GENERAL ARTICLES

PURE THEORY'S DECONSTRUCTION

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In this article, I engage with the deconstructive strategy at play in Hans Kelsen's highly influential Pure Theory of Law to highlight both its iconoclasm and its limitations. Pure theory is a critical undertaking, reflecting a commitment to confronting the ideological aspects of law and legal theory. Nevertheless, pure theory's critical edge remains mostly overlooked both in mainstream interpretations as well as in critical legal thought. To offer an alternative reading, I first flesh out pure theory's radical and efficient critique of the political prejudice ingrained in traditional legal theory by utilizing Derrida's framework of deconstruction. Secondly, I turn Kelsen's deconstructive tools against pure theory itself. Kelsen's insistence on the separation of law and violence results in an effective declaration of the superiority of the normative over the factual, constructing a self-deconstructive hierarchy. Rather than a defeat, this is an ironic affirmation of Kelsen's critical stance that refuses to validate any ideology.

Keywords: Pure Theory of Law, Hans Kelsen, epistemology, deconstruction, Jacques Derrida

TABLE OF CONTENTS

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I. INTRODUCTION

In this article, I trace the deconstructive strategy at play in Hans Kelsen's Pure Theory of Law ('pure theory') in order to highlight both its iconoclasm and its limitations. This tracing is twofold: first, I draw inspiration from Jacques Derrida to flesh out the deconstructive strategy at play in pure theory's challenging of the political prejudices ingrained in legal theory. Second, I draw on Derrida's legal theory to highlight the self-deconstructive aspects of pure theory's onto-epistemology and its conceptualization of the relationship between law and violence. My reading strongly affirms pure theory as a critical and relevant approach to legal theorizing and proposes that Kelsen's inability to effectively disentangle law and violence is not a failure, but an ironic confirmation of his nonconforming philosophical outlook.

In the first part of the article, I set the stage for a deconstructive reading of pure theory by outlining Kelsen's motivations in constructing his theory and briefly summarizing pure theory's principal claims. Dealing with pure theory requires a recognition that its reception that regularly focuses on Kelsen's reconstruction of the legal system and side-lines his critical ambitions. Pure theory is often perceived as an ode to political and even economic liberalism. The political thrust of pure theory cannot be denied, but this thrust consists less in a praise of a certain mode of organizing a political and legal system and more in a lucid scepticism that favours suspicion over any ideal. Pure theory's critical tendencies nevertheless find some recognition in the literature. I engage with some readings of Kelsen's theoretical apparatus as radically critical and propose to take this line of interpretation even further.

In the second part of the article, I focus on Kelsen's epistemological program and its neo-Kantian presuppositions through the prism of his desire to construct a theory that would transcend its human creator and offer a perfectly objective description of law as an object of cognition. Pure theory's deconstructive strategy is rooted in Kelsen's ambition to erect a normative legal science that would lay bare both law and its theory and expose each as products of politics. Kelsen was on a mission to expose the prejudice and ideology at the heart of supposedly neutral concepts such as subjective right and objective law. Pure theory's deconstruction of this pairing is considered through Derrida's elaboration of the strategy.

Deconstruction, a double reading, always implies self-deconstruction. Hence, the third part of the article focuses on the impurities that Kelsen failed to exorcise from his theory. By concentrating on pure theory's prioritization of the normative vis-à-vis the factual, I argue that Kelsen's theory falls on its own sword. This argument departs from Kelsen's characterization of law as a coercive order and ventures to the very question of the foundations of legal validity. Pure theory's notorious *Grundnorm* (basic norm), presupposing an absent authorization of the original law-founding act, stands out not as the (theoretical) origin but as the whole becoming of legality.

The unauthorized act of power enshrining the initial norm of a legal order cannot be seen as an inconvenient origin of an otherwise disciplined organization; the *Grundnorm's* presupposition haunts the entire legal order – every legal norm echoes its essential question. To assert that law cannot be fully distinguished from the power and violence that both give birth to it and sustain it is not to assert that legal validity does not exist and that we ought to dismiss legal theory altogether. This claim rather celebrates Kelsen's critical spirit and pays tribute to his warning that law is a pernicious outcome of political struggles.

II. PURE SCIENCE

1. Kelsen's Pure Theory of Law

Pure Theory of Law is a product of thinking about the possibility of thinking about and cognizing law, an undertaking that occupies Kelsen just as much –

if not more – as thinking about and cognizing law itself. He acknowledges the chaotic state of the object of cognition and then rationalizes this chaos out of existence in order to arrive at a logical and coherent exposition of law's supposed essential traits.[1] The result of this undertaking – pure theory – is above all an epistemological project that presents itself as doubly pure: unadulterated by value judgments and by factual reality.[2]

While pure theory is widely perceived as Kelsen's theory, it is important to bear in mind that Kelsen was, at least during his European years, developing pure theory within a circle of like-minded individuals. Pure theory is thus a product of a collective effort and vivid debates; it is not just Kelsen's personal project.[3] Nevertheless, he was the undisputed trailblazer of the approach and its fiercest proponent. Doubtlessly, Kelsen gradually introduced changes and contradictions into the fibre of pure theory's system.[4] But as Alf Ross predicted in his 1936 review of the first edition of Pure Theory of Law:

> Hopefully we can still expect many more works from Kelsen's productive hand, but in all probability nothing essentially new. This is because Kelsen's work is so distinctively *System*.[5]

This prediction turned out to be rather accurate and an investigation of Kelsen's critical stance demands a holistic approach to his theory. Accordingly, I understand pure theory as Kelsen's entire body of work on legal science/theory. I comprehend pure theory as a coherent whole, mixing

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1 Hans Kelsen, *General Theory of Law and State* (Russell and Russell 1961) 437–439.

2 Joseph Raz, 'The Purity of the Pure Theory' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998) 238. According to Comanducci, pure theory is (at least) triply pure – he adds the purity of the object, as the third purity. See Paolo Comanducci, 'Kelsen vs. Searle: A Tale of Two Constructivists' (2000) 4 Associations 33.

3 Pure theory, as Kelsen never denied, is a product of stimulating discussions of the Vienna Circle at the turn of last century. For more on this, see Clemens Jabloner, 'Kelsen and His Circle: The Viennese Years' (1998) 9 European Journal of International Law 368.

4 For more on the issue of periodizing Kelsen's legal theory, see e.g. Stanley L Paulson, 'Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization' (1998) 18 Oxford Journal of Legal Studies 153.

5 Alf Ross, 'The 25th Anniversary of the Pure Theory of Law' (2011) 31 Oxford Journal of Legal Studies 243, 244 (emphasis in original).

assertions made by Kelsen at various stages of his career as if they all belonged to an overarching narrative.

Pure theory is an investigation into the cognitive possibility of the normative realm of the Ought (i.e. norm, value, validity, immaterial existence, cognition, coherence, structure, reason, meaning, etc.), the category that allows Kelsen to avoid the great beyond of natural law metaphysics while retaining a strong emphasis on the non-factual nature of legal phenomena, which he seeks to explore scientifically. The normative realm is constructed by a legal thinker (of any kind, that is, whether a theorist, a practitioner, a layperson) on the basis of the factual realm of the Is (i.e. fact, matter, efficacy, power, volition, violence, force, chaos, action, will, nature, etc.).[6] In pure theory, law is both a fact (Is) and a meaning (Ought); yet without *meaning*, it would just be a fact – sheer power. Kelsen's plan, accordingly, is to emancipate the meaning qua norm; to establish it independently of the fact that 'carries it' in order to articulate law's essence.[7]

The onto-epistemological dualism of the Is and the Ought might not be pure theory's most appreciated aspect, as this dualism and the methodological postulates that come with it seem strange and perplexing to many readers.[8] Kelsen's reconstruction of a modern legal order as a hierarchical structure, on the other hand, seems to have captured the hearts and minds of generations. In his effort to logically organize normative material, Kelsen eagerly adopted the *Stufenbau* doctrine, focusing on the hierarchical structure of a legal system as a system of creation, to illustrate law's validity and dynamic, norm-

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6 See e.g. Hans Kelsen, 'On the Pure Theory of Law' (1966) 1 Israel Law Review 1; Hans Kelsen, 'What Is a Legal Act?' (1984) 29 American Journal of Jurisprudence 212.

