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## **KELSEN, HAYEK, AND THE ECONOMIC ANALYSIS OF LAW**

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While casting about for a suitable topic for this lecture that I had been invited to give at an annual meeting of the European law and economics association and that was to be held in Vienna, I was told that economic analysis of law hadn't made much headway in Austria, because the Austrian academic legal profession remained under the sway of Austria's (and Continental Europe's) most distinguished twentieth-century legal philosopher, Hans Kelsen. I had never read Kelsen, but his reputation as a Kantian, and the title of his most famous book, *Pure Theory of Law*, made it indeed plausible that followers of Kelsen would be unsympathetic to the application of economics to law. But I remembered that another famous twentieth-century Austrian intellectual—indeed one more famous than Kelsen—namely Friedrich Hayek, had been a distinguished economist who had studied law as well as economics in college<sup>2</sup> and had written extensively about law—had written in fact a trilogy

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<sup>2</sup> F. A. Hayek, *Hayek on Hayek: An Autobiographical Dialogue* 62–63 (Stephen Kresge and Leif Wenar eds. 1994).

entitled *Law, Legislation and Liberty*. Although I had read little of Hayek's work, I was confident that he could be placed in opposition to Kelsen as a model for the integration of law and economics. With that in mind I set about to read Kelsen and Hayek.

I shortly made the surprising discovery that Kelsen's philosophy of law opens a space for economic analysis, and in particular for the use of economics by judges in a wide range of cases that come before them, but that Hayek's philosophy of law closes that space, forbids judges to have anything to do with economics. His general approach is pragmatic, as is (I'll argue) Kelsen's, but Hayek believes that pragmatism requires judges to be formalists. Kelsen's philosophy of law denies this, and in so doing it creates a space for economics in law and also forges an interesting link between legal pragmatism and legal positivism.

I begin with Kelsen, specifically with *Pure Theory of Law*, the classic statement of his position.<sup>3</sup> Know-

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<sup>3</sup> My references are to Max Knight's translation, published in 1967, of the second (1960) edition of *Pure Theory of Law*. However, the much shorter first edition (translated into English by Bonnie Litschewski Paulson and Stanley L. Paulson in 1992 under the title *Introduction to the Problems of Legal Theory*) contains the essentials of the theory. In between the two editions, Kelsen published *General Theory of Law and State* (Anders Wedberg trans. 1945), which expounds his pure theory at greater length and also discusses competing views at greater length.

There is an enormous secondary literature on Kelsen's theory of law, much of it highly critical. For sympathetic but penetrating criticisms by another prominent legal positivist, see Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, chs. 2–5 (1970); Raz, *The Authority of Law: Essays on Law and Morality*, ch. 7 (1979); for a detailed general survey of the theory, see Iain Stewart, "The Critical Legal Science of Hans Kelsen," 17 *Journal of Law and Society* 273 (1990). For my purposes, most of the criticisms of Kelsen's theory are beside the point. I am interested not in its ultimate soundness but in its contrast with Hayek's views and its congeniality to the economic approach.

ing that Kelsen considered himself a Kantian, reacting to the connotations of the word “pure,” and supposing that it is Kantian ethics rather than epistemology that a pure theory of law would draw upon, one expects to encounter in Kelsen’s book a moralistic conception of law far removed from pragmatic considerations. That is not what one encounters. The intellectual style, the method, of *Pure Theory of Law* is closer to that of the Vienna Circle, and hence to logical positivism,<sup>4</sup> than to that of Kant; and logical positivism has affinities with pragmatism. Logical positivism also takes science as the model of objective inquiry, and economics prides itself on being scientific, at least in method and aspiration, which suggests that pragmatism and economics might go hand in hand too.

The “pure” of Kelsen’s pure theory of law has nothing to do with idealism or with hostility to the social sciences. It has to do with his aim of offering a *universal* definition of law. He wants to discover what all law has in common. His inquiry is parallel to that of Newton’s study of gravitation. Newton asked (or can be imagined as asking) what a cannonball, the ocean’s surface, a feather, a planet, and all other physical objects have in common and answering that they all behave in conformity with the same law (that

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<sup>4</sup> On which see the recent reconsideration in Michael Friedman, *Reconsidering Logical Positivism* (1999). The affinities of Kelsen’s philosophical approach to that of the logical positivists has frequently been noted. See, for example, Jeffrey Brand-Ballard, “Kelsen’s Unstable Alternative to Natural Law: Recent Critiques,” 41 *American Journal of Jurisprudence* 133, 139–141 (1996); Alan Gewirth, “The Quest for Specificity in Jurisprudence,” 69 *Ethics* 155, 156 (1959).

is, regularity) of gravitation. Newton's inquiry was of course positive rather than normative; he was trying to discover, not change, universal "laws" of nature. But Kelsen too is engaged in positive, not normative, analysis. He is trying to discover what all law has in common. He is seeking a positive theory of a social rather than a natural phenomenon and the particular phenomenon that he's interested in is normative, but his interest is strictly positive. In that sense his inquiry is, as he says, scientific, not just systematic.<sup>5</sup> We might call it sociological or even linguistic, in the sense of the Oxford ordinary-language philosophers; he is excavating the meaning, the way we use, the word "law." Law, his subject, is normative, but his analysis is not normative.

True, it is more difficult to devise a clean empirical test of his theory than of Newton's, simply because "law" is more difficult to "measure" than distance, mass, velocity, and acceleration. If someone located a society whose members claimed to have "law" but its "law" did not meet Kelsen's definition, he might be tempted to try to save his concept from empirical falsification by saying that what the society in question called "law" wasn't really "law." But these dodges occur in science too. For example, if part of the definition of "swan" is that it's white, yet someone discovers a bird that has every attribute of a swan except

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<sup>5</sup> The German word for science, *Wissenschaft*, is closer to the English "scholarship" than to the English "science," but Kelsen appears to conceive of his pure theory of law as scientific in the English sense. It may be pertinent to note that he studied law only at his father's insistence; he regretted not having become a scientist or a philosopher. Iain Stewart, "The Basic Norm as Fiction," 25 *Juridical Review* (n.s.) 199, 212 n. 70 (1980).

whiteness, scientists have a choice between treating the discovery as falsifying the definition or declaring the bird not a swan because it doesn't satisfy the definition.

So what is it that all law has in common? Kelsen answers that it is nothing that has anything to do with the *content* of legal principles. The content of the law varies greatly across societies and over time. That rules out any possibility of defining law by reference to natural law (or to "justice"),<sup>6</sup> which is to say to some set of universal principles found instantiated in every society's legal system.<sup>7</sup> Kelsen denies that "certain traits of man have appeared so compelling both factually and morally that to transgress them would render positive laws at once unjust and ineffective."<sup>8</sup> And he means it: making clear—this Jewish refugee from Hitler (Kelsen was teaching at a German university when Hitler came to power, and he was fired forthwith and left Germany within a few months)—that Nazi laws, including the racial and retroactive laws, were law within the meaning of his theory.

A few principles may seem universal in the relevant sense; every legal system forbids murder, for example. But this turns out to be a tautology. Murder is

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<sup>6</sup> Hans Kelsen, *Pure Theory of Law* 67–68 (2d ed., Max Knight trans. 1967). Thus, for Kelsen there are no such things as "*mala in se*"—that is, crimes such as murder that are wrong in themselves rather than wrong simply by virtue of the law's declaring them to be wrong (*mala prohibita* rather than *mala in se*). *Id.* at 112. He won't even allow talk of "breaking" the law. See *id.* at 112–113. A law is a norm. Far from being "broken" by an act contrary to it, it exists only by virtue of the possibility of such an act. The wrongful act is not the negation of law, but its condition.

<sup>7</sup> See, for example, *id.* at 13.

