepts may be reversed. A rights-oriented theory stresses human aims, goals, and aspirations. Its central concern is the individual, and it implies a primary political concern for individual interests even when there is a cost in terms of social utility. A duty-oriented theory directs attention to the demands of the legal order; individual benefits flow only indirectly from this order. The connotation of duty is one of restraint rather than aspiration. A conceptual arrangement resting on duty deflects the view that there are basic rights that preexist the legal order and that the legal order may support but does not actually create.<sup>82</sup>

In the Pure Theory, the concept of duty is central and right is derivative. A right claimed by an individual is nothing more than a technique provided by the legal order; it does not precede the legal order. Thus, there is no right not to be robbed or killed, since the execution of the sanction is dependent upon action by a legal institution. The injured party or his relatives have no claim or right

80. See K. BAIER, *THE MORAL POINT OF VIEW* 235-39, 309 (it is better to construct society than to live without rules because morality possible only in society); T. HOBBS, *supra* note 21, at 142-44 (it is better to give all power to one sovereign than to remain in state of nature).

81. Conceptual emphasis on one of two related concepts is not indigenous to legal theory. In ethical theory, some formulations give the central position to "good" and a derivative place to "right"; others use the reverse approach. See A. EDEL, *METHOD IN ETHICAL THEORY* 35 (1963). Similarly, the subordination of right and duty to value has been the thrust of utilitarian formulations since Bentham. See G. MYRDAL, *THE POLITICAL ELEMENT IN THE DEVELOPMENT OF ECONOMIC THEORY* 56 (1954).

82. Similarly, the arrangement of other concepts communicates a set of attitudes: [R]educing "right" to "good" often carries the view that the rules of right are merely generalized methods of achieving the good in an unstable world. Reducing "good" to "right" may mean directing men's energies away from the apparent goods of unsophisticated men toward an eternal set of objects of striving.

A. EDEL, *supra* note 81, at 34-35.

to initiate official sanctions against the perpetrator. There is, in contrast, a right to sue for breach of contract; execution of a sanction depends "not only upon the fact that a contract has been made and that one party has failed to fulfill it, but also upon the other party's expressing a will that the sanction be executed against the delinquent."<sup>83</sup> Because right is derivative of duty, "[n]o legal right is conceivable without any corresponding duty, but there could well exist a legal duty without a corresponding legal right."<sup>84</sup>

To structure the concepts in another way would be to acknowledge the existence of rights apart from those created by the state. These might be rights that existed before the state itself arose. To Kelsen, a theory that permits rights to exist before the legal order undermines the authority of a legal order and thus fails to describe legal systems that exist.

If the legal order cannot create but [can] merely guarantee rights, it cannot abolish existing rights either. It is then legally impossible to abolish the institution of private property, nay, legislation is then incapable of depriving any particular individual of any particular proprietary right of his. All these consequences of the doctrine of the priority of rights are in contradiction to legal reality. The doctrine of the priority of rights is not a scientific description of positive law but a political ideology.<sup>85</sup>

But if the doctrine that gives priority to rights expresses a political ideology, so does the doctrine that stresses duty; the difference is only in the content of the values, not in the presence or absence of such valuational elements. Priority placed on rights elevates the individual above the community and justifies resistance to the legal order if it impinges on individual rights. Priority placed on duty reflects an overriding concern for the demands of the society as a whole and denies the validity of individual notions that violate the legal order.<sup>86</sup> The conceptual arrangement described by the Pure Theory implements a set of political values that shape views of human choice and potential within society; it does not arrange a legal theory purified of valuations.

83. GENERAL THEORY at 82. The right to sue for breach of contract derives from the legal order, not prior norms.

84. *Id.* at 85.

85. *Id.* at 80.

86. See D. RITCHIE, NATURAL RIGHTS 101-02 (2d ed. 1903) ("The person with rights and duties is the product of a society, and the rights of the individual must therefore be judged from the point of view of a society as a whole, and not the society from the point of view of the individual.")