7 Hans Kelsen, '"Foreword" to the Second Printing of Main Problems in the Theory of Public Law' in Paulson and Paulson (n 2) 19.

8 To cite a famous example, HLA Hart nearly fell off his chair when Kelsen attempted to explain his onto-epistemology, which Hart did not seem to ever fully grasp. See HLA Hart, 'Kelsen Visited' in *Essays in Jurisprudence and Philosophy* (Clarendon 1983) 286-308. Of course, there are also authors who cherish the Is-Ought dualism as prerequisite for Kelsen's sharp critique and reconstruction of legal theory. See e.g. Jörg Kammerhofer, 'The Benefits of the Pure Theory of Law for International Lawyers, Or: What Use Is Kelsenian Theory' (2006) 12 International Legal Theory 5.

generating quality.[9] Since norms do not exist as facts or things, validity represents their specific mode of existence. According to pure theory, a legal system is a system of norms and each norm derives its validity from a higher norm.[10] Such tracing of legal validity eventually leads to the problem of infinite regress, as we climb the chain of norms all the way to the original norm that cannot be grounded in another.[11] No formal authorization of this founding moment can be found, as it concerns an act of power that posited the historically first constitution.

The question of foundations and its implications for a deconstructive reading of pure theory is discussed in more detail later on; for now suffice it to say that, since Kelsen's philosophical system intentionally excludes all non-legal material, the only remaining possibility is to ground law on law by presupposing the *Grundnorm* – the symbolic 'transformation of power into law'.[12] Unsurprisingly, the *Grundnorm* has proven a source of academic controversy ever since it emerged from Kelsen's writings; legal theorists have variously reproved it as 'a conceptual ragbag',[13] 'bizarre logic reasoning',[14] 'something comic',[15] 'so pathetically wrong that no further comment is

9 Kelsen adopted the *Stufenbau* doctrine from Adolf Merkl. See Andras Jakab, 'Problems of the *Stufenbaulehre*: Kelsen's Failure to Derive the Validity of a Norm from Another Norm' (2007) 20 The Canadian Journal of Law and Jurisprudence 35, 35–36.

10 Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Bonnie Litschewski Paulson and Stanley L Paulson trs, Clarendon Press 1996) 55–57.

11 Ibid 56–58.

12 Kelsen, *General Theory of Law and State* (n 1) 437.

13 Hamish Ross, 'Hans Kelsen and the Utopia of Theoretical Purism' (2001) 12 King's Law Journal 174, 193.

14 Neil Duxbury, 'The Basic Norm: An Unsolved Murder Mystery' (2007) LSE Law, Society and Economy Working Papers 17/2007 <https://www.lse.ac.uk/law/working-paper-series/2007-08/WPS17-2007Duxbury.pdf> accessed 15 January 2021.

15 HLA Hart, *The Concept of Law* (Clarendon Press 1994) 236.

needed',[16] 'either unintelligible or unacceptable',[17] and 'fraught with danger',[18] to quote just a few examples.

Another controversial trait of pure theory is its monism. According to pure theory, national and international legal systems form one single system – a (conceptual) unity that cannot be examined separately. Kelsen explains that the unity of national and international law may be achieved by assuming that one is superior to the other, as long as a single *Grundnorm* validates and unites the entire system. It does not matter whether international law prevails over national or vice versa; either assumption is an ideologically constructed fallacy and is equally expedient from the perspective of pure theory.[19] Kelsen's monism reflects a belief in the unity of law, which in turn reflects a belief in the unity of the object of cognition.[20]

Pure theory, its aspirations to universality notwithstanding, is tailored to the systematic nature of the modern continental-style state law and the emerging consolidation of international law.[21] Pure theory addresses something concrete, despite the high level of abstraction it entails.[22] Much of the recent critique focuses on pure theory's state-centric approach, which no longer fits

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16 Ronald Moore, 'Kelsen's Puzzling Descriptive Ought' (1972) 20 UCLA Law Review 1269, 1280, quoting Gustav Bergmann and Lewis Zerby, 'The Formalism in Kelsen's Pure Theory of Law' (1945) 55 Ethics 116.

17 Graham Hughes, 'Validity and the Basic Norm' (1971) 59 California Law Review 695, 703.

18 Ibid.

19 Hans Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange 1989) 344–347.

20 In Kelsen's words: 'To know an object and to recognize it as a unity means the same thing'. Kelsen, *General Theory of Law and State* (n 1) 410.

21 For an in depth and contextualized analysis of Kelsen's engagement with international law, consult e.g. Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010).

22 Consider the following: 'Positive law is always the law of a definite community: the law of the United States, the law of France, Mexican law, international law. [...] The subject matter of a general theory of law is the legal norms, their elements, their interrelation, the legal order as a whole, its structure, the relationship between different legal orders, and, finally, the unity of the law in the plurality of positive legal orders'. Kelsen, *General Theory of Law and State* (n 1) xiii.

the reality of the transformed postmodern 'lawscapes'.[23] Then, of course, there are also those who do not see the supposed conflict between pure theory and postmodern legal realities.[24] Pure theory may strike one as a relic of the past that still haunts our understanding of legal phenomena with its systematization and thus limits our imaginations in reconstructing (transformed) legal realities. Despite the controversy over the ongoing pertinence of pure theory, there is little resistance to the idea that Kelsen described brilliantly the prevailing legal order of his time.

The idea that pure theory got something very important very right is especially evident in the continental European tradition, where lawyers are trained to understand law along more-or-less Kelsenian lines. The question is: Why does pure theory's systemization fit our perceptions of law so neatly? Is it because pure theory captures the modern legal system so masterfully or because we, albeit unwillingly and unconsciously, observe the world through its lens? To borrow from one of Kelsen's philosophical idols, Friedrich Nietzsche,[25] is it possible that '[t]he world seems logical to us because we have made it logical'?[26] To deal with this question successfully, it is important to acknowledge that it was Kelsen's radical epistemological program, with all its strangeness, that made his celebrated vision of a modern legal system possible. Any critique or defence of pure theory must affirm this entanglement. Before delving fully into Kelsen's onto-epistemological system, it is instructive to observe how pure theory resonates in recent debates.

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23 See e.g. Kaarlo Tuori, 'Whose Voluntas, What Ratio? Law in the State Tradition' (2018) 16 International Journal of Constitutional Law 1164.

24 See e.g. Jörg Kammerhofer, 'Hans Kelsen in Today's International Legal Scholarship' in Jörg Kammerhofer (ed), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014).

25 Kelsen has his own reading of Nietzsche's thought. It is clear that he adores Nietzsche's vigour and recognizes him as a kindred spirit: 'Nietzsche, this sceptic and relativist, this heir of Enlightenment'. Hans Kelsen, *Secular Religion: A Polemic against the Misinterpretation of Modern Social Philosophy, Science and Politics as 'New Religions'* (Springer 2012) 225.

26 Friedrich Wilhelm Nietzsche, *The Will to Power* (first published 1901, Vintage Books 1968) book 3 verse 521, 283.

The debate on pure theory is an enormous and heterogeneous field; it seems as though pure theory communicates everything and nothing, amounting to a riddle that can only be read by being read-into. While it would be impossible to engage with all the interpretations, appropriations, attacks, rejections, and reconstructions that pure theory has undergone since its inception in the early 20th century, a handful of examples will provide a point of departure for my reading, which explores pure theory's critical edge.