<sup>8</sup> Gewirth, note 4 above, at 171.

defined as unjustified killing, so the important question is what counts as justification, and the answers vary from society to society. A concept of law based on substantive overlaps among different legal systems would explain only a small fraction of law. It would be like a gravitational theory that explained the rate of fall only of safety pills and cantalopes.

So natural law is out as a positive theory of law and with it any possibility of *equating* law to economics. But no one has ever tried to go quite that far in integrating the disciplines and we'll see that Kelsen's concept of law leaves plenty of room for economic principles to inform law—though for other principles as well, for I am not suggesting that Kelsen was carrying the flag for economics.

What Kelsen finds that all legal systems have in common and thus what becomes his concept of law is the property of being a *normative* system backed by a *credible* threat of using *physical force* against a violator of the norms. Morals and etiquette are also normative systems but differ in not relying on physical force to secure compliance. Propaganda, persuasion, indoctrination, even brainwashing—yes, but not physical force (at least if we except parental beatings!). A criminal gang may also be a normative system—prohibiting, for example, defecting or informing—and may use physical force to enforce its norms. But this system lacks credibility (or, Kelsen's preferred term, effectiveness) “if the coercive order regarded as the legal order is more effective than the coercive order constituting the gang.”<sup>9</sup> This may seem a tenuous dis-

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<sup>9</sup> Kelsen, note 6 above, at 48.

inction, but it will become clearer and more persuasive when we consider the importance of the international-law concept of recognition to Kelsen's theory.

As for the objection that much law is facilitative rather than punitive, for example laws that authorize the making of contracts, Kelsen points out that contract law is really a delegation to private persons of authority to create a system of norms backed by a credible threat of using physical force against the violator.<sup>10</sup> So if *A* and *B* make a contract, and *B* breaks it, *A* can sue *B* and if he wins a judgment can enlist the force of the state to seize *B*'s property to satisfy it.

Notice that on this view there is no interesting difference between right and duty—the holder of a right is simply someone authorized to invoke the sanctioning power of the state—or between public law (law enforced by or against the state) and private law, since both create or authorize the creation of legal norms, that is, norms backed by an effective threat of physical force if they are disobeyed.<sup>11</sup> But not everything an authorized creator of legal norms, such as a legislature or a court, does is norm creating. Kelsen gives the example of a legislature's resolution congratulating a foreign head of state on the anniversary of his accession to power.<sup>12</sup> This is a valid enactment, but not a valid legal norm; it is not prescriptive or backed by a threat of physical force if disobeyed—not being prescriptive, it can't *be* disobeyed.

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<sup>10</sup> Id. at 147–148.

<sup>11</sup> See id. at 281–283.

<sup>12</sup> Id. at 52–53.

And notice how in collapsing right into duty (“right” is merely the “reflex” of “obligation”<sup>13</sup>), Kelsen jettisons a superfluous concept. This is a consistent feature of his theory, and lends it an attractive spareness. He says for example that a judicial determination that a statute is unconstitutional is simply an alternative mode of repeal to the enactment of a repealing statute.<sup>14</sup> And as for whether “free will” is a presupposition of making a person legally responsible for his violations of the law, Kelsen answers that we can do quite nicely without any concept of free will; it is enough that the threat of sanctions enters into the causal chain that determines a person’s behavior.<sup>15</sup> Or consider Kelsen’s treatment of the corporation. Like John Dewey, he will have no truck with the concept of a juristic person, or other personifications: “the law does not create persons.”<sup>16</sup> A corporation’s rights and liabilities are merely the collective rights and liabilities of the individuals who by virtue of their contractual relation with the corporation in effect own the corporation’s property, or—in the case of shareholders that are trusts, other corporations, or other nonhuman entities—collective rights and liabilities of the individuals who own the property of those entities.

The question remains how to identify a norm as being a *legal* norm. The question is similar to, perhaps inseparable from, the question of the validity of

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<sup>13</sup> See, for example, *id.* at 128.

<sup>14</sup> *Id.* at 271.

<sup>15</sup> *Id.* at 94.

<sup>16</sup> *Id.* at 191.

a legal norm. A norm prescribes; what makes us decide that the prescription is one that we should follow, that is, that it creates a duty? The fact that if we don't follow it something bad will happen to us can't be the answer, because that would make the criminal gang's norms valid, at least until the gang was broken up. Very much in the spirit of logical positivism, Kelsen denies that a prescriptive statement can be derived from a factual assertion—an ought from an is. So the validity of a norm must depend on its derivation from another norm that has been determined to be valid, and not just from its being backed by force.

There are two methods of derivation. One is logical, in a broad or narrow sense; and so we might say that the doctrines of contract law (consideration, reliance, statute of frauds, duress, modification, the parol evidence rule, and so forth) are derived logically from the basic norms of that law, such as freedom of contract, perhaps supplemented by procedural norms concerned with accuracy and with the cost of adjudication. The other mode of derivation of one norm from another is jurisdictional (my term—his terms for the two types of derivation, “static” and “dynamic,” are not illuminating): the creation of a norm is authorized by another, a higher norm. Contract is again illustrative. The norm that is contract law authorizes private persons to create the norms to govern their commercial relations; the content of those norms cannot be derived from the principles of contract law. Similarly, it would be unrealistic (this of course is not one of Kelsen's examples—and it is characteristic of the Continental style of jurisprudence that he gives very

few examples) to suppose the rule of *Roe v. Wade* derived logically from the U.S. Constitution. It is not a deduction from, but an interpretation of, the Constitution; and Kelsen is realistic about interpretation. Rather than assimilating interpretation to deduction, he regards it as establishing a frame, the boundaries, of judicial discretion. He claims that the typical interpretive issue presented to a court is one in which there are two equally plausible interpretations and the judges must appeal to noninterpretive considerations in order to make a choice between them.<sup>17</sup> Certainly the rule of *Roe v. Wade* is more realistically understood as reflecting the relative weight that seven Justices of the U.S. Supreme Court placed on fetal life and women's reproductive autonomy, respectively, than as reading the Constitution to create abortion rights. Nevertheless, the rule created by *Roe v. Wade* is a valid legal norm, because Article III of the U.S. Constitution authorized the Supreme Court to decide the case.

Even when deducible from another norm, "a legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way—ultimately in a way determined by a presupposed basic norm."<sup>18</sup> That is, there must be a basic norm to complete, to close, the hierarchy of norms, and it cannot be a "content" term (such as freedom of contract). If a norm is valid only by virtue of its derivation (logical or jurisdictional) from a

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<sup>17</sup> Id. at 351–353.

<sup>18</sup> Id. at 198.

higher norm, then its validity depends on the higher norm's being valid, and so we must consider what norm it is derived from and whether that higher norm is valid. An infinite regress looms. Kelsen avoids this by positing a basic norm (*Grundnorm*) as the highest norm in every legal system.<sup>19</sup> "Basic" and "highest" rather clash, but we should understand "highest" in the sense of original, in the same way that "upstream" points toward the origin of a river. In the case of the U.S. (federal) legal system, the basic norm is that the U.S. Constitution is a valid legal norm.

The validity of the basic norm is—must be, by definition—assumed rather than proved, since it could be proved only by being derived from another norm, and then it would not be the basic norm. Kelsen makes this clear with a theological example. The norm that God's commands should be obeyed is a basic norm, not a derived norm, because it would be absurd to justify obedience to God's commands by arguing that someone had ordered you to obey those commands.<sup>20</sup>

The idea of the basic norm is transcendental in the sense of being a precondition to having a theory of law, as causation was to Kant a precondition of certain physical theories. And just as the self in Kantian metaphysics is not a part of the empirical world but is instead the foundation or precondition of our empiri-

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<sup>19</sup> See *id.* at 193–203. Kelsen's concept of the *Grundnorm* is similar to, as well as earlier than, H. L. A. Hart's concept of the "rule of recognition." On the differences, see Hart, *The Concept of Law* 292–293 (2d ed. 1994).