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### C. *The Concepts of "Delict" and "Sanction"*

The Pure Theory was intended to employ a conceptual apparatus that would avoid the abuses of natural law theorists and prevent the appeal to human experiences beyond the legal order as a defense to legal culpability.<sup>87</sup> In the name of purifying the concept of "delict," Kelsen strips it of moralistic stigma and imbues it with his notions of legal obligation and duty. Accordingly, legal culpability is incurred as a price to be paid for membership in a legal community. It is simply the result of the limitations on individual freedoms that necessarily inhere in any legal system.

In this vein, the Pure Theory places primacy on the coercive sanction rather than on long- or short-ranged normative appeals based on the substantive content of a particular legal norm. A community member who breaches a legal norm triggers the fundamental obligation of those in authority to impose a sanction. The prescriptiveness of the norm lies fundamentally in this requirement of imposing the sanction, not in the "good" or "duty" that inheres in the subject-matter of the norm itself.<sup>88</sup>

Professedly a structural account that describes all legal orders, Kelsen's formulation claims to purify legal culpability of any notion of moral wrongdoing, and to stress the coercive element as central to legal control. Yet the coercive element of the "legal" has not always nor does it everywhere play a central role. Indeed, where it has prevailed, it may reflect a period of strife or a time of considerable internal social conflict; it may signal a pathological rather than a normal condition of community life. Kelsen's notions of delict and sanction, rooted in assumptions about human nature, function to separate legal wrongdoing from moral considerations, and in so doing, generate a particular valuational perspective toward the legal order.

### D. *"Public" and "Private" Law*

Kelsen claims that the traditional distinction between private legal transactions and regulation by public authorities has an ideological character that must be rejected by a pure legal theory.<sup>89</sup> In particular,

87. Kelsen fears that giving primacy to the substantive content of laws would encourage appeal to natural law, which he suspects "may and has been abused for political purposes in a manner not always consistent with progress or justice." Lauterpacht, *Kelsen's Pure Science of Law*, in *MODERN THEORIES OF LAW* 136 (W. Jennings ed. 1933).

88. Kelsen suggests that a conditional statement exhaustively describes this notion: "If a certain behavior is present, then a certain sanction ought to be executed." *PURE THEORY* at 113.

89. *Id.* at 281.

two consequences of this dualism lead to ideological contamination: (1) the view that government and its administrative machinery are above the law or free *from* law;<sup>90</sup> and (2) the view that "political dominion is restricted to public law, that is, primarily to constitutional and administrative law, but entirely excluded from private law."<sup>91</sup>

To purify legal theory, Kelsen breaks down the traditional dualism by underscoring the common characteristics of private and public law. He identifies both private legal transactions and regulation by public authorities as different expressions of delegated legal authority. The focus on the common function of delegated law subjects government and its machinery to the control of the basic norm of the legal order; similarly, "the 'private' right created by the legal transaction of the contract is just as much the theater of the political dominion as the public law created by legislation and administration."<sup>92</sup> Both public and private law, under this conceptual approach, emanate from the single source of the basic norm. Both the prescriptions of government and the arrangement of private transactions are creations of the single overarching authority of the legal order.

This facially neutral principle of "the unity of the normative order"<sup>93</sup> in fact produces consequences with a distinct political content and ideological cast. Under this formulation, freedom to negotiate private contractual relationships is no longer an act of two free wills outside the realm of legal authority. Instead, it is a delegation of lawmaking by the legal authority to its designated agents. What were private rights become political rights, created by the legal order. In addition, because public authority is unified with private law, it is not above the legal order and not free from the coercive power of the law. Unlike the sovereign in Austin's theory, public authority is subject to the restraints and obligations imposed by the basic norm of the legal order. Because it introduces these changes in the traditional conceptual arrangement, the Pure Theory represents one ideology in deadly competition with the one that is attacked.

90. *Id.* at 283.

91. *Id.* Note Kelsen's comment: "The political character of private rights becomes still more obvious as soon as one realizes that the conferring of private rights upon individuals is the specific legal technique of civil law, and that civil law is the specific legal technique of private capitalism, which is at the same time a political system." GENERAL THEORY at 89.