2. Pure Theory, Iconoclasm, and Radical Critique

Pure theory as a quintessentially positivist legal theory does not seek, or so Kelsen claims, to prescribe how law ought to be. Polishing the bare bones of the quasi-universal legal structure, pure theory often reminds us of its moral relativism. Nevertheless, many readers remain unconvinced. Those who rebel against the rigid norms of positivist approaches to law all too often overlook the critical attitude of pure theory's apparent cynicism. Such critics tend to project political programs onto pure theory's empty structures. The list includes everything from fascism to democratic liberalism, from Bolshevism or even anarchism to capitalistic statism, from Catholic scholasticism or Protestantism to atheism. As Kelsen asserted in 1934:

> In a word, the Pure Theory of Law has been suspected of every single political persuasion there is. Nothing could attest better to its purity.[27]

Interpretations of pure theory as a celebration of political liberalism are especially prominent, even though Kelsen denied such political contamination of this theory: 'It is clear to everybody who has read my works [...] that my theory of law from the beginning [...] has nothing to do with my political attitude as a liberal democrat'.[28] Regardless, inscribing pure theory with a (neo)liberal political program is a widespread and popular practice. I limit myself to two recent examples. Lars Vinx's reading of pure theory as the utopia of legality expresses enthusiasm about Kelsen's political philosophy and its commitment to liberal democracy, yet Vinx is underwhelmed when it comes to pure theory's lack of substantial moral commitment and is on a

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[27] Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 3.

[28] Hans Kelsen, 'Professor Stone and the Pure Theory of Law' (1965) 17 Stanford Law Review 1128, 1135.

mission to salvage pure theory from the 'grips of a crude ethical relativism'.[29] As he demonstrates, pure theory can easily be transformed into natural law by substituting Kelsen's analytical *Grundnorm* with 'some substantive moral principle'.[30] This rewriting of pure theory is based on the assumption that pure theory is a rule of law theory, committed to the defence of liberal constitutional democracy and individual freedom. Kelsen might disagree:

> [T]he rule of law principle does not guarantee the freedom of the individual but only the possibility of the individual to foresee, to a certain extent, the activity of the law-applying, that is, the administrative and judicial, organs, and hence to adapt his behavior to these activities.[31]

Another example of engagement with pure theory's liberal leanings is Mónica García-Salmones Rovira's interpretation of Kelsen as a neoliberal. She criticises Kelsen's vision of law as serving business interests instead of the interests of universal justice and equates his moral relativism with nihilism.[32] Yet Kelsen himself never equated political liberalism with the postulates of the free market:

> The life-principle of every democracy is therefore – not, indeed, as has sometimes been supposed, the economic freedom of liberalism, for there can just as well be a socialist democracy as a liberal one – but rather spiritual freedom, freedom to express opinions, freedom of belief and conscience, the principle of toleration, and more especially, the freedom of science, in conjunction with the belief in its possible objectivity.[33]

Kelsen's sharp and critical attitude is often perceived as disturbing and in need of revision, but what is disturbing to some is the prerequisite of critique to others. Alexander Somek celebrates pure theory's destructive and deconstructive ethos as a much-needed alternative to the currently more

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29 Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press 2007).

30 Ibid 58.

31 Hans Kelsen, 'Foundations of Democracy' (1955) 66 Ethics 1, 77–78.

32 Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford University Press 2014) 120–156.

33 Hans Kelsen, 'State-Form and World-Outlook' in Ota Weinberger (ed), *Essays in Legal and Moral Philosophy* (Reidel 1973) 101–102.

prominent Hartian version of legal positivism.[34] Unlike commentators who perceive pure theory as *démodé* in the context of postmodern post-national lawscapes, he embraces one of the most criticized aspects of pure theory, its monism, arguing that pluralism itself may be perceived as but a closeted form of monism.[35] Somek understands Kelsen's monism as disenchanting and capable of transcending the state-centred apprehension of law that haunts much of pluralist and dualist legal theorizing. Furthermore, he recognizes the monist-dynamic understanding of law – seeing law as a unity in constant becoming, i.e. constant transformation – as attractive to those sceptical of universal morality and the related idea that the validity of a legal norm depends on its moral content.[36]

Jörg Kammerhofer also values Kelsen's radical positivism. Understanding pure theory as a critical and deconstructive effort, he strongly endorses its continued salience for (international) legal scholarship.[37] Without denying the transformations of lawscapes taking place, he affirms pure theory as a useful and productive toolbox for a present-day legal scholar. He accepts that certain modifications to Kelsen's original wording are in order if pure theory is to remain relevant to legal research, yet pure theory's core strikes him as relevant as ever. He aims to dispel the stigma attached to Kelsen's name by faithfully following pure theory's radical epistemological program, taking into account the historical context in which it was developed.[38] In the

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34 Alexander Somek, 'Legality and Irony' (2016) 7 Jurisprudence 431; Alexander Somek, 'The Spirit of Legal Positivism' (2010) University of Iowa Legal Studies Research Paper No. 10-21 <https://papers.ssrn.com/abstract=1621823> accessed 2 May 2017.

35 Alexander Somek, 'Monism: A Tale of the Undead' (2010) University of Iowa Legal Studies Research Paper No. 10-22 <http://papers.ssrn.com/abstract=1606909> accessed 23 April 2016.

36 Alexander Somek, 'Stateless Law: Kelsen's Conception and Its Limits' (2006) 26 Oxford Journal of Legal Studies 753, 767.

37 Kammerhofer, 'Hans Kelsen in Today's International Legal Scholarship' (n 24); Kammerhofer, 'The Benefits of the Pure Theory of Law for International Lawyers' (n 8).

38 Jörg Kammerhofer, 'Hans Kelsen's Place in International Legal Theory' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 143-167.

process, he fleshes out one of the key strengths of pure theory: its ability to unmask the political prejudices underlying much of legal theory to this day.[39]

Christoph Kletzer also shows great appreciation for pure theory and attempts to demonstrate the lucidity and elegance of Kelsen's neo-Kantian theory.[40] He understands that pure theory's objective is epistemological and shows great sympathy for the fundamental question of legal theory as articulated by Kelsen: How is legal science possible? Another aspect of pure theory that Kletzer finds deserving of attention is its conception of law and violence, law and force. Kelsen keeps referring to law as a coercive system, understanding the term coercive in its broadest sense.[41] It is important to note that for Kelsen law (the normative) is not identical with force or violence (the factual); law is rather an organization of force. Kletzer embraces this idea and uses it to challenge the common obsession in Anglo-Saxon analytical jurisprudence with demonstrating that there is no direct link between law and force, largely in an effort to avoid appearing Austinian.[42]

Kletzer agrees with Kelsen that law is not force but an organization of force. Indeed, Kelsen was focused on understanding the possibility of cognizing the ways in which force is organized and employed. This is a critical undertaking,

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39 Kammerhofer adopts a Kelsenian stance in interpreting the political ideology of constitutionalism as present-day natural law theory posing as legal positivism. See ibid 151.

40 See generally Christoph Kletzer, *The Idea of a Pure Theory of Law: An Interpretation and Defence* (Bloomsbury 2018).

41 More specifically, Kelsen refers to law as a 'specific social technique of a coercive order'. The question of coercion and material force is addressed further on in more detail. For now, see Hans Kelsen, 'The Law as a Specific Social Technique' (1941) 9 University of Chicago Law Review 75.

42 John Austin's legal theory is infamous for defining law as a sovereign's command backed by a threat of sanction. For some discussion of Austin's theory and its general rejection by the positivists – most notably Hart – see e.g. Frederick F Schauer, 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law' (2010) 23 Ratio Juris 1; Hart, *The Concept of Law* (n 15) 18–25. Kelsen describes pure theory as close to Austin's analytical jurisprudence, but also as more nuanced and consistent. He is bothered by the conflation of fact and meaning and of coercion and sanction in Austin's command theory. For Kelsen's full engagement with Austin, see Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 Harvard Law Review 44, 54–70.

rejecting moralistic fantasies in which law is too virtuous to need to rely on the threat of violence or force.[43] It is indeed not popular to be too vocal about one's perception of law as coercive, since such an assertion supposedly blocks us from realizing law's true essence, potential, and reach.[44] While it is true that Kelsen does not shy away from the coercive nature of law, modern positivism – pure theory included – is nevertheless an attempt to divorce law's essence from coercion, force, power, and violence.