<sup>20</sup> Kelsen, note 6 above, at 203.

cal understandings, so the basic norm grounds the legal system but is not itself a part of it.<sup>21</sup>

There can't be valid legal norms, and so a subject matter for an inquiry into law, without a basic norm for each legal system; and it must be a jurisdictional norm rather than a logical norm or "content" norm, or as Kelsen sometimes says, a "material" norm, or, clearest I think, a "substantive" norm. A substantive norm cannot determine the validity of the norms deducible from it, because it does not have the form: "the \_\_\_ is a valid norm." It doesn't validate anything. The basic norm, in contrast, establishes competences to create subordinate norms.

The Constitution of the United States is a compendium of jurisdictional and substantive norms. It is jurisdictional in parceling out authority among the various branches of government; it is substantive in placing limits on the types of substantive norms that are permissible. For example, the Constitution forbids Congress to pass *ex post facto* laws. Yet this does not mean that such a law cannot be a valid legal norm. The authority to determine whether a statute violates a substantive norm in the Constitution has been lodged in the courts. Until and unless a court declares an *ex post facto* statute unconstitutional, the government stands ready to enforce it, using force if necessary, because Congress is empowered by a chain of delegations from the basic norm of the federal legal

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<sup>21</sup> There is more to Kelsen's transcendentalism, but the more is pertinently only to the interests of professional philosophers. For an important recent contribution, see Michael Steven Green, "Hans Kelsen and the Transcendental Method in Jurisprudence" (Aug. 3, 2001, George Mason University Law School, unpublished).

system to enact statutes. It would be different if Congress merely issued a press release purporting to authorize an *ex post facto* punishment, rather than enacting a statute; a press release is not an authorized mode of creating a legal norm.<sup>22</sup>

The fact that the basic norm can't be defended, but merely accepted, does not block inquiry into its origin or into the reason it's accepted as the basic norm. We can ask why for example the basic norm in our system is the norm that deems the Constitution of 1787<sup>23</sup> rather than the Articles of Confederation a valid legal norm. The answer is that no one would pay any attention to a legal norm derived from the Articles of Confederation. Therefore it wouldn't be a legal norm, because it would lack minimum efficacy, which remember is one of the conditions of a valid legal norm.

One could challenge the proposition that the norm that places the Constitution of 1787 at the head of all the other legal norms really is our basic legal norm, but the challenge would not affect Kelsen's argument. One might argue for example that the validity of the Constitution derives from the fact that it was ratified by popular vote in all the then states comprising the United States. But then we would have to defend the validity of a popular election as a method of establishing a nation's constitution; and so on *ad infinitum*. There is a practical reason for stopping with the norm that validates a nation's constitution. It is related to

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<sup>22</sup> This means, as Kelsen usefully points out, that even an agency not authorized to declare a statute unconstitutional has to decide whether the "statute" really is a statute. Kelsen, note 6 above, at 271–273.

<sup>23</sup> I am simplifying; the legal systems of the U.S. states, though constrained by the Constitution, do not derive from it.

the international-law doctrine of recognition.<sup>24</sup> When a government is overthrown, and a new government installed, foreign nations have to decide whether to recognize the new government. The general rule is that they will do so if it establishes solid control (likely to be durable) over the nation, irrespective of the legitimacy of its seizure of that control. Recognition is an acknowledgment that any constitution promulgated by the new government will be valid, and so it can be said to establish the basic norm of a nation's legal system. Of course to proceed in this fashion is to imply that a nation's basic norm isn't really basic, that it's derived from the international-law norm of recognition, and this creates a potential problem of circularity, since international law is often thought to be valid only by virtue of being accepted by national law. Nothing in Kelsen's theory enables a choice to be made between an international-law *Grundnorm* validating national law and a national-law *Grundnorm* validating international law; he concludes that it is purely a political choice, with pacifists favoring the former and imperialists the latter!<sup>25</sup> The important points for my purposes are only that, as a practical matter, the control of a nation establishes the *Grundnorm*, the indispensable foundation, of the nation's legal system and that there is no need to try to defend the validity of the *Grundnorm*. (An interesting implication of the *Grundnorm* approach should also be noted, however: that international and national law constitute a single legal system, whether

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<sup>24</sup> See Kelsen, note 6 above, at 50, 210, 212, 215.

<sup>25</sup> *Id.* at 343.

ultimately international or ultimately national in character—the choice Kelsen deems purely arbitrary.)

We should be able to see more clearly now what the criminal gang lacks. It lacks a *Grundnorm*. Its control is too weak to induce acceptance of the proposition that its norms are valid—though criminal gangs sometimes seize entire nations and when they do so and their control is secure a *Grundnorm* pops into existence that makes their norms valid legal norms. In other words, they are “recognized” as the lawful, and hence lawgiving, government. It is true that “the original constitution of virtually every country was invalid. It was made by people who were not entitled to rule. They seized power by conquest, usurpation, or revolution.”<sup>26</sup> But it is irrelevant.

Do you sense here a whiff of Thrasymachus, of might makes right? I do, but with two important qualifications. In Kelsen’s system, might makes *legal* right, not right *simpliciter*, or moral right; and it does so as a matter of fact, not as a normative matter. That is, it just is a fact that a group which has secure control over an entire nation will be able to enact laws that are obeyed by the population, not uniformly of course, but not purely as a direct consequence of coercion. Secure control will (not should) induce most people to accept that the laws made by the controllers impose a legal obligation upon them. They may think the laws wicked, unjust, foolish, extortionate, enacted without their consent, even “illegitimate,” but if they violate them they will not deny that it is laws that

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<sup>26</sup> Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* 103 (1987). Honoré criticizes this view as a version of “Might is Right.” *Id.*

they are violating and not a criminal a gang's extortionate demands. They will not deny that they have legal obligations, although they may not think the legal obligations have any moral force—they may even feel morally obligated to disobey the laws.

Even within a recognized legal system, laws can cease to be valid. This happens when they lose efficacy, a process that, when complete, Kelsen calls desuetude.<sup>27</sup> In the usual case, a statute or body of case law<sup>28</sup> ceases to be valid by repeal or overruling, respectively. But sometimes, and in fact rather often, even in a legal system such as that of the United States that has no formal doctrine of desuetude, a statute or precedent ceases to be a valid legal norm because it has, in fact, no coercive backing. The clearest example would be a statute that had never been declared unconstitutional or repealed but was universally recognized to be materially identical to a statute that had been declared unconstitutional.<sup>29</sup> Another example would be a precedent that, though never explicitly overruled, was so far forgotten, because of its inconsistency with other, newer precedents, that no one would think it still “good law.”<sup>30</sup>

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<sup>27</sup> Kelsen, note 6 above, at 213.

<sup>28</sup> Kelsen, despite his orientation to the Continental rather than Anglo-American legal system, is well aware of case law as a source of valid legal norms. See *id.* at 250–256.

<sup>29</sup> Thus, to recur to a previous example, if a congressional statute were *obviously* an *ex post facto* law, it might so lack efficacy—because no one was willing to enforce it—as not to be a valid legal norm.

<sup>30</sup> A number of antitrust cases decided by the Supreme Court in the 1960s illustrate this point. See Richard A. Posner, *Antitrust Law* 128–130, 152–153 (2001).