92. PURE THEORY at 283.

93. GENERAL THEORY at 110-11.

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### E. *International Law*

In constructing a distinct conceptual framework for international law, the Pure Theory manifests some of the same valuational elements that permeate the rest of the Theory and introduces some additional ideological elements as well.<sup>94</sup> One of the methodological assumptions that is important to Kelsen's construction of a theory of international law is that a theory of law must "present its object as a unity."<sup>95</sup> This assumption requires a basic norm by which both national and international law must be validated. Logically, international law itself could serve as the basic norm and provide the validating base for all national legal orders, or alternatively, international law could owe its own validity to each of the respective national legal orders. The first view would accord ultimate authority to international law; the second, to national law. Logic, according to Kelsen, is indifferent to either model, for either could provide the basis for a complete, systematic, and unified account of legal validity for all law.

For the Pure Theory, Kelsen chooses primacy for international law because, from an aesthetic view, its monism is simpler and neater than the more disjointed and cumbersome pluralistic conception.<sup>96</sup> From this viewpoint, "the international obligations and rights of the States are exactly the same whether the one or the other of the two hypotheses is assumed."<sup>97</sup> From a *political* point of view, however, Kelsen admits that the difference is important:

A person whose political attitude is one of nationalism and imperialism will naturally be inclined to accept the hypothesis of the primacy of national law. A person whose sympathies are for internationalism and pacifism will be inclined to accept the hypothesis of the primacy of international law. From the point of view of the science of law, it is irrelevant which hypothesis one chooses. But from the point of view of political ideology, the choice is important since tied up with the idea of sovereignty.<sup>98</sup>

A supranational foundation for international law carries with it the valuational overtones of a worldly outlook on human problems, a

94. Indeed, the very use of the label "international law" is not devoid of an impact on attitudes. H. KANTOROWICZ, *THE DEFINITION OF LAW* 10 (A. Campbell ed. 1958) (existence of civilization would become more precarious if other name were substituted for international law).

95. *PURE THEORY* at 328.

96. "Both systems are equally correct and equally justified. It is impossible to decide between them on the basis of the science of law." *PURE THEORY* at 345-46.

97. *GENERAL THEORY* at 387.

98. *Id.* at 388; *see PURE THEORY* at 346.

broadly shared conception of expectations and responsibilities, and perhaps a universal kind of human restraint and aspiration. This model also suggests an enveloping "legal community" to which nation states look as the source of ultimate authority for validating their legal existence and for accounting for their behavior. Once it is given the ultimate legitimate power to determine when a national legal system expires and when a new legal system earns entry into the world community, the supranational world order acquires the aura of the highest, independent authority.<sup>99</sup> Valuational overtones of some sort are unavoidable according to Kelsen's approach because of his demand for unifying the authority behind the national and international realms.<sup>100</sup> Because Kelsen uses the international legal order as the validating base, he elevates the importance of commitment to a supranational community.

Professor Hart offers a contrasting resolution of the issue of unified authority; his approach suggests an entirely different political perspective on international law. According to Hart:

[O]nce we emancipate ourselves from the assumption that international law *must* contain a basic rule, the question to be faced is one of fact. What is the actual character of the rules as they function in the relations between states? Different interpretations of the phenomena to be observed are of course possible; but it is submitted that there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties.<sup>101</sup>

Hart suggests that international law be regarded as a body of law for a community that is not advanced enough to enjoy the luxury of a general criterion of validity, such as a *Grundnorm* or rule of recognition. The binding force of the community would be found simply in the fact that its rules are actually accepted and observed as standards of obligatory conduct. No ultimate rule, no unitary system is required to demonstrate the validity or binding force of particular rules of international law. Indeed, notes Hart, no basic rule

99. See L. COHEN, *THE PRINCIPLES OF WORLD CITIZENSHIP* 87 (1954) (law of international community overrides loyalty to individual states; supreme allegiance owed to most widely administered legal system).

100. Kelsen thus asserts an "epistemological postulate: to understand all law in one system—that is, from one and the same standpoint—as one closed whole" is necessary for human cognition of law. *PURE THEORY* at 328.

101. H.L.A. HART, *supra* note 45, at 230-31.

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now serves as a test for the validity of individual rules of international law yet nations carry on their relations with one another.