Kelsen never loses sight of the fact that law is born out of force, that law's founding moment boils down to an unauthorized act of law creation that can only be remedied by a recourse to fiction. Simultaneously, however, Kelsen's epistemological dualism of the Is and the Ought implies a hierarchy in which law, an organization of force, is superior to mere force. While Kelsen puts his finger on an important and highly disturbing aspect of legal phenomena, he still perceives law as a possible tool for reducing and taming the violence inherent to human sociability. He understands that law may organize violence in the most disquieting ways[45] and yet he believes that legal order also holds potential for something greater. Pure theory's conception of law and violence is thus both deconstructive and self-deconstructing, as I examine more closely later on.

The problematic notion of the separation of law and violence or law and power is a popular motive for critical legal scholars. If much positivist theory attempts to relativize law's dependence on violence, critical scholarship has focused a lot of attention on this very issue. Even though Kelsen's radical positivism inspires a critical outlook, pure theory usually receives but a brief

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43 Kletzer (n 40) 21-25.

44 For discussions of the role of coercion in (positivist) legal theory and the strong tendency of legal theory to justify force/violence of/in law, see e.g. Frederick F Schauer, *The Force of Law* (Harvard University Press 2015); Ekow N Yankah, 'The Force of Law: The Role of Coercion in Legal Norms'. (2008) 42 University of Richmond Law Review 1195.

45 Consider Kelsen's following statement: 'The legal order of totalitarian states authorizes their governments to confine in concentration camps persons whose opinion, religion, or race they do not like; to force them to perform any kind of labor; even to kill them. Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order of those states'. Kelsen, *Pure Theory of Law* (n 19) 40.

mention as a traditional theoretical foe in critical writings. The reasons for this are, again, rooted in Kelsen's rigid epistemology. Panu Minkkinen's close critical engagement with pure theory's onto-epistemological implications stresses the importance of active engagement with the tradition of legal positivism as a necessary step in overcoming the restraints imposed on legal philosophy.[46] Minkkinen places Kelsen at the heart of 'thinking without desire' – the tradition of the detached study of law that rejects justice equated with truth as an unattainable ideal and focuses instead on the mundane aspects of law as it is – that is, on (truth as) correctness. Minkkinen's exploration of continental legal philosophy reveals that, despite Kelsen's intentions, desire cannot be disentangled from cognition. Kelsen's desire to divorce scientific research from any personal inclinations is in stark contrast with the explicitly political critique of legalities performed by critical legal thinkers. Indeed, Kelsen's epistemological norms are highly restrictive, yet his own critique is far from disinterested, as it will emerge more clearly from the following section.

III. Pure Iconoclasm

1. Norms of Thinking: Pure Theory's Prescriptive Dimension

To avoid falling prey to any political ideology, Kelsen takes refuge in the ideal of scientific objectivity. Scientific objectivity – not merely an ideal but a self-imposed norm – is Kelsen's core value and it demands discipline and detachment: this is the prescriptive dimension of pure theory. Pure theory's contribution to legal studies is not so much the information pure theory transmits about the structure of a modern legal system. Instead, what is crucial is what pure theory transmits in terms of norms of thinking, instructions on purification, and disconnect with the world 'as it appears to us'.[47] Pure theory seeks to establish a legal-philosophical method capable of achieving certainty and objectivity, mirroring the illusive ideal of modern

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46 Panu Minkkinen, *Thinking without Desire: A First Philosophy of Law* (Hart 1999) 1-50, 183-187.

47 Kelsen, *General Theory of Law and State* (n 1) 434.

natural science.[48] This epistemology, Kelsen hopes, has the potential to become *the* legal science.

Paradoxically enough, considering that pure theory presupposes the highest (humanly obtainable) level of objectivity and self-annihilation of the legal thinker, it is Kelsen's embodied and embedded experience that offers an insight into his iconoclastic ambitions.[49] The ideals chased by Kelsen are unattainable and yet this fact does not invalidate his intellectual project. If anything, Kelsen's failure to achieve full objectivity demonstrates the deconstructive play blurring the line between the subjective and the objective. Having witnessed two World Wars, the dissolution of great empires, the rise of Nazi fascism, and the reconstitution of the global politico-legal landscape, Kelsen was well aware of the enormous challenges facing humanity. State theory, natural law, religion, and the nationalisms of his time are the targets of his scientific rage, as they represent attempts to disempower and subjugate human beings.[50] Pure theory, with its deconstructive strategy, aims to expose the instabilities inherent in these very narratives. Kelsen is convinced that it is the lack of scientific rigor that has led legal theory to become nothing but an apologetic discourse of the ruling ideology.[51] The rigid and ascetic epistemological norms put forward by pure theory, on the other hand, hold the promise of exposing rather than masking political interests in the corpus of law and its theory; the critical scientific-philosophic approach and its strict norms of thinking are the only means of escaping the swamps of dualisms, fictions, and personifications – that is, from metaphysical representations (or so Kelsen believes).

For Kelsen, 'ideological', 'metaphysical', and 'ontological' are synonyms. From its inception, one of pure theory's main objectives was to challenge the traditional legal theorizing and to construct a dynamic theory of law capable of perceiving law as an ever-changing and hence always changeable

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48 Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 4.

49 While rejecting the strict distinction between norm and fact proposed by modern legal positivism, Douzinas and Gearey acknowledge Kelsen's theory as a response to the spectacular failure of the Weimar Republic and an attempt to counter Nazi irrationalism. See Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing 2005) 157.

50 Hans Kelsen, 'God and the State' in Weinberger (n 33).

51 Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 2.

phenomenon. This motivated Kelsen to deconstruct the pairings of being and becoming, subjective right and objective law, and private and public law, as well as to reject the differentiation between natural and juridical persons.[52] Kelsen's aim is not to invent a new political system, but to criticize the existing one in hope of its transformation. Pure theory's sharp description will not appeal to the law-creating authorities, he warns, nor will it provide a blueprint for the forces aiming to erect a new legal order in place of the old.[53] While Kelsen had his own vision of a desirable legal order, he was keenly aware that the inevitable transformations of law may take myriad shapes and that their legality will not depend on their (endlessly relative and contingent) moral adequacy.

The era in which Kelsen rose to prominence was profoundly characterized by the incredible progress of the natural sciences and their ability to produce ultimate, reliable, and verifiable truths/results.[54] Empiricism was thriving, and the entire history of metaphysics seemed but a dead end. This was also obvious in legal theory. Kelsen's normativist project may be seen as a direct response to the fact-centred legal positivism of the 19th century, in both its expressions: historicism and naturalism. Such positivisms took empiricism as their guiding norm and thus obliterated the Ought as belonging to the unscientific realm of metaphysical investigation.[55] Kelsen's question '(how) is science of law as a normative phenomenon possible?' echoes one of the basic questions of neo-Kantianism, which in its essence is a theory of knowledge.

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52 Kelsen, '"Foreword" to the Second Printing of Main Problems in the Theory of Public Law' (n 7).

53 Ibid 106–107.

54 For more on the development and status of the natural sciences and their relationship with/influence on philosophy in this era, see Cathryn Carson, 'Method, Moment, and Crisis in Weimar Science' in Peter Eli Gordon and John P McCormick (eds), *Weimar Thought: A Contested Legacy* (Princeton University Press 2013).

55 Agostino Carrino, 'Between Weber and Kelsen: The Rebirth of Philosophy of Law in German-Speaking Countries and Conceptions of the World' in Ian Bryan, Peter Langford and John McGarry (eds), *The Foundation of the Juridico-Political: Concept Formation in Hans Kelsen and Max Weber* (Routledge 2015) 23–24.

