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THE RECEPTION OF HANS Kelsen's LEGAL THEORY IN THE  
UNITED STATES: A SOCIOLOGICAL MODEL

D. A. Jeremy Telman\*

*Abstract*

*The Essay explores the reasons underlying opposition to Hans Kelsen's approach to the law within the U.S. legal academy. The vehemence with which legal scholars within the United States rejected Kelsen's philosophy of law is best understood as a product of numerous factors, some philosophical, some political and some having to do with professional developments within the legal academy itself. Because philosophical and political opposition to Kelsen's legal philosophy has been well-explored in earlier articles, this Essay discusses those topics briefly in Part I and then sets out in Part II a sociological model that grounds the academy's rejection of Kelsen's pure theory of law in professionalization processes already well underway when Kelsen arrived in the United States.*

*Kelsen had little impact in the U.S. legal academy not only because his brand of legal positivism was uncongenial to a U.S. audience. He also had little impact because he arrived in the United States just as the twin innovations of Legal Realism and the professionalization of the legal academy were solidifying their grips on the U.S. legal community. His mode of legal thought and his approach to legal education could not be accommodated within the newly-created discursive practice of the legal professoriate, and there was thus little possibility that his approach could be accommodated within that realm.*

INTRODUCTION

At the time of the Nazi seizure of power, Hans Kelsen was Germany's leading legal theorist and the Dean of the Faculty of Law at the University of Cologne.<sup>1</sup> Forced from his university post because of his Jewish ancestry, Kelsen fled to Geneva in 1933

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<sup>1</sup> RUDOLF ALADÁR MÉTALL, HANS Kelsen: LEBEN UND WERK (Vienna: Verlag Franz Deuticke, 1969), at 57-63.

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and to the United States in 1940.<sup>2</sup> By that time, Kelsen's reputation was already well-established in the United States. In 1934, Roscoe Pound, a legal theorist and Dean of the Harvard Law School, lauded Kelsen as "undoubtedly the leading jurist of the time."<sup>3</sup>

After his immigration to the United States, Kelsen spent 30 years actively engaged in scholarship and teaching in the United States and at visiting professorships abroad,<sup>4</sup> but his approach to legal theory never found a following within the legal academy of the United States, even as his reputation grew internationally. Karl Llewellyn, a leading practitioner of the Realist school of jurisprudence, regarded Kelsen's work as "utterly sterile," although he acknowledged Kelsen's intellect.<sup>5</sup> Echoing Oliver Wendell Holmes' famous dictum that the life of the law is not logic but experience, Harold Laski denounced Kelsen's legal theory as a sterile "exercise in logic and not in life."<sup>6</sup> To this day, Kelsen and his ideas are rarely considered in the U.S. legal academy.<sup>7</sup> Recently, one of the United States' leading

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<sup>2</sup> *Id.* at 63-64, 76-77.

<sup>3</sup> Roscoe Pound, *Law and the Science of Law in Recent Theories*, in 43 *YALE L.J.* 525, 532 (1934).

<sup>4</sup> During the time that he was living in the United States, Kelsen taught and/or held visiting professorships in Geneva, Newport, The Hague, Vienna, Copenhagen, Stockholm, Helsingfors, Edinburgh and Chicago. He received honorary doctorates from Utrecht, Harvard, Chicago, Mexico, Berkeley, Salamanca, Berlin, Vienna, New York, Paris, and Salzburg. Nicoletta Bersier Ladavac, *Bibliographical Note and Biography*, 9 *EUROPEAN J. INT'L L.* 391, 392 (1998).

<sup>5</sup> See KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (Chicago: University of Chicago Press, 1962), at 356, n.6 ("I see Kelsen's work as utterly sterile, save in by-products that derive from his taking his shrewd eyes, for a moment, off what he thinks of as 'pure law.'").

<sup>6</sup> HAROLD LASKI, *A GRAMMAR OF POLITICS* (4th ed.) (London: Allen & Unwin, 1938), at vi.