This by the way is the point at which Kelsen's theory of law approaches closest to Holmes's theory that the "law" concerning a question is a prediction of how the judges will answer the question if it arises in a case.<sup>31</sup> The theory is otherwise uncongenial to Kelsen because of his belief that a norm (what ought to happen) cannot be derived from a fact (what will happen).<sup>32</sup> A legal obligation is a norm, so it can't be derived from a fact such as what the judges will do with a question, but only from another norm; hence the need for a *Grundnorm*. Yet we've seen that the *Grundnorm* of every legal system is derived, not logically but sociologically, from a fact, namely the lawmakers' secure control over the nation.

But doesn't this suggest a contradiction in Kelsen's theory? A norm in his theory can be derived only from another norm, but the basic norm seems to be derived from a fact, namely the control of territory. That fact, however, is used merely to identify a precondition for the use of the word "law" to describe a normative system. The concept of law requires that there be a basic norm, but the fact that establishes the existence of that norm is not itself an element of the norm. Indeed, what that fact is that the concept of law is not itself reducible to any facts. So there is no inconsistency.

This completes my summary of Kelsen's theory of law. The summary is bare of significant reference to economics or any other social science. The reason is

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<sup>31</sup> Oliver Wendell Holmes, "The Path of the Law," 10 *Harvard Law Review* 457, 461 (1897).

<sup>32</sup> See Kelsen, *General Theory of Law and State*, note 3 above, at 168–169.

that these bodies of thought or practice play no role in Kelsen's theory. There was no law and economics movement in Europe, and none recognized as such in the United States (though there were harbingers and glimmerings of such a movement, at least in hindsight), when the first edition of *Pure Theory of Law* was published in 1934. And though Kelsen was teaching in the United States in 1960, when the second edition was published, by which time the *Journal of Law and Economics* had begun publication, he was an old man and would hardly have been conscious of a movement, still nascent,<sup>33</sup> in a legal system that must still have seemed quite alien to him.<sup>34</sup>

But (to pick up the original thread of my argument) what is significant in his book for law and economics is the space it creates for pouring economics into the formulation of legal doctrines. Law for Kelsen is a series of delegations, for example from the federal legal system's *Grundnorm* to the U. S. Constitution, from the Constitution to Congress, from Congress to judges, from judges (in contract cases) to contracting parties. What judges do with their delegation is thus law, by virtue of the delegation, provided they don't stray outside the delegation's bounds—for example by issuing press releases in lieu of decisions.<sup>35</sup> Law is an

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<sup>33</sup> See Richard A. Posner, *Frontiers of Legal Theory* 32–34 (2001).

<sup>34</sup> He left Germany, as I mentioned, in 1933, but only for Switzerland; he did not move to the United States until 1940, when he was almost 60 years old.

<sup>35</sup> See Kelsen, note 6 above, at 140. Stanley Fish mentions a study of judges in which the investigator “tried to get the judges to talk about the distinction between a government of laws and a government of men as it related to the understanding they had of their own authority, but he found that they understood their authority to flow from the role the society authorized them

assignment of competences.<sup>36</sup> The congeniality to a pragmatist of such an approach, a conspicuous feature of the judicial practice of Holmes, should be apparent. Believing “that there is no viewpoint that can claim precedence on the basis of its presumed objectivity gives rise to the question of whose viewpoint is to prevail.”<sup>37</sup>

Here, though, we might sense a serious weakness in his theory. Remember that a valid legal norm has to be backed by a credible threat to use physical force against the violator—and is this condition satisfied when a judge exceeds his jurisdiction? I think it is, since the judge in such a case is subject not only to the reversal of his decision but also to discipline. For we must imagine the judge not merely taking jurisdiction of a case mistakenly but acting so far outside the bounds of the judicial power as to render his actions lawless, as in my example of the press release. Likewise a judge who refused to enforce the law. That would be an abandonment of office. In the federal le-

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to play and not from any of the abstract concepts they might employ in the course of playing that role.” Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too* 198 (1994).

<sup>36</sup> This feature of his theory “may have derived in part from confusions that affect Habsburg law...There existed so many levels of jurisdiction...that endless conflicts ensued.” William M. Johnston, *The Austrian Mind* 97 (1972). Immediately one is put in mind of Kelsen's contemporary and (until the collapse of the Austro-Hungarian Empire in 1918) co-national, Franz Kafka (both were born in Prague, though Kelsen moved to Vienna as a child). A striking feature of Kafka's great novel *The Trial* is the uncertainty that pervades the novel about the status and jurisdiction of the mysterious unnamed court in which Joseph K's case is lodged, in relation to the other courts of the nation.

<sup>37</sup> Catharine Wells Hantzis, “Legal Innovation within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.,” *82 Northwestern University Law Review* 541 (1988).

gal system, the ultimate legal power in Kelsen's sense is Congress, which is empowered to remove federal judges for misconduct or abandonment of office. All legal systems reserve the power to remove judges who act dramatically outside their jurisdiction or who refuse to exercise their jurisdiction.

But the point I want to emphasize here is that the content of the legal norms that judges create by their decisions is not given by Kelsen's concept of law.<sup>38</sup> As one of his natural-law critics puts it, "How the judge arrives at his decision is [for Kelsen] a 'meta-legal' question without interest for the jurist."<sup>39</sup> Kelsen's rejection of natural law, his emphasis on jurisdictional at the expense of substantive norms, his repeated references to judicial discretion, his claim that application of law is not mechanical but often involves "the creation of a lower norm on the basis of a higher norm,"<sup>40</sup> his acknowledgment that sometimes the only preexisting law that a court can apply to decide a case is the law that confers the power of decision on the court,<sup>41</sup> and his concept of interpretation as a frame rather than an algorithm, delimit a broad range of judicial action that is free (in the sense of "free range" chicken) yet lawful.<sup>42</sup> The judges have to fill it with something, but while that something is lawful, it

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<sup>38</sup> See, for example, Kelsen, *General Theory of Law and State*, note 3 above, at 141.

<sup>39</sup> Lon L. Fuller, *Law in Quest of Itself* 89 (1940).

<sup>40</sup> Kelsen, note 6 above, at 235.

<sup>41</sup> Kelsen, *General Theory of Law and State*, note 3 above, at 152.

<sup>42</sup> See, for example, Kelsen, note 6 above, at 353; Dhananjai Shivakumar, "Note: The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology," 105 *Yale Law Journal* 1383, 1410 (1996).

is not the law. Kelsen even uses the term “ideology” to describe what the judge must use to create the specific legal norms necessary to decide cases not ruled by preexisting law.<sup>43</sup>

H. L. A. Hart’s version of legal positivism has been criticized by me and others on the ground that to describe the exercise of judicial discretion, in the open area where no preexisting legal norm dictates the outcome, as not doing law is misleading.<sup>44</sup> This criticism can’t be made against Kelsen. He pictures the judge as either deriving a specific legal norm to resolve the case before him from a higher norm, or, if there is no higher substantive norm to guide him in the particular case, creating such a norm, as he is authorized to do by the jurisdictional norm that authorizes judges to decide cases. In either situation the judge is doing law; it’s just that in the second he creates rather than derives the legal norm that he applies to decide the case. It’s not, as Hart’s formulation suggests, that the judge is a judge when he derives a specific norm from some higher norm but turns into a politician when he creates a specific norm. Kelsen would never say, with Hart, that when a judge decides a case in which “no decision either way is dictated by the law” he is “step[ping] outside the law.”<sup>45</sup> And despite Hart’s emphasis on the “internal perspective” (how judges view their role), Kelsen’s concept of law is closer to judges’ conception of their role than Hart’s is. Judges

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<sup>43</sup> See, for example, Kelsen, note 6 above, at 175.

<sup>44</sup> See Richard A. Posner, *The Problematics of Moral and Legal Theory* 92–98 (1999).