2. Kelsen's (Neo)Kant(ianism)

In pursuit of his goals, Kelsen finds a 'frenemy' in Kant who, to Kelsen's satisfaction, addresses the question of the possibility of the cognition of facts without recourse to metaphysics. Kelsen aims to address the same question in the normative sphere.[56] From the time he joined the ranks of academic lawyers, Kelsen was convinced that legal scientific philosophy lagged behind other fields and was clearly frustrated by this. The entire struggle for legal positivist methodology, in Kelsen's eyes, resulted time and again in a reiteration of metaphysics. Kelsen believed that pure theory represented a revolution:

> Pure Theory of Law was the first to try to develop Kant's philosophy into a theory of positive law [...], it marks in a certain sense a step beyond Kant, whose own legal theory rejected the transcendental method. [...] The Pure Theory of Law first made the Kantian philosophy really fruitful for the law by developing it further rather than clinging to the letter of Kant's own legal philosophy.[57]

To construct an objective theory of law, Kelsen rejected Kant's practical reason and natural law, perceiving them as rooted in Christianity and thus in the dreaded metaphysical duplication, that is, the doubling of the object of cognition rooted in superstitious metaphysical beliefs about heaven and earth and the like. This leads Kelsen to the following conclusion about Kant:

> The struggle which this philosophical genius, supported by science, waged against metaphysics, which earned him the title of the 'all-destroyer', was not actually pushed by him to the ultimate conclusion. In character, he was probably no real fighter but rather disposed to compromise conflicts.[58]

Kelsen, in contrast, saw himself as a true fighter, a fearless demystifier. While Kant understood legal validity as absolute, Kelsen's pure theory understands

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[56] 'Kant asks: "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms?"' Kelsen, *Pure Theory of Law* (n 19) 202.

[57] Hans Kelsen, 'The Pure Theory of Law, "Labandism", and Neo-Kantianism. A Letter to Renato Treves' in Paulson and Paulson (n 2) 172.

[58] Kelsen, *General Theory of Law and State* (n 1) 444.

it as relative. It is not easy to be a positivist, Kelsen speculated – the desire to uncover the 'absolute foundation' is too forceful. Hence legal positivism had never yet appeared in the entirety of history.[59] Pure theory was about to change this, Kelsen hoped, and thus change the trajectory of history itself. He self-identified as the all-destroyer of legal metaphysics (which he imagined to be identical with natural law). In other words, he understood himself as the Kant-becoming-Nietzsche of jurisprudence.

Simultaneous rehabilitation and transformation of Kant's original critique, as well as the employment of the transcendental method, conceptualism, idealist epistemology, and the rejection of Kant's 'thing-in-itself', are the traits of the neo-Kantian movement.[60] The neo-Kantians preceding Kelsen intended to save philosophy as a transcendental critique of knowledge and thus preserve room for reasonable speculation. At the centre of their interest is the question of the object of study and the methodology creating this object; in other words, an attempt to solve the crisis of philosophy with epistemology. Kelsen himself was convinced that knowledge consists in the formal construction of the object of study according to the rigorous principles governing concept-formation. Human reason, in the (neo)Kantian imaginary, creates the life-world without being shaped by it.

Nevertheless, Kelsen's (neo)Kantianism remains debatable. For example, some authors believe that he stopped being a (neo)Kantian after he moved to

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59 Ibid 445.

60 Neo-Kantianism as an intellectual movement encompasses a multiplicity of irreconcilable views and approaches that nevertheless share a common thread. Kelsen's approach is the closest to the neo-Kantian philosophy of value that replaces the ontological existence of values (Is) with their axiological validity (Ought), thus supposedly enabling an investigation into transcendental values (formal validity) as the unconditional standards of transcendent values (what 'ought to be', legitimacy). The philosophy of value is associated with Heinrich Rickert. For more on affinities between Rickert's philosophical system and Kelsen's approach, see Christian Krijnen, 'The Juridico-Political in South-West Neo-Kantianism: Methodological Reflections on Its Construction' in Ian Bryan, Peter Langford and John McGarry (eds), *The Foundation of the Juridico-Political: Concept Formation in Hans Kelsen and Max Weber* (Routledge 2015).

the United States[61] because the second (and more popular) edition of Pure Theory, which Kelsen wrote for the Anglo-Saxon public in his American years, differs somewhat from the first edition in both its style and its content.[62] Some read Kelsen's fascination with Hume's philosophy as a rejection of Kant. Yet Kelsen saw Hume as one of Kant's influences and, thus, not incompatible with Kant's theory of cognition.[63] Essentially, pure theory still remained as it was; or, as Kelsen himself stated in 1965: 'Its very essence is and always has been that it is *Erkenntnis*-jurisprudence in the true sense of this term'.[64] I am not convinced by the theory that Kelsen somehow dramatically transformed from a (neo)Kantian into an analytical legal philosopher, especially considering the intimate connection between Anglo-Saxon analytical philosophy and (neo)Kantianism.[65]

3. Pure Theory and Deconstruction

This section deals with deconstruction, drawing connections between pure theory and Derrida's quasi-transcendental critique of the metaphysics of presence. Derrida's work, too, is indebted to Kant's critical project and is generally considered as an important milestone in post-Kantian philosophy. The reading of Kelsen's deconstruction through Derrida allows us to move away from the rigidity of traditional neo-Kantian method and shift the focus towards the rebellious spirit animating Kelsen's purist enterprise.

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61 For a glimpse into this debate, see Stanley L. Paulson, 'Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory' (1999) 19 Oxford Journal of Legal Studies 351. Regarding the debate on Kelsen's (neo)Kantianism, see e.g. Alida Wilson, 'Is Kelsen Really a Kantian?' in Richard Tur and William L Twining (eds), *Essays on Kelsen* (Clarendon Press 1986); Hillel Steiner, 'Kant's Kelsenianism' in Tur and Twining (n 61); Stefan Hammer, 'A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law?' in Paulson and Paulson (n 2); Geert Edel, 'The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen' in Paulson and Paulson (n 2); García-Salmones Rovira (n 32) 126–129.

62 Most notable is Kelsen's switch to will doctrine, see: Kelsen, 'Professor Stone and the Pure Theory of Law' (n 28) 1138.

63 Kelsen, *Secular Religion* (n 25) 129–136.

64 Kelsen, 'Professor Stone and the Pure Theory of Law' (n 28) 1135.

65 See e.g. Hans-Johann Glock, 'The Development of Analytic Philosophy: Wittgenstein and After' in Dermot Moran (ed), *The Routledge Companion to Twentieth-Century Philosophy* (Routledge 2008).

Revisiting Kelsen's rebellious ambitions is instructive for two reasons. Firstly, it allows for a reconsideration of Kelsen's place in jurisprudence and permits a reading of pure theory as a multidimensional complexity rather than writing it off as a nemesis of critical legal thought. While pure theory's rigidity and essentialism certainly invite criticism, pure theory nevertheless exposes many of law's theoretical vulnerabilities and points towards the endless possibility of legal reform. Secondly, while the prejudices inscribed in both legal texts and legal rationality uncovered by Kelsen's anti-ideological methodology might be old news, they still deserve further criticism as the narratives attacked by Kelsen largely remain naturalized and normalized.

Undoubtedly, a lot has changed in the world (of law) since Kelsen's death, yet his theory still resonates strongly. Despite global transformations and shifts in the distribution of power, the old models of private property remain unchanged and corporate interests are intimately intertwined with populists railing against globalization. But what has pure theory to do with any of this? Pure theory – notwithstanding interpretations that would place it at the heart of (economic) liberalism – ruthlessly exposes capitalism as an ideology amongst other ideologies and traces the naturalizations of its principles in legal theory. Pure theory's laying bare of the capitalist prioritization of private property, which calls attention to the contingency of the capitalist system and the possibility of its transformation, thus remains extremely instructive in the current atmosphere. Therefore, it is prudent to pay more attention to pure theory's decentring of property rights, a seldom-discussed aspect of Kelsen's theory that does not fit in with the familiar story of pure theory as the guardian of the status quo.