Hart proposes a pluralistic construct as the theory of international law. Accordingly, international law emanates not from a central authority but centripetally from the nation states to common mooring points. The rules for establishing common mooring points develop pragmatically and are crystallized in practice; they obtain their binding force much as the rules of a game come to bind those that play it. A nation state that wittingly uses the procedures specified by the rules of the game—procedures, for example, that transform words into treaties<sup>102</sup>—are thereby deemed “bound” by what the procedures entail. Through participation in a game, there is an implicit acceptance of the general rules and an obligation to abide by the specific consequences of the particular “moves” or “plays.” If Kelsen’s formulation were to be characterized by a game model, his players would be confined to one game, the rules of which are the product of the international legal order and its tests for legal validity. Hart’s players instead are engaged in a series of games played according to rules that are developed and sustained by customary practices of the nation states themselves.

The political function of Kelsen’s approach is brought to the fore by the points of contrast between it and Hart’s conception. A different attitude towards the hierarchy of authority and the sources of binding rules is conveyed by each; different views of the legitimacy of common usage and custom are also apparent. Kelsen’s approach may have been developed for aesthetic reasons or to satisfy a particular methodological concern for unity, but its effect is to implement only one from among competing conceptions of an international legal order.

### V. Role Assignments Under the Pure Theory

The designation of those who are to play major and minor roles under the theory, and the leeway that accompanies the major roles assigned, project images of a legal order with valuational overtones for those who are the actors within it.

#### A. *Selection of Persons Addressed*

Who is addressed by the Pure Theory? Legal obligation is characterized not as a prescription of a certain type of conduct addressed

102. *Id.* at 228 (international law in the “usual terminology of international lawyers [is] a set of customary rules of which the rule giving binding force to treaties is one”).

directly to members of the community; rather it is merely an indirect result of the requirement that officials impose coercive measures if conditions in violation of the law should arise. The direct address is only to the officials of the legal order. Kelsen explains:

Legal obligation is not, or not immediately, the behavior that ought to be. Only the coercive act, functioning as a sanction, ought to be. If we say: "He who is legally obligated to a certain behavior, 'ought' to behave in this way according to the law," we only express the idea that a coercive act as a sanction ought to be executed if he does not behave in this way.<sup>103</sup>

This conception can be stated formally: If *A* (delict) is, *B* (sanction) ought to be. The "is" part of this formulation is perceived simply as a factual condition for an obligation on the part of the *authorities* to impose a coercive sanction.<sup>104</sup> Thus it is the authorities who are given the central role under the theory. Those who are on the receiving end of the law and subject to its sanctions are viewed merely as subsidiary, supporting characters. Moreover, those in authority are not confined to controlling willed or negligent human action for which responsibility may be ascribed. Indeed, the coercive "ought" may be triggered by circumstances that individuals cannot control, such as race, nationality, or contagious disease.

Cast in the language of criminal law and trespass, the Pure Theory emphasizes threats and deprivations, not incentives and rewards. A similar formulation could employ a different tone: the subjects could be placed in a direct personal relationship with the sovereign who commands awe as well as imposes sanctions. Legal obligation under the Pure Theory, however, appears as an impersonal result of the power of officials to impose sanctions. The image projected is an authoritarian model of a legal order that demands submission by community members. Officials receive the sense of absolute power to impose sanctions where necessary and to interpret the law where necessary.

### B. *Interpretation by Officials*

Officials have the responsibility to impose sanctions whenever circumstances arise in violation of the law. But what should an official

103. PURE THEORY at 119 (citation omitted).

104. This formulation prompted the following observation: "We cannot, according to Kelsen, speak of the citizen obeying or disobeying the law. For the latter contains not orders to the individual citizen but only declarations to its officials as to what consequences follow certain acts. The law is thus not a command by any natural person or group to other human beings, but only a self-contained system of propositions." M. COHEN, REASON AND LAW 80 (1950).