<sup>45</sup> H. L. A. Hart, *The Concept of Law* 272 (2d ed. 1994).

don't in their own mind divide what they do on the bench into "applying law" and "legislating." What they think they're doing is deciding cases using all the resources at hand (legislative texts, precedents, policy, moral intuitions, and so forth), provided they don't exceed their jurisdiction, broadly defined, as they would be doing not only if they decided a case that was not justiciable but also if they decided a case on the basis of a financial or familial or partisan political interest in the outcome.

Kelsen's jurisdictional concept of positivism has another advantage over Hart's: it accounts nicely for the large areas of explicit discretion in a legal system. Prosecutorial discretion, sentencing discretion, scheduling and other case-management discretion, the discretionary judgments made by juries, the discretionary jurisdiction of many appellate courts, such as the U.S. Supreme Court—these are illustrations of the vast area in which officials, including judges, exercise lawful authority but neither "legislate" in any recognizable sense of the word nor apply legal principles. These official actions are lawful (and done without embarrassment, without a sense of skating on thin legal ice) though unruled by law because they are within a chain of delegated powers that can be referred ultimately to the legal system's *Grundnorm*. These actions are law in a jurisdictional sense, in Kelsen's sense, though not in a substantive one.

Kelsen can be described as a "pragmatic positivist," because his concept of law has—no content; it is purely jurisdictional. The judge's decision making is lawful because he is a judge, not because he is en-

gaged in a distinctive form of reasoning. The American pragmatist philosopher John Dewey's essential insight about law was that there is no such thing as legal reasoning; it is practical reasoning deployed on legal problems. Kelsen systematizes Dewey's insight, albeit in a characteristically abstract Continental way, and in so doing he may be thought to be implicitly licensing the use of economics in adjudication by making clear that law does not dictate the outcome of judicial decisions, provided only the judge does not stray outside the boundaries of his jurisdiction. Concocting novel legal norms from materials supplied by economics, social science, and so on is one of the things a judge does. Since he is doing law when making specific legal norms, he need feel no embarrassment in bringing economics to bear on the creation of a new legal norm. He may be mistaken; but he is not being lawless.

This account leaves out, however, the possibility of a local concept of law narrower than the universal concept. Kelsen is concerned with what all legal systems have in common; that is what makes his theory a "pure" theory of law. A particular legal system might have a much narrower notion of what law is; it might, for example, regard all "law" that did not conform to some notion of natural law as not law at all. That is one way to look at the concept of law adopted by the Nuremberg Tribunal, which punished people who had acted in conformity with the laws of Nazi Germany. A certain kind of positivist, one closer to Hart than to Kelsen, might think that natural law is inconsistent with the Anglo-American concept of law

and that therefore the Nuremberg Tribunal acted lawlessly in punishing such people. Nothing in Kelsen's pure theory bears on such a disagreement.

As an example of a "local" theory of law far narrower than Kelsen's general theory, consider my distinguished judicial colleague Frank Easterbrook's positivist theory of constitutional interpretation.<sup>46</sup> He deems judicial interpretations of the U.S. Constitution lawless unless the judges are merely "enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills."<sup>47</sup> He derives this view from the proposition that "the fundamental theory of political legitimacy in the United States is contractarian," implying that the Constitution is a contract and should be interpreted accordingly.<sup>48</sup> I find this unconvincing on two grounds. The first is the leap from contractarian to contractual. Social-contract theory can be found both in the historical background of the Constitution and in modern political theories of democracy, but it uses "contract" in a loose, nontechnical sense either to emphasize the importance of consent in democratic theory or, what is closely related, to base political legitimacy on a showing of what people would agree to if it were feasible to negotiate anew the basic institutions of the society.

Second, contractual interpretation is not textualist in any very precise sense. Intentions and purposes

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<sup>46</sup> Most recently and succinctly articulated in Frank H. Easterbrook, "Textualism and the Dead Hand," 66 *George Washington Law Review* 1119 (1998). He states there: "textualists are positivists." *Id.*

<sup>47</sup> *Id.* at 1120.

<sup>48</sup> *Id.* at 1121-22.

figure largely, and there are all sorts of defenses and meliorative doctrines to avoid textual traps—doctrines of patent and latent ambiguity, the defenses of impossibility, impracticability, and frustration, implied duties of good faith and best efforts, the notion of contracts implied in fact, of quantum meruit and restitution, the defenses of laches and of the statute of limitations, notions of estoppel, limitations on remedies, the need for flexibility in the interpretation of long-term contracts, and much else besides. Adapt these to judicial enforcement of the Constitution conceived of as an ordinary contract of exceptionally long term, and it is not at all clear that the results would be much different from what we have as a result of the interpretive notions that Easterbrook detests, such as that of “the living Constitution.” It is not as if the sole doctrine of contract were the “four corners” rule of textual literalism and the only escape hatch voluntary modification by the parties, akin to amendment of the Constitution.

In defense of textualism, conceived of (perhaps erroneously, as I have just been arguing) as a method of holding judges on a very short tether in constitutional cases, Easterbrook asks, “Why...should [federal] judges be obeyed?”<sup>49</sup> and answers that it is only because (and if) the Constitution has a single meaning, the textual meaning. Kelsen would have given a different answer. Federal judges should be obeyed by virtue of the basic norm of federal law when they are exercising the judicial power of the United States, conferred on judges by Article III of the Constitution.

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<sup>49</sup> *Id.* at 1122.

The fact that the Constitution can be interpreted to mean different things has nothing to do with judicial legitimacy, since judicial legitimacy does not depend on univocal substantive directives to judges. Remember that Kelsen thought it common for texts to be susceptible of equally good alternative interpretations; far from that being a situation in which the judge is barred from choosing, the need for choosing between the equally plausible interpretations of a legally operative document is one of the reasons we *have* judges. If those documents were clear, there would be fewer legal disputes, so fewer judges, and in a sense less law; if they were perfectly clear maybe we wouldn't need any judges. The basic norm tells us whose interpretation has the force of law: the judge's, because he *is* a judge, acting within the scope of his jurisdiction, not because he can point to a text-based command that he is merely carrying out, without creative embellishment.

Kelsen's theory is thus a better description of the concept of law actually regnant in the United States than Easterbrook's. This is not surprising, because Kelsen wants to explain the law as it is; Easterbrook wants to change our understanding of law. As Kelsen would have predicted, decisions of federal courts are obeyed even when the textual basis for a decision is exceedingly tenuous, as in such famous cases as *Roe v. Wade*. By way of an ironic contrast, consider one of the few cases in which a constitutional decision by the U.S. Supreme Court has been openly defied by one of the other branches of the federal government. During the Civil War, Chief Justice Roger Taney granted an

application for habeas corpus by a Maryland resident who had been seized and detained by the army on suspicion of being implicated in treason and rebellion.<sup>50</sup> The Constitution authorizes the suspension of habeas corpus in time of rebellion, but by Congress,<sup>51</sup> not by the President. Although there was no suggestion that Taney lacked authority to grant habeas corpus, and although the textual basis for his action was unequivocal, the President refused to obey the Chief Justice's order—and got away with it. The propensity to obey judges is unrelated to the textual basis for their decisions; it is much more closely related simply to their jurisdiction, with *Ex parte Merryman* a rare exception.

It may be objected that I am taking Easterbrook's question about why judges should be obeyed in the wrong way, as a threat rather than as simply a request for a justification. But when critics of the courts ask why judges should be obeyed, there is generally an implication that the failure to give an intellectually convincing reason endangers judicial authority. Thus we find Robert Bork, whose jurisprudence is similar to that of Easterbrook, stating ominously: "The man who prefers results to processes has no reason to say that the Court is more legitimate than any other institution of wielding power. If the Court will not agree with him, why not argue his case to some other group, say the Joint Chiefs of Staff, a body with rather better

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<sup>50</sup> *Ex parte Merryman*, 17 Fed. Cas. 144 (Cir. Ct. D. Md. 1861) (Taney, C. J., in chambers). See Carl B. Swisher, *The Taney Period* (vol. 5 of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*) 844–854 (1974).