The public-private divide and the conception of private property as central, along with the ideal of an autonomous individual subject qua owner, have been meticulously dissected in the past decades.[66] Nevertheless, Kelsen's deconstruction reminds us of the responsibility of legal theorists to remain alert and capable of questioning the presuppositions of their own beliefs and ideals. It also reminds us that the biggest challenges of our age, distinctive and

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[66] Indeed, this is one of the central arguments of critical legal thought. See e.g. Susan B Boyd, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press 1997); Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart 2000).

unique as they might seem, are not all that different from those of a century ago. As discussed, Kelsen harbours deep suspicion towards metaphysical dualisms and is a masterful deconstructor of received narratives. To stress the subversive power underlining Kelsen's arguments, it is fruitful to relate his legal theory to Derrida's framework of deconstruction. It is important to underline that pure theory is itself deconstructable and vulnerable to its own critical approach: the play of deconstruction that happens *in* and *to* pure theory. The double genitive, adored by Derrida, is at play here.

The double genitive is a recurring theme in Derrida's writings and a helpful introduction to his deconstruction. Deconstruction is a form of radical philosophical critique originating in literary theory but extending to an array of pressing philosophical and political issues. Deconstruction, as Derrida presents it, is all about complexification and openness. It is not a method; rather it is a process, a strategy.[67] Derrida's double genitive is an expression of the ambiguity that haunts our language, as the title of his book *Spectres of Marx* suggests. Loaded with two meanings, this title takes advantage of the subjective and the objective use of the genitive, invoking both the ghosts of Marx haunting us and the ghosts haunting Marx and his works.[68] Derrida's deconstructive strategy calls attention to the hierarchical relationships defining seemingly neutral dualisms (speech-writing, mind-body, male-female, presence-absence, and so on) and invites what has been silenced and excluded in the construction of such hierarchies back into play.[69] Derrida puts forward a fierce critique of western metaphysics but also quickly recognizes his project as its part rather than its end. There is no text that

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67 In Derrida's words: '[D]econstruction, that strategy without which the possibility of a critique could exist only in fragmentary, empiricist surges that amount in effect to a non-equivocal confirmation of metaphysics'. Jacques Derrida, *Dissemination* (Athlone 1981) 7.

68 Pierre Macherey and Ted Stolze, 'Marx Dematerialized, or the Spirit of Derrida' (1995) 8 Rethinking Marxism 18, 18–19.

69 See e.g. Jacques Derrida, 'Differance' in *Speech and Phenomena, and Other Essays on Husserl's Theory of Signs* (David B Allison tr, Northwestern University Press 1973); Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, corrected ed, Johns Hopkins University Press 1998) 3–93.

could not be deconstructed, even 'deconstruction always in a certain way falls prey to its own work', as he puts it.[70]

How can we connect Kelsen with Derrida, whose post-structuralist approach is often seen as the enemy of the certainty and truth celebrated and pursued by Kelsen's positivist vision? Of course, Kelsen's and Derrida's respective approaches are far from identical. Unlike Derrida, Kelsen embraces neo-Kantianism, its epistemological binaries, and its norms of thinking. In this sense, his understanding of critique is in stark contrast with Derridean deconstruction. Nevertheless, Derrida's deconstruction of law has been designated as the 'most sustained critique of metaphysics since logical positivism'.[71] Moreover, Derrida's engagement with law is deeply marked by Kelsenianism, the prevailing (if indirect and insidious) stance among jurists in Derrida's French cultural context.[72] Just like French jurists who operate in the shadow of pure theory without explicitly declaring themselves Kelsenians, Derrida does not mention pure theory either as an inspiration or as a theoretical foe. Critical legal thinkers, often adopting Derrida as an ally, rarely mention Kelsen's pure theory as anything but an example of the traditional legal thinking that must be overcome. Yet there is a very interesting intersection between the two approaches. To flesh this out, let us take a closer look at Kelsen's deconstruction of the pairing of objective law and subjective right.

4. Metaphysics of Property: Pure Theory's Deconstruction

Kelsen, disturbed by the dualism of objective law and subjective right, concentrated on the fetishization of subjective right in legal theory. As he points out, subjective right stands, first and foremost, for private property:

> The ideological function is easy to see in this utterly self-contradictory characterization of the concepts of subjective right and legal subject. The notion to be maintained is that the subjective right, which really means private property, is a category transcending the objective law, it is an

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70 Derrida, *Of Grammatology* (n 69) 24.

71 Merold Westphal, *Overcoming Onto-Theology: Toward a Postmodern Christian Faith* (Fordham University Press 2001) 219.

72 For more on this, see Pierre Legrand, 'Introduction (Of Derrida's Law)' in Pierre Legrand (ed), *Derrida and Law* (Routledge 2017).

> institution putting unavoidable constraints on the shaping of the content of the legal system.[73]

Such fetishization represents subjective right as the predecessor of any objective legal system: 'In line with its original function, the dualism of objective law and subjective right expresses the idea that the latter precedes the former logically as well as temporally'.[74] Kelsen argues that the ideological prioritization of subjective right reflects an understanding of ownership as freedom and results in a conspicuous silence regarding the concept of legal obligation. He observes that proponents of this view go so far as to juxtapose rights against law, overlooking that rights *are* law and that no right can exist without a reciprocal obligation. The notion of legal obligation is thus effectively silenced by the 'ideology of liberty' masquerading as legal theory.[75] Kelsen traces this mystification back to natural law and its ideal of natural rights, which supposedly exist in and of themselves without, and prior to, any human intervention.[76]

Kelsen overturns the binary in question and proclaims the superiority of the element previously perceived as inferior: There can be no subjective right without objective law; or, rights are law. The purpose of declaring that rights are, first and foremost, law is to work through the hierarchy on its own terms, using its inherent presuppositions against it. Kelsen's aim is not to celebrate the unjustly overlooked and shamed concept of legal obligation as somehow superior, but to reveal the fragility of the dualism. Thus, subjective rights are exposed as just one possible way of constituting and enforcing – that is, shaping – law, and not as some originary essence preceding law's manifestation:

> In any case, private property is historically not the only principle on which a legal order can be based. To declare private property as a natural right because the only one that corresponds to nature is an attempt to absolutize a special principle, which historically at a certain time only and under certain political and economic conditions has become positive law.[77]

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73 Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 40–41.

74 Ibid 38.

75 Ibid 38–40.

76 Kelsen, *Pure Theory of Law* (n 19) 125–130.

77 Kelsen, *General Theory of Law and State* (n 1) 11.

As Kelsen recognizes, subjective rights are systematically favoured in legal theory and objective law is consequentially perceived as a system that emerges to protect and enforce, but also to limit, these rights. In other words, law is perceived as inflicting violence upon rights. This perception leads to the celebration of (property) rights and the sphere of so-called private law as the realm of freedom, while legal obligations and so-called public law are condemned as the realm of subjection:

> What we call private law, seen from the standpoint of its function—*qua* part of the legal system—in the fabric of the law as a whole, is simply a particular form of law, the form corresponding to the capitalistic economic system of production and distribution; its function, then, is the eminently political function of exercising power.[78]

The strategic reversal of the dualism challenges this view with the proclamation that all law is primarily obligation – that all law is public law. Through this reversal, Kelsen exposes the intimate relationship between (human) rights and the principle of sovereignty, a suspicion that continues to occupy critical theorists to this day.[79]

Kelsen's deconstruction of the dualism of subjective right and objective law vindicates deconstruction as a deeply affirmative and political enterprise. Far from a nihilist and malicious attack on sacred values, deconstruction fleshes out what has been suppressed and silenced in the constitution of what passes as natural, normal, meaningful, and true. It exposes an ever-elusive origin. Indeed, it exposes the very impossibility of an origin – of an absolute point of departure. Deconstruction, as employed by Kelsen and famously elaborated by Derrida some decades later, operates as 'a double gesture, a double science, a double writing'.[80] The silenced element in the hierarchy is strategically positioned as the 'origin' to reveal the undecidability of the binary at issue – the impossibility of its resolution.