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do in the face of a law that is intentionally or unintentionally indeterminate? Kelsen joins other theorists in concluding that an indeterminate law leaves the law-applier several possibilities from which to choose and no single one of them is exclusively correct.<sup>105</sup> Subject to much dispute, however, is the extent to which the law-applying organ is free to fill in the gaps or instead is restricted by general rules or requirements for interpretation. Hart urges that officials act as would a scorer in applying a rule in a competitive game; although the indeterminate rule permits flexible judgments the rule "has a core of settled meaning."<sup>106</sup> If there are frequent official aberrations from the core of settled meaning, either the players no longer accept the rulings or the game has changed to one based on the scorer's discretion.<sup>107</sup> Another approach finds judges bound to the "overriding principle that good reasons for judicial decision must be *public* standards rather than *private* prejudice."<sup>108</sup> Alternatively, restraints on official discretion may stem from precedents or customs.<sup>109</sup>

It would not be hard to find support for each of these positions in the experiences of various legal orders. Kelsen adopts another view that may also be supported in practice, but certainly does not describe universal experience. Like the realists who claim that it is self-deceptive to believe that official discretion is circumscribed by any standards guiding interpretation, Kelsen asserts that the official is unfettered in applying indeterminate laws. The legal official called upon to establish a legal act has free discretion "unless the positive law itself delegates some meta-legal norms like morals or justice; but then these norms are transformed into norms of the positive law."<sup>110</sup>

Kelsen's view communicates an attitude of broad latitude to legal authorities, limited only by the extent to which officials can maintain an effective legal order. Officials could even permit moral and other "alien" considerations to enter via their interpretations of the law. Unlike those who would tether official discretion to something be-

105. PURE THEORY at 353.

106. H.L.A. HART, *supra* note 45, at 140.

107. *Id.* at 141.

108. Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 635 (1963).

109. Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 853 (1972). There is a related tug-of-war over the meaning and limits of "authority" in political theory. See Peters & Winch, *Authority*, in POLITICAL PHILOSOPHY 83 (A. Quinton ed. 1967). Peters notes that "once it is granted that [the authority] occupies an office or holds a status legitimately, and once it is made clear that he is not straying from its sphere of competence or exceeding his prerogative, there can be no further question of justifying his commands." *Id.* at 95. Winch argues that "we have to deal with genuine authority, as opposed to bare power or ability to influence, only where he who decides does so under the idea of what he conceives to be the *right* decision." *Id.* at 105.

110. PURE THEORY at 353-54.

yond itself, Kelsen's approach accords expansive power to officials, and it is a power unchecked by the principles held within the community or the legal authorities' own precedents. These role assignments under the Pure Theory and the valuational tone that accompanies them are neither inevitable nor universal.

## VI. Assumptions Concerning the Functions of a Legal Order

Legal theories have vied with each other in proclaiming the basic function or goal that a legal order, by its very nature, must serve. The result is not a consensus but a variety of competing notions that generate different attitudes towards the legal order and implicitly carry with them different standards for implementing and evaluating it. Some theories assert that the basic value or function of law is to promote "good human activity, or more briefly, the good life";<sup>111</sup> "to perform an essentially *utilitarian* function";<sup>112</sup> to "[o]pen up, maintain and preserve the channels of communication by which men convey to one another what they perceive, feel, and desire";<sup>113</sup> to pursue "the modest aim of survival";<sup>114</sup> to assist as society struggles to achieve democratic ideals;<sup>115</sup> and to adjust conflicting human claims through social engineering.<sup>116</sup>

Although Kelsen considers the notion of "collective security" as the basic function of a legal order and suggests that "the aim of collective security is peace, because peace is the absence of the use of physical force," he nevertheless concludes that "[a]ll one can say is that the development of the law runs in this direction."<sup>117</sup> By rejecting any particular function as essential to the legal order, Kelsen apparently assures that the Pure Theory will be value-neutral and have universal application. Yet what would this notion mean for one who lives in a legal system molded along the lines of the Pure Theory? It means that a particular value preference *is* expressed in the theory—a preference that permits systems of law to develop even if they do not aim to promote the good life, to implement democratic ideals, or to further some other quality deemed important if not crucial by

111. F. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 17 (1933) (citation omitted).

112. R. WASSERSTROM, *THE JUDICIAL DECISION* 10 (1961) (citation omitted).

113. L. FULLER, *supra* note 42, at 186.

114. H.L.A. HART, *supra* note 45, at 187.

115. See Lasswell & McDougal, *Legal Education and Public Policy*, 52 *YALE L.J.* 203, 205 (1943).

116. See R. POUND, *INTERPRETATIONS OF LEGAL HISTORY* 163-64 (1923); J. STONE, *HUMAN LAW AND HUMAN JUSTICE* 266-75 (1965) (commentary on Pound's theory).