<sup>51</sup> U.S. Const. art. I, § 9, cl. 2.

means for enforcing its decisions? No answer exists.”<sup>52</sup> The answer, banal but conclusive, is that the joint chiefs will not listen to someone who tells them that the Supreme Court is being usurpative.

Friedrich Hayek, a generation younger than Kelsen (he was born in 1899, Kelsen in 1881), is famous for two ideas. The first, which builds on the work of an earlier Austrian economist, Ludwig von Mises, is that socialism (in the sense of public ownership of the means of production) is unworkable, because to make it work would require more information about the economy than could possibly be obtained and processed by a central planning board.<sup>53</sup> The information necessary for the operation of the economy is distributed among the many millions of individuals who engage in economic activity (billions, in the case of the global economy). Each has a tiny amount of the relevant information and the price system is the only way the information possessed by each can be pooled and translated into an efficient schedule of economic outputs.

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<sup>52</sup> Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 265 (1990).

<sup>53</sup> See, for example, Friedrich A. Hayek, “Economics and Knowledge,” 4 *Economica* 33 (1937); “The Use of Knowledge in Society,” 35 *American Economic Review* 519 (1945); Hayek, “Two Pages of Fiction; The Impossibility of Socialist Calculation,” in *The Essence of Hayek* 53 (Chiaki Nishiyama and Kurt R. Leube eds. 1984); Sherwin Rosen, “Austrian and Neoclassical Economics: Any Gains from Trade?” *Journal of Economic Perspectives*, Fall 1997, p. 139; Steven Horwitz, “From Smith to Menger to Hayek: Liberalism in the Spontaneous-Order Tradition,” *Independent Review*, Summer 2001, p. 81; Louis Markowski and Joseph M. Ostrov, “Perfect Competition and the Creativity of the Market,” 39 *Journal of Economic Literature* 479, 487–489 (2001).

This idea, first advanced in the 1930s when most economists considered socialism eminently feasible and many considered it distinctly superior to capitalism, which had seemed, in that depression decade, to have proved itself incapable of organizing a modern economy efficiently, was and is correct, and is the basis of Hayek's celebrity as an economist. His second famous idea, advanced in his book *The Road to Serfdom* (1944), is that socialism, even in the limited form advocated by the British Labour Party of the day, would if adopted lead inexorably to totalitarianism.<sup>54</sup> This idea has proved to be false. Socialism in either the limited form advocated by social-democratic parties or the extreme form instituted in the communist countries leads, via Hayek's first point, the unworkability of socialism, to capitalism. The Soviet Union was of course totalitarian, but not because it was socialist. Nazi Germany was totalitarian but was not, contrary to Hayek and despite the name of Hitler's party (National Socialist German Workers' Party), socialist; nor, as he thought, had socialist thought paved the way for the Nazis by assisting in the creation of a planned economy for Germany during World War I.<sup>55</sup>

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<sup>54</sup> Friedrich A. Hayek, *The Road to Serfdom* (1944), esp. ch. 13. In fairness to Hayek, the program advocated by the Labour Party was more radical than the one it implemented when it took power in 1945. But as late as 1976, in a preface to a reprinted edition of the book, he reaffirmed its main conclusions.

<sup>55</sup> See *id.*, ch. 12 ("The Socialist Roots of Naziism"). The book has little to say about communism because, as Hayek later acknowledged, he had been reluctant to criticize the Soviet Union, Britain's wartime ally. Hayek, "Foreword," in *id.* (1976 reprint edition), at iii–iv.

I am not interested in Hayek's two famous ideas as such, but rather in his legal theory.<sup>56</sup> But both ideas influenced the theory, the first decisively. The theory is simple and readily summarized.<sup>57</sup> There are two ways of establishing norms to guide human behavior. In one, which Hayek calls "constructivist rationalism,"<sup>58</sup> they are prescribed from the top down by a legislature, a bureaucracy, or a judiciary—in other words by experts who gather the information necessary to formulate by the method of reason the best possible set of norms. This method, as we might guess from Hayek's aversion to central planning, he rejects as requiring too much information to be feasible; in addition, it endangers liberty by enlarging the administrative powers of government and thus weak-

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<sup>56</sup> Lucidly summarized in Charles Covell, *The Defence of Natural Law* 126–139 (1992).

<sup>57</sup> The first volume of his trilogy *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, entitled *Rules and Order* (1973), contains the fullest statement of his legal theory; indeed, virtually the entire book is devoted to expounding and defending it. But he discusses law at almost the same length in an earlier book, *The Constitution of Liberty*, pt. 2 (1960).

A virtually identical theory of law is propounded in Bruno Leoni, *Freedom and the Law* (3d ed. 1991). Leoni, an Italian lawyer who was a friend of Hayek, published the first edition of his book in 1961, the year after *The Constitution of Liberty* was published. Leoni is sometimes thought to have originated the view (on which see, for example, Richard A. Posner, *Economic Analysis of Law*, pt. 1 [5th ed. 1998]) that common law decisions tend to be more efficient than statutory ones. The attribution is incorrect. Leoni liked the common law for the same reason that Hayek did; he thought that common law judges enforced custom (with some tidying) rather than making law. See, for example, Leoni, above, at 86, 217.

<sup>58</sup> See, for example, Hayek, *Rules and Order*, note 57 above, at 95, 117.

ening the rule of law—the thesis of *The Road to Serfdom*.<sup>59</sup>

The alternative method of creating norms is that of custom, and is based on the superiority of what Hayek calls “spontaneous order” over order brought about by plan or design. The word “spontaneous,” with its connotation of suddenness, is not the best term for what he has in mind; “unplanned” or “undesigned” would be better and “evolved” would be best, given his emphasis on the analogy of natural selection. The natural world is an extraordinary complex system, amazingly “well designed,” but according to Darwinian theory there was no designer. Markets are another example of “spontaneous order” in Hayek’s sense. They emerged thousands of years ago; they were not invented or designed; and their operation does not involve central planning. Consider the system by which New York City is supplied with milk. There is no milk czar who decides how much milk is needed when and by whom and then obtains the necessary inputs—the cows, the milking machines, the milkmaids, the milk trucks, the milk bottles or cartons, and so forth. And yet the interactions of millions of consumers and tens or hundreds of thousands of input suppliers bring about an orderly supply. There is no coordinator—except price. A still larger spontaneous order, moreover, coordinates the milk market with other agricultural markets and ultimately with the entire national and world economy.

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<sup>59</sup> “A directed economy must be run on more or less dictatorial lines...Whoever controls all economic activity controls the means for all our ends and must therefore decide which are to be satisfied and which not.” Hayek, note 53 above, at 88, 91

In the normative realm the spontaneous order that corresponds to the market is custom; indeed the market itself could be thought a product of custom. So strong is Hayek's dislike of planning that in places he comes close to denying that legislatures have any business legislating, in the sense of regulating private behavior. Not that he's an anarchist and wants to abolish government. But he thinks that virtually the only proper business of a legislature is to direct and control the government, for example by levying the taxes that are necessary to defray the cost of government and by appointing and monitoring government officials.<sup>60</sup> And he points out that historically that was the primary function of the British parliament, not laying down rules of conduct for private citizens. Most of those rules were laid down by the royal judges. Those are the rules and doctrines of the "common law." But judges' traditional aversion to appearing to be creative led the judges to say that what they were doing in deciding common law cases was not making new rules or standards of conduct but merely enforcing immemorial custom. Hayek takes this claim literally. He thinks (and he thinks the English common law judges thought) that the only question a judge is entitled to decide is "whether the conduct under dispute conformed to recognized rules," that is, to "the established custom which they ought to have known."<sup>61</sup> Alternatively but equivalently, the judicial duty is to enforce the expectations created by

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<sup>60</sup> Hayek, *Rules and Order*, note 57 above, at 125–131. Elsewhere, however, as we'll see, he allows a significantly greater scope to legislation.