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78 Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 96 (emphasis in original).

79 See e.g. Jessica Whyte, 'Human Rights: Confronting Governments?: Michel Foucault and the Right to Intervene' in Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Routledge 2012).

80 Jacques Derrida, 'Signature Event Context', in *Limited Inc* (Northwestern University Press 1988) 21.

To illustrate the striking similarity between Kelsen's and Derrida's deconstructive strategies let us take a look at Derrida's deconstruction of the speech-writing binary.[81] Derrida argues that writing is perceived as violence against the spoken language – as logically and temporarily subsequent to it. Speech, in turn, is perceived as the original manifestation of language, possessing its full meaning. Derrida questions this framework by placing writing in the privileged position, declaring all language to be writing. He does so not to glorify writing, but to expose the instability of the hierarchical pairing. This move highlights the metaphysical and political prejudices, as well as the violence, that sustains hierarchical binaries that couple a privileged with a devaluated element.

Both examples – Kelsen's and Derrida's – follow the dynamics of deconstruction. Deconstruction addresses a binary and exposes this binary as representing a hierarchy: an interplay between a privileged element (subjective right, spoken language) and an element which is silenced and devaluated (obligation/law, writing). We can observe how Derrida subverts the prevailing narrative by declaring that all language is writing; Kelsen by proclaiming that all rights amount to obligations. These moves should not be read superficially as mere reversals of the hierarchies in question. These moves aim to *work through* the hierarchies and oppositions, using their language and inherent presuppositions against them. Deconstruction does not aim to overturn, erase, or neutralize a binary; deconstruction is about illuminating the binaries and the power relations embedded in these seemingly neutral oppositions. The first step of reversal – proclaiming that the traditionally inferior element is actually superior – is taken only to enable the second step, where the system in which the binary emerged is displaced. In Kelsen's case, this system is legal theory; in Derrida's, linguistics.

Simultaneously, deconstructive reading of binaries allows us to pay attention to the ironic play taking place in pure theory itself: in his quest to purify legal theory of the dualisms he perceives as ideological, Kelsen produces an array of epistemological dualisms.[82] Believing that ontology and epistemology

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81 Derrida, *Of Grammatology* (n 69) 27-37.

82 'Yes, this philosophy, too, is dualistic; only it is no longer metaphysical, but an epistemological, critical dualism on which it rests'. Kelsen, *General Theory of Law and State* (n 1) 435.

represent two distinct spheres of cognition, the former belonging to metaphysics and the latter to science, Kelsen constructs a dualist onto-epistemology of the factual and the normative. Neatly separating law (the normative) from power (the factual), pure theory encourages a theoretical framework that privileges law above power, force, violence, and politics. As in all dialectical pairings, law needs (to tame and control) its factual other:

> Force and law do not exclude each other. Law is an organization of force.[83]

Pure theory is all about proclaiming clear boundaries between its privileged object of cognition and the messy realm of material existence it brackets out of legal research. Pure theory is constructed upon a hierarchical binary, a vertical relationship of the preferred and the frowned-upon, announcing its own self-deconstructibility. This feature of Kelsen's intellectual undertaking exposes a crack in pure theory without challenging its theoretical merit; as we are about to see, the fact that pure theory is deconstructible is by no means a fatal flaw.

IV. Pure Undecidability

1. Law-Preserving Violence

Derrida's deconstructive reading of the entanglement of law, justice, and force/violence can be instructive in fleshing out the fault lines lurking under pure theory's smooth depiction of law as an object of cognition divorced from its material manifestations. The undecidability in Kelsen's theory is not a proof that pure theory is invalid. Nor is it an invitation to infuse pure theory with moralizations and ideologies. The impossibility of divorcing the normative from the factual that emerges from the deconstructive reading of pure theory merely illustrates the impossibility of declaring any ideology as meritorious or worthy of praise. Ironically, Kelsen's failure to achieve closure by establishing a clear division between law and violence – the undecidability haunting pure theory – is a confirmation of his sceptical critical outlook that deserves greater recognition.

As discussed, Kelsen does not shy away from the fact that violence and force play an integral part in the functioning of a legal system. He describes law as

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[83] Hans Kelsen, *Peace through Law* (Garland Pub 1973) 7.

a specific social technique organized as a coercive order and concludes that no legal state can ever be considered peaceful.[84] In pure theory, objective legal validity is conditioned by the efficacy of the legal system.[85] This formula exposes pure theory's recognition that the factual material life of law is crucial for law's existence, yet simultaneously subordinate to the immaterial quality of legal validity perceived as law's true essence. In other words, efficacy of a legal system is a condition – but never the determining factor – of legal validity.

Kelsen sees the difference between sanction and delict as a difference of authorization, a difference of meaning.[86] Questioning this difference, in his eyes, is tantamount to anarchism, which equates law with brute force.[87] Kelsen holds it to be crucial that the actual behaviour establishing an efficacious order corresponds with applicable legal norms only to a certain degree.[88] A legal norm that goes unbroken is as superfluous and oxymoronic as a legal norm that no one obeys: Law comes into existence precisely when the factual deviates from the normative.

A dialogue with Derrida's seminal essay *Force of Law* can expose the cracks in the distinction between law and violence, which Kelsen sees as not only possible, but indeed necessary for a coherent concept of law.[89] Derrida is fascinated with the verb 'to en*force*' (law), which explicitly indicates the coupling of law and force/violence.[90] Kelsen's purist project, on the other

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84 Kelsen, 'The Law as a Specific Social Technique' (n 41) 78–82.

85 Hans Kelsen, 'A "Realistic" Theory of Law and the Pure Theory of Law: Remarks on Alf Ross's On Law and Justice' in Luís Duarte d'Almeida, John Gardner and Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart 2013) 205.

86 Kelsen, *General Theory of Law and State* (n 1) 21.

87 Consider Kelsen's thoughts on anarchism: 'Anarchism tends to establish the social order solely upon voluntary obedience of the individuals. It rejects the technique of a coercive order and hence rejects the law as a form of organization'. Ibid.

88 Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 59.

89 Kelsen, *General Theory of Law and State* (n 1) 23.

90 Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority" (Deconstruction and the Possibility of Justice)' (1990) 11 Cardozo Law Review 920.

hand, aims to present law as organizing and giving meaning to, but never as equivalent to, violence and force.

When discussing coercion and law-enforcement, it is worth stressing that neither Derrida nor Kelsen propose that *all* legal norms assume the prohibitive structure of delict and sanction. What is at stake here is law's interpersonal nature. As Derrida puts it, the applicability of law, its enforceability, is not a secondary, exterior, and inferior supplement to law. It is not a mere condition operating in the shadows of law's validity. On the contrary, force and enforcement are essential not only to the concept of law, but even to the understanding of justice as law championed by enthusiasts of due process of law, who presuppose the generality and universality of legal norms as the prerequisite of justice.[91]

2. Law-Founding Violence

The difficulties rooted within the desire to disentangle the normative from the factual are closely related to the question of law's foundations – to Kelsen's enigmatic presupposition of the *Grundnorm*. To assess the role of force in law's becoming it is instructive to consider the mystical founding moment: The creation of the historically first constitution, the original legal norm. Derrida intends to problematize the (absent) foundations of law, morality, and politics, which for him (if not for Kelsen) appear hopelessly entangled. Derrida urges the reader not to misunderstand this move: 'This questioning of foundations is neither foundationalist nor anti-foundationalist'.[92]

Questioning the foundations of law in a deconstructive fashion means critically engaging with the idea of a legitimate fiction – a fiction necessary to establish the truth of justice – instead of merely positing such a fiction and considering the matter settled.[93] While Kelsen is a champion of purity and a prophet of the clear distinction between the normative and the factual, he could hardly be reproved for overlooking the fictitious nature of law's foundations. It is no coincidence that his *Grundnorm* is empty – a mere

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91 Ibid 949.