117. *PURE THEORY* at 37-38.

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other theories of law. Permitting the coercive nature of a legal order to cloak what some may call oppression or tyranny is not a neutral stance but a particular choice about which there is continuing debate.<sup>118</sup>

### VII. Looking at Legal Theory

A legal theory may be attired in the language of science to emphasize its empirical dimensions. It may employ logic to clarify its conceptual apparatus; it may use linguistic analysis to locate experiences incorporated in common language usage. In these and other ways, legal theory may hide from view its political function—the extent to which it is shaped, consciously or not, by political values, and, in turn, itself shapes attitudes and conduct under a legal order.

The political function of the Pure Theory is not readily apparent because of Kelsen's own approach to legal theory. Kelsen has fashioned a special pair of lenses through which the detached observer is invited to see what purport to be the structural elements and framework of any legal order. The picture received by this observer is distorted, however, because the viewing lenses are so constructed as to block from vision one of the theory's essential structural components—the valuational element. The distortion might well elude this observer if he is trained as a scientist to consider primarily the procedures for obtaining reliable facts about nature, rather than to identify the values that accompany commitment to the norms of a legal order.

To correct the distortion, it was necessary in the foregoing analysis to adopt a viewing lens fashioned for a critical participant in the legal order, *i.e.*, one to whom the legal order is directly and not vicariously applicable, one who is alert to the constant need to assess the impact of the legal order on the community, and one for whom legal theory is less a matter for detached contemplation than a mechanism to assist human adaptation to the environment. Although both the detached observer and the critical participant are interested in the knowledge conveyed by a theory, the critical participant is concerned less with the theory's claims to logic and clarity than with the more directly felt human values that the theory would implement if adopted and acted upon. The function of legal theory, from the vantage point of the critical participant, is not to describe or explain the happenings of a legal order in the manner of a scientific theory; nor is its pur-

118. Kelsen's emphasis on the minimal order to be assured by the legal system is also a valuation. See p. 13 *supra*.

pose to use a kind of linguistic analysis to delineate the ways in which legal concepts actually are employed. Instead, the critical participant understands a legal theory to identify commitments demanded by the legal order and to provide guidance and invite action in application of those commitments.

Thus, one approach in this analysis has been to ask, at each point of entry to the Pure Theory, what the consequences of this theory are for one's attitudes about commitment to and conduct under the legal order, and what other approaches might be both possible and preferable. Much as a theory of music may be seen by one who plays a musical instrument as a guide to proper understanding of the instrument for the purpose of playing it, the Pure Theory is perceived by the critical participant as a mechanism for guiding conduct and for directing attitudes within a framework of actual or potential human commitment to a legal order. From this perspective, it is apparent that despite its claims to be free of valuations, the Pure Theory reflects political values in its selection of tasks, in the meanings ascribed to its key terms, in its factual assumptions, conceptual apparatus, procedures for validation, in its role assignments, and in its assumptions concerning the functions of a legal order.

In addition to these specific valuations, the Pure Theory reflects and promotes a particular political response to the social context that prevailed when it was constructed. Kelsen's *Grundnorm* may be seen as a response to the need for a political shift from the notion of the personal ruler who is above the law to the constitutional authority that circumscribes and impersonalizes legitimate power in society. The theory's emphasis on validation addresses the need of the modern nation-state to secure what Weber called "*legitimations of domination*":<sup>119</sup> the use of traditional, legal, and charismatic justifications for demanding respect for the state's monopoly of authorized coercion. As a paradigm of legal formalism, the Pure Theory has been linked with ideas that "have come into vogue with the rise of absolute government throughout the world and [that] give the autocrat the aid and comfort of scientific theory."<sup>120</sup> It is no accident that the theory projects a particular image of legal authority.

The weakness of the Pure Theory is not that it occasionally violates its own method and purpose but that it attempts, in the name of method and purpose, to insulate its normative base from its en-

119. Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H. Gerth & C. Mills eds. 1946).