<sup>61</sup> *Id.* at 87.

custom.<sup>62</sup> Judges who step outside this boundary are—and here we see the influence of Hayek’s second master idea at work—stepping onto the slippery slope to totalitarianism. And thus “a socialist judge would really be a contradiction in terms.”<sup>63</sup>

But so, by Hayek’s logic, would a capitalist judge! The contradiction in terms that Hayek identifies has nothing to do with the content of the judge’s policy views, but lies rather in the judge’s allowing those views to influence his decisions. Hayek acknowledges, it is true, that there are gaps in legal rules and (what amounts to the same thing) that “new situations in which the established rules are not adequate will constantly arise,” requiring the “formulation of new rules” by the judges. But the judges are to fill these gaps with custom; their role is passive; “neither the judges nor the parties involved need to know anything about the nature of the resulting overall order, or about an ‘interest of society’ which they serve.”<sup>64</sup> The judge is precluded from “balancing of the particular interests affected [by the rules] in the light of their importance” or from concerning himself “with the effects of their applications in particular instances.”<sup>65</sup> That “overall order” which the judge is to serve is the market,<sup>66</sup> but he doesn’t have to know that in order to do his job.

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<sup>62</sup> *Id.* at 97, 119.

<sup>63</sup> *Id.* at 121.

<sup>64</sup> *Id.* at 119.

<sup>65</sup> *Id.* at 121.

<sup>66</sup> *Id.* at 115.

Not all customs should be made part of law (that is, enforced by legal sanctions), in Hayek's view. Only customs that are general or, the term he prefers, "abstract" should have that backing.<sup>67</sup> Contract law is exemplary; it provides merely a framework for private action, leaving the identity of the parties, and the price and other terms of the contract, to private determination. That is, contract law "abstracts" from all the particulars of people's voluntary interactions and so maximizes their freedom, their "spontaneity." Hayek does not explain who decides which customs should have the backing of law. But presumably it is the judges, whom he would also permit to engage in "piecemeal tinkering...to make the whole [body of law] more consistent both internally as well as with the facts to which the rules are applied."<sup>68</sup> This is a potentially significant bow in the direction of Kelsenian positivism. But the dearth of concrete examples, a Germanic characteristic of his writing on law that Hayek shares with Kelsen, makes it difficult to discern how deep the bow is; a few pages later Hayek says that "impartial justice...is not concerned with the effects of their application [that is, the application of 'end-independent rules']."<sup>69</sup> He also recognizes a limited power in legislatures to correct the rules enforced by judges, but his description of *that* power underscores the tightness of the constraints that he would place on judicial creativity. "The judge is not perform-

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<sup>67</sup> See, for example, Hayek, *The Constitution of Liberty*, note 57 above, at 151–154.

<sup>68</sup> Hayek, *Rules and Order*, note 57 above, at 118.

<sup>69</sup> *Id.* at 121.

ing his function if he disappoints reasonable expectations created by earlier decisions.”<sup>70</sup> (As a detail, I note that Hayek’s disapproval of law founded on “constructivist rationalism” rather than on custom is in considerable tension with his great admiration for the Constitution of the United States.<sup>71</sup>)

When Hayek is writing against lawgiving by legislatures and judges, any perception of the existence of externalities or of other sources of market failures is occluded. Yet he is aware that the amount of pollution is not optimized, or cartels prevented from arising, by the spontaneous order of the market, that they require public intervention to control.<sup>72</sup> He generally thinks the scope of public intervention should be quite limited, but he acknowledges the necessity of it; he is not a doctrinaire adherent to the idea that the only proper functions of government are internal and external security (the functions of the “nightwatchman” state). *The Constitution of Liberty* countenances some rather surprising departures from laissez-faire,<sup>73</sup> though Hayek is skeptical that economists have much to contribute to the design of public regulation of the economy.<sup>74</sup> Yet he fails to note the limitation of custom as a guide to law that is inherent in his recognition of the need for at least some regulation. Customs arise to guide and organize cooperative activities.

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<sup>70</sup> Id. at 88. See Covell, note 56 above, at 133.

<sup>71</sup> See Hayek, *The Constitution of Liberty*, note 57 above, ch. 12.

<sup>72</sup> See, for example, volume 3 of *Law, Legislation and Liberty*, entitled *The Political Order of a Free People* 42–43, 86–87 (1979).

<sup>73</sup> Hayek, *The Constitution of Liberty*, note 57 above, at 224–231.

<sup>74</sup> Id. at 229–230.

Competing firms might evolve a custom that price cutting is unethical; that custom obviously could not be made the basis of antitrust law. Manufacturers might evolve a custom of ignoring the pollution they create; that custom could not be made the basis of environmental law. Likewise in the case of accidents to “strangers” in the sense of persons with whom the injurer has no actual or potential contractual relations, the customary level of safety in the injurers’ industry cannot be considered socially optimal, because the injurers will not internalize the accident costs of their victims unless forced to do so by law; and so the courts have rejected the defense of custom to liability for negligence—a good example of an economically sound judge-made rule of law.<sup>75</sup> The rejection of custom in such cases is consistent with Hayek’s conception of a proper economic order, but it is inconsistent with the role that he assigns to judges. Judges are not to upset customs.

Limiting judicial discretion so might be defended by arguing that legislatures have superior competence to judges when it comes to making rules of conduct. But the closest Hayek comes to such an argument is in emphasizing that rules should be changed only prospectively, which is the method of legislation, in order to protect reasonable expectations.<sup>76</sup> This cannot be a complete theory of the respective competences of legislatures and courts.

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<sup>75</sup> See William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* 131–139 (1987). It is not efficient, however, when applied to accidents arising out of a contractual relation between injurer and victim. See *id.* at 133–139.

<sup>76</sup> Hayek, *Rules and Order*, note 57 above, at 88–89.

Hayek is right that law owes much to custom and that custom is a reliable guide to efficient methods of cooperation. But the idea, only a slight exaggeration of his position, that the only thing a judge should do is enforce custom, without any consideration of its consequences, because custom is the only legitimate law and so a legal judgment not founded on it is not true law,<sup>77</sup> is too narrow. In any event it extinguishes any explicit role for economic analysis in adjudication. That is why I said at the outset that Hayek, the economist, closes the space that economic analysis might occupy in adjudication while Kelsen, the legal philosopher, opens that space wide.

Of course Kelsen opens it wide to other things besides economics, including very bad things. The Nazi and Soviet legal systems, to us shocking examples of flouting the rule of law, were true legal systems under Kelsen's concept of law, as his critics have been quick to note.<sup>78</sup> But the shock diminishes if we distinguish between "law" and "rule of law." These sound like the same thing but are very different. The former is something that all societies have; the latter is one of the elements of a liberal polity (classical liberal, not mod-

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<sup>77</sup> There is a resemblance here, as Hayek notes approvingly, *id.* at 22, 74, 152–153, to the German "historical school" of jurisprudence, led by Friedrich Carl von Savigny, who, as Kelsen notes, thought that the only legitimate law was customary law. Kelsen, *General Theory of Law and State*, note 3 above, at 126. The customary law Savigny had in mind was Roman law. See Posner, note 35 above, at 194. This suggests certain difficulties in ascertaining what is to count as custom. Hayek does not discuss these difficulties; Leoni, however, writes admiringly of Roman law. See, for example, Leoni, note 57 above, at 11, 81–82, 209.