92 Ibid 931.

93 Ibid 939.

authorization of an act of force rather than a substantive imperative. Further, while he presupposed the *Grundnorm* in an effort to build a definitive theoretical structure capable of ordering legal thought for generations, Kelsen himself never ceased to return to this question, reconsidering the issue and updating it with more-or-less subtle transformations in hopes of guaranteeing the stability of his intellectual venture as a whole.[94]

A good place to begin a deconstruction of Kelsen's presupposition is the idea that the founding moment of law is precisely that: a moment – a singular isolatable point in time. Kelsen proposes that the *Grundnorm*, the original authorization, only changes with the advent of a successful revolution.[95] On pure theory's account, legal orders – like legal norms – form a clear chain of succession from one revolution to the next, from one *Grundnorm* to another. Kelsen believes that the fact that the *Grundnorm* can change, in contrast to the immutable natural law, makes it a dynamic concept. He clearly recognizes the non-law embedded in the *Grundnorm*, but reads it as exceptional; he understands the making of the first constitution as the only unauthorized (or, more precisely, fictionally authorized) legal act. The creation of the first constitution – an arbitrary and violent act that can only be justified *post factum* and with recourse to a fiction – is not merely a moment in the history of a legal system. As Derrida puts it:

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94 The *Grundnorm's* journey in Kelsen's thought is full of twists and turns. Kelsen initially equated the *Grundnorm* with the positive constitution before later declaring it to be pure theory's hypothetical foundation, a transcendental-logical presupposition, and then finally a fiction. For more see Kelsen, '"Foreword" to the Second Printing of Main Problems in the Theory of Public Law' (n 7) 13; Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 58–61; Kelsen, *Pure Theory of Law* (n 19) 193–221; Hans Kelsen, 'The Function of a Constitution' in Tur and Twining (n 61).

95 The key condition of a successful revolution is that the new 'reality' conforms to the new 'ought' – that the new legal system appears valid on the condition of it being efficacious. The radical break of a revolution in pure theory first transpires on the normative level. Its success depends on the conformation of the 'real reality' to the 'legal reality'. See e.g. Kelsen, *Pure Theory of Law* (n 19) 208–211.

> This moment of suspense, this *épokhè*, this founding or revolutionary moment of law is, in law, an instance of non-law. But it is also the whole history of law. *This moment always takes place and never takes place in a presence*.[96]

The presupposition of the *Grundnorm* thus cannot be understood as an isolated instance referring to the original legal act and the original legal norm. The *Grundnorm* should rather be read as a process – as a dynamic becoming: not a constitution, but a permanent re-constituting. To support this proposal with Derridean terminology, each presupposition of the *Grundnorm* is marked by iterability; the *Grundnorm* represents the foundational promise that is never (and could never be) kept but is (and must be) continuously repeated.[97] This iterability – the constant re-grounding and re-presupposing of the *Grundnorm* – perpetually inscribes it with variation and perpetually inscribes law-preserving with law-founding violence.

The aspiration to isolate unauthorized violence as a unique law-founding moment runs through the entire project of pure theory of law, with its fragile dualisms. Pure theory's realm of the factual already includes legal meanings – it is precisely the quest of legal cognition to purify these meanings and separate them from the factual. Kelsen's legal science is all about formalizing and systemizing recovered legal meanings, creating the normative realm in the process. Kelsen assumes the factual realm as given and independent of cognition, while he readily submits that a legal norm as an object of legal science is created by the thinking subject. This exclusion of the factual as the boring, immutable, and passive is constitutive rather than descriptive. It creates factuality as necessary evil and elevates meaning as its opposite – that is, as transformative and creative, since factuality only makes sense when the normative realm is presupposed.

The deconstructive strategy allows us to invert the opposites of the normative and the factual and of law and violence and declare that the factual is embodied in concepts like power, force, and violence as legality itself. However, such a conception would obviously result in a distorted image. Thus, deconstruction is more productively employed to demonstrate that there is no clear hierarchy between the assumed realms. Albeit potentially disturbing for the ontological presuppositions of pure theory, a

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96 Derrida, 'Force of Law' (n 90) 991 (emphasis in original).

97 Ibid 997.

deconstructive reading of law's contamination by force does not destroy law by reducing it to sheer power and domination. It merely exposes an undecidability: the hopeless entanglement of law and violence that serves as a reminder that law remains pernicious even in the realm of theory.

While such a reading contradicts the core postulates of pure theory, it also highlights one of Kelsen's most piercing arguments: Law possesses no inherent righteousness and may sanction the use of violence in morally repugnant ways without losing its validity. This argument urges legal thinkers to remain vigilant and critical, wary of endorsing any ideology and even warier of excluding as non-legal those normative orders they perceive as unjust.[98]

V. Conclusion

The main goal of this article was to highlight the critical and iconoclastic tendencies of Kelsen's pure theory of law, which has been watered down through decades of interpretation as a (neo)liberal, state-centred theory in service of the status quo. Building on Kelsen's motivations in conceiving his theory, as well as some of the less discussed aspects of pure theory that clearly expose its critical edge, I offer an interpretation that celebrates Kelsen's vision of legal theory as a highly vigilant discipline that does not succumb to the fantasies of an ideal legal order aligned with elusive conceptions of justice.

Kelsen developed a radical and lucid reconsideration of the neutralized and naturalized ideas about law and embraces the unpleasant dimensions of legality. Although his moral relativism is often criticized, it allows for a sincere evaluation of the disturbing practices that take place within legal orders. The debate that marked Kelsen's times was the intellectual quarrel over whether the Nazi fascist legal order ever possessed legal validity. Kelsen was always firm on the opinion that law may have any content whatsoever, no matter how immoral it may be. While disturbing, this position encourages not only critique, but also vigilance; the absence of the presuppositions that

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98 After the atrocities of the Second World War, some legal theorists declared the National Socialist legal order as non-legal – as never possessing legal validity. In contrast, positivist thinkers like Kelsen hold that recognizing such an order as legal means being a critical observer of legality. For the non-law argument, see e.g. Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630.

legality is synonymous with morality and goodness renders the observer sceptical and suspicious. In our own times, when the optimistic idea of the 'end of history' is rapidly dissolving, Kelsen's lesson remains valuable.[99]

Indeed, pure theory cannot be taken at face value and its deconstructible moments hold lessons of their own. Kelsen insists that the normative and the factual must be conceived as a hierarchy privileging the normative. Such a hierarchy of law and violence (or law and power) is problematic because it reflects a desire to celebrate law as morally superior to the power and violence that engender it. Yet law is always pregnant with violence; force remains a crucial part of any legal system, not merely an external condition of its functioning. Here we meet the limits of Kelsen's critique, which poses as disinterested and wholly objective when it is, in fact, laden with aspirations and desires. Kelsen's hope that scientific objectivity would become the guiding norm of a united global society have not materialized. Therefore, any critical confrontation with geopolitical power struggles demands a recognition that the normative and the factual are entangled, since the line between law and power remains as murky as ever.

Questioning the prioritization of the normative vis-à-vis the factual does not result, as Kelsen would have it, in a complete dismissal of the concept of legal validity. Questioning Kelsen's onto-epistemological binaries is in line with pure theory's rejection of any and all complacency and wishful thinking. Pure theory urges us to take law as it is, without embellishments that would substantially justify or embellish it, and this demand will continue to resonate even when legal realities transform beyond what we could imagine at the present time. Rejecting the possibility of purity, either factual or ideological, and distancing oneself from Kelsen's norms of cognition thus ironically celebrates his dissenting attitude and rigor as crucial inspirations for the future of legal theory.

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99 'The end of history' is an allusion to Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992).