120. R. POUND, SOCIAL CONTROL THROUGH LAW 28 (1942).

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vironment and thereby shut from view the values and choices built into the theory. If the operative political values were systematically expressed and justified, an enhanced understanding and more responsive evaluation of the theory would be possible. Unsubstantiated claims that appear in the background of the theory would be subject to scrutiny; factual assumptions and valuational judgments would be available for assessment. For example, doubts about Kelsen's assumptions of innate human aggression and the effectiveness of coercive power could be brought to bear on the theory; similarly, the theory could be tested in light of contemporary challenges to vertical authority as the sole mode of distributing power. Absent explicit expression and justification of these fundamental elements of the theory, the theory cannot be fully understood nor appropriately prepared for evaluation. Its political values can be weighed more readily if they are brought to the surface and made accessible to observation. Rather than perceiving these elements as contaminants or irrelevant side issues, it would seem more fruitful to recognize the valuations as essential to the theory's construction and evaluation. Open expression and justification of the value preferences inherent in this legal theory would permit the critic to evaluate, not just expose, the theory's internal inconsistencies.<sup>121</sup>

This analysis was undertaken as a case study. At this juncture, the pervasive presence of valuational elements in this extreme and uncompromisingly positivist theory suggests that any formal legal theory would also contain valuations affecting commitments, attitudes, and conduct under the proposed legal order. Evaluation of other legal theories would be helped if they were viewed as if they were recommendations for legislative policy. Such a perspective would force to the forefront the political values sought by each theory; it would inspire rigorous argument and critical scrutiny of the empirical claims and value judgments grounding each theory's structure and method. In this way, a meaningful joinder of issue between theorist and critic might be possible. Currently, such a joinder is woefully lacking in much of the literature in legal theory.

In the style of a legislative debate, the ultimate argument for accepting a legal theory should not be that it is irrefutable. That

121. Compare Gunnar Myrdal's discussion of guidelines for social analysis:

Value premises should be introduced openly. They should be explicitly stated and not kept hidden as tacit assumptions. They should be used not only as premises for our policy conclusions but also to determine the direction of our positive research. They should thus be kept conscious and in the focus of attention throughout the work . . . .

G. MYRDAL, *VALUE IN SOCIAL THEORY* 52 (1958).

claim, common to scientific theory, is inappropriate for a normative theory. Instead, the argument for a legal theory should be that it would serve as a better conduit for preferred human values. In contentions over rival theories, as in political debate, differences in values or in the weights accorded to values would be at work even where there may be agreement on facts. An occasional demonstration of illogic or refutation of a factual assumption may persuade one against the adoption of a theory, but decisive knockouts of this sort would probably be achieved only rarely. Even when competing theories seem to turn on meanings ascribed to key terms, such as community, morality, and obligation, it is a comparison of values that yields acceptance or rejection. If debates of legal theory took this form, the result would be not unlike the process of judicial decisionmaking. A dissenting opinion is rarely considered wrong in the sense that it has been refuted by logic or through facts;<sup>122</sup> it is the minority view because the values that it expresses are not, at a given time, dominantly preferred. It could well become the dominant opinion at a different time and place if it acquires a new trajectory and force in a climate of changed values.

If legal theories would aim at expressing the values that they implicitly carry with them, they would be seen less as formal constructs and more as proposals for human action to be adopted now or in the future. A legal theory, regardless of claims about positivist passivity, carries with it potentially active valuational elements that should be brought into the open. A direct route to this goal would be a new resolve to view such positivist legal theories as proposals for human action, to borrow the spectacles of the critical participant, and to adopt the procedures of practical reasoning in the process of their construction and evaluation.<sup>123</sup>

122. Involved here is a presumption that a case can be made out for both sides, even if one side is clearly superior to the other. See Ladd, *Practical Reason in Judicial Decision*, in *RATIONAL DECISION* 136 (NOMOS VII C. Friedrich ed. 1967) (judicial decisions involve *confutation*, or "[o]verturning a practical syllogism by overriding a premise though a case can be made out for the premise"; scientific judgments involve *refutation*, or "overturning by attacking the premises" as untrue).

123. D. GAUTHIER, *PRACTICAL REASONING* 2, 9-23 (1963) (account of procedures for practical reasoning; relating standards of judgment to solutions of actual problems).