<sup>78</sup> See, for example, Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* 47 (1944).

ern welfare liberal). It is not paying a *compliment* to Nazi Germany or the Soviet Union to say that they had law. But it is a justified condemnation that they did not have the rule of law—the idea that law should be general, generally prospective, reasonably clear, and administered rationally and impartially. It is a normative notion, not a description of what all law has in common. Unfortunately, “rule of law” is a misleading expression because it seems to mean that a society which lacks it is lawless. This is wrong; a society which lacks it is merely not a liberal society. Hayek uses the term “true law” to denote legal doctrines, procedures, and so forth that conform to the rule of law;<sup>79</sup> but the opposite of “true law” in his sense is not false law or no law; it is merely bad law.

It might be argued that Hayek does not reject economic analysis of law but merely rejects an economic analysis that says that judges should use economics to help decide their cases. If Hayek based this rejection on economic grounds, it would mean that he was simply offering a rival economic theory of law to that of people like me. And to an extent he does base the rejection of economic analysis in adjudication on economic grounds, specifically on the superiority of spontaneous to planned order because of what today would be called the costs of information. But one cannot read Hayek and think this his only ground for not wanting judges to meddle with economics. His passionate opposition to central planning in all its forms, even the attenuated form represented by judges who pay some

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<sup>79</sup> See, for example, Hayek, *The Constitution of Liberty*, note 57 above, at 208–209.

attention to externalities, is moral and political as well as economic. His conception of the rule of law has a strong natural-law flavor. And while natural law need be no more hostile to economics than Kelsenian positivism, since in a morally diverse society “natural law” has no fixed content, we have seen that Hayek was determined to keep economics out of adjudication.

What Hayek might have argued is that the common law provides a better framework for economic development than the civil law, because judges in common law countries tend to have greater independence from the (more) political branches of government and so are more reliable enforcers of property rights. There is even some limited evidence of this view.<sup>80</sup> But Hayek is riding a different horse, or rather a different team. His theory of law is a peculiar mixture of the pragmatic and the dogmatic. The fundamental orientation is pragmatic. His Darwinesque ruling concept of “spontaneous order” is pragmatic, his theory of knowledge echoes John Dewey’s concept of epistemic democracy, and his passionate commitment to the rule of law is based ultimately on a belief that even small departures from it put us on the road to ruin. He was, however, excessively pessimistic, reflecting the doctrinaire character of his rule-of-law ideology.

His position, incidentally, underscores the tension between liberalism and democracy. As one of his sympathetic commentators has remarked, “Hayek is not

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<sup>80</sup> See Paul G. Mahoney, “The Common Law and Economic Growth: Hayek Might Be Right,” 30 *Journal of Legal Studies* 503 (2001). An unpublished paper by Edward Glaeser and Andrei Shleifer (Harvard Economics Department) makes a similar argument.

opposed to democracy *as such*.”<sup>81</sup> But in practice, much like Joseph Schumpeter (another Austrian economist), Hayek sees democracy as leading pretty inevitably to socialism. They differ mainly in that Hayek thought Nazism a form of socialism, while Schumpeter, obnoxiously but perceptively, thought it a rearguard action against socialism. Believing as he did that Hitlerian tyranny “was the natural outcome of the replacement of the traditional rule of law and its liberal values by democratic legislation and administrative regulations on the basis of legislation,”<sup>82</sup> Hayek wanted to put so many limitations on democracy that all that the people would be able to do would be to pick the officials, and all the officials would be able to do would be to administer the government; they could not establish rules of private behavior.

It remains to note Hayek’s criticism of Kelsen’s theory of law (I am not aware that Kelsen ever wrote about Hayek’s views of law, which were not published until late in Kelsen’s life). *The Road to Serfdom* draws a straight line between Bismarck’s social welfare legislation and Hitler;<sup>83</sup> and the line runs through Hans Kelsen, whose pure theory of law, Hayek argued in a later book,

signaled the definite eclipse of all traditions of limited government...There are no possible limits to the power of the legislator...Every single tenet of the traditional conception of the rule of law is represented as a metaphysical supersti-

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<sup>81</sup> Gottfried Dietze, “Hayek on the Rule of Law,” in *Essays on Hayek* 107, 130 (Fritz Machlup ed. 1976) (emphasis added).

<sup>82</sup> *Id.* at 133.

<sup>83</sup> Hayek, *Rules and Order*, note 57 above, at 175–178.

tution...The possibilities which this state of opinion created for an unlimited dictatorship were already clearly seen by acute observers at the time Hitler was trying to gain power...But it was too late. The antilibertarian forces had learned too well the positivist doctrine that the state must not be bound by law.<sup>84</sup>

This is a complete misunderstanding. It results from the confusion between law and rule of law. Kelsen's analysis does clearly imply that despotic governments, including "unlimited dictatorships," have law. But he never said they had good law, or the rule of law. The suggestion that Hitler might have been prevented from gaining power if only despotic laws had been denied the label "true laws"<sup>85</sup> merely shows Hayek's exaggerated belief in the influence of philosophy on society.

Put differently, Kelsen's analysis of law is content neutral; and Hayek is interested only in content. So there is no possible inconsistency. Hayek merely missed the distinction.

Hayek can't have known a great deal about Kelsen, or indeed about legal positivism, to have said what he said about him. Kelsen drafted Austria's post-World War I constitution, and a notable feature of it was the creation of a constitutional court (of which he became one of the first members!), that is, a court that places definite "limits to the power of the legislator." Kelsen repeatedly uses the example of a justiciable constitution to illustrate a high legal norm

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<sup>84</sup> Hayek, *The Constitution of Liberty*, note 57 above, at 238–239 (footnote omitted). See also Dietze, note 81 above, at 131–133.

<sup>85</sup> See Hayek, *The Constitution of Liberty*, note 57 above, at 238.

(the highest beneath the *Grundnorm*). He would not have subscribed to Hayek's view of "true" (that is, good) law, because he was not a Hayekian libertarian, not because he was a legal positivist.

Economic Analysis of Law as Implementation of Petrazhychycki's Project for Externalist Theory of Legal Policy. Gadis Gadzhiev1. Justice, the Constitutional Court of the Russian Federation; Professor, National Research University Higher School of Economics (Saint Petersburg Campus). Address: 1 Senatskaya Square, Saint Petersburg 190000, Russian Federation. E-mail: gadg@ksrf.ru. The first author to call the attention to the similarity between Petrazhychycki's ideas and the methodological foundations of the economic analysis of law—sometimes referred to as law and economics—was Tomasz Giaro, who in 2009 had published a series of articles on this subject both in Polish and in Russian6. During that same year, an article on that subject by Edoardo Fittipaldi also appeared7. economic analysis of law indicates why Hayek has been overlooked by the modern. school of law and economics.1 The Hayekian view of the world rests on conceptions of. law, economics, and the state that are fundamentally at odds with prevailing modes of. analysis. Finding this fundamental incompatibility, Posner concludes somewhat. surprisingly (to both conventional wisdom as well as himself), that it is Kelsen, not. 1 Richard A. Posner, Kelsen, Hayek, and the Economic Analysis of Law. Judge Posner originally produced this essay for a conference sponsored by the European Law and Economics Association in Vienna in 2001. The essay was then included as Chapter 7 of Posner's 2003 book Law, Pragmatism & Democracy. Although I had read little of Hayek's work, I was confident that he could be placed in opposition to Kelsen as a model for the integration of law and economics. With that in mind I set about to read Kelsen and Hayek. I shortly made the surprising discovery that Kelsen's philosophy of law opens a space for economic analysis, and in particular for the use of economics by judges in a wide range of cases that come before them, but that Hayek's philosophy of law closes that space, forbids judges to have anything to do with economics.