<sup>7</sup> Albert Calsamiglia, *For Kelsen*, 13 *RATIO JURIS* 196, 99 (2000) ("At present, in North America, Kelsen is practically unknown, and with only a few exceptions . . . American [j]urisprudence has totally ignored his

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philosophers of law contended that Kelsen has no following in the United States, at least among philosophers of law, because H.L.A. Hart demonstrated “that two central features of his jurisprudential view seem to be mistaken.”<sup>8</sup>

Two simple quotations exemplify the extent to which Kelsen's entire approach to law is anathema to U.S. legal scholars. In the two areas where one might expect Kelsen's influence to be unavoidable—international law and jurisprudence—opposition to his thought is most pronounced. As is well-known, Kelsen sought to create a science of law as an autonomous field, divorced from politics and morality.<sup>9</sup> But when students in the United States are introduced to international law through one of the most popular U.S. casebooks, the very first sentence they confront in Chapter 1, Section 1 reads as follows: “First, law is politics.”<sup>10</sup>

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contribution.”). The United States' most widely cited legal theorist, Judge Richard Posner, admitted that, until recently, he had never read Kelsen. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (Cambridge, Mass.: Harvard University Press, 2003), at 250.

<sup>8</sup> Brian Leiter, *Why don't American philosophers of law talk about Kelsen?* Brian Leiter's Legal Philosophy Blog (Oct. 3, 2007), <http://leiterlegalphilosophy.typepad.com/leiter/2007/10/why-dont-amer-1.html>.

<sup>9</sup> See Hans Kelsen, “‘Foreword’ to the Second Printing of *Main Problems in the Theory of Public Law*,” in *NORMATIVITY AND NORMS: ESSAYS ON KELSEN* (Stanley L. Paulson (ed.)) (Oxford, Eng.: Clarendon Press, 1998), at 1, 1-2 (“The purity of the theory is to be secured against the claims of a so-called ‘sociological’ point of view, which employs causal, scientific methods to appropriate the law as a part of natural reality. And it is to be secured against the *natural law theory*, which, by ignoring the fundamental referent found exclusively in the positive law, takes legal theory out of the realm of positive legal norms and into that ethico-political postulates.”)

<sup>10</sup> LORI DAMROSCH, ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* (4th ed.) (St. Paul, MN: West, 2001), at 1. The sentence at issue is presented in an excerpt from an essay by one of the casebook's

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Leading U.S. legal philosophers similarly rejected Kelsen's fundamental principles. In 1949, for example, after Kelsen had been teaching in the United States for nearly a decade, Lon Fuller, the celebrated U.S. legal scholar and theorist, noted that Kelsen had "excluded justice from his studies because it is an 'irrational ideal' and therefore 'not subject to cognition.'" Fuller noted that "the whole structure of [Kelsen's] theory derives from this exclusion."<sup>11</sup> But Fuller voiced his agreement with Jerome Hall, who in his influential *Readings in Jurisprudence* stated that jurisprudence must start with justice.<sup>12</sup> Leading U.S. academics' approach to the law derives from principles antithetical to Kelsen's pure theory of law.

In this Essay, I shall explore the reasons underlying opposition to Kelsen's approach within the U.S. legal academy. The vehemence with which legal scholars within the United States rejected Kelsen's philosophy of law is best understood as a product of numerous factors, some philosophical, some political and some having to do with professional developments within the legal academy itself. Because I believe that philosophical and political opposition to Kelsen's legal philosophy has been well-explored in earlier articles, I will discuss those topics briefly in Part I and then set out in Part II a sociological model that grounds the academy's rejection of Kelsen's pure theory of law in professionalization processes already well underway when Kelsen arrived in the United States.

My aim in this Essay is neither to portray Kelsen as a victim nor as an overlooked genius who offered elixirs that could have been used to treat the various ailments afflicting the U.S. legal academy. Although shunned by the U.S. legal academy, Kelsen

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authors, Louis Henkin, who has been a leading figure in his field within the U.S. academy for decades.

<sup>11</sup> Lon L. Fuller, *The Place and Uses of Jurisprudence in the Law School Curriculum*, 1 J. LEGAL EDUC. 495, 496 (1949). It is also significant that Fuller's essay appears in the first volume of a new journal that has since become the dominant U.S. journal on legal pedagogy.

<sup>12</sup> *Id.* (citing JEROME HALL, READINGS IN JURISPRUDENCE (1938)).

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enjoyed a brilliant career and cannot be portrayed as a person to be pitied. I am moreover, at this point in my immersion in Kelsen's legal theory, agnostic as to whether, or to what extent, the U.S. legal academy would benefit from a belated encounter with Kelsen. Rather, the Essay is an exercise in the sociology of knowledge and a contribution to the intellectual history of the U.S. legal academy. The fact that Kelsen plays almost no role in that history says relatively little about Kelsen and is intended to illustrate the structures of openness and exclusions within which a professional modality develops. Historians of the legal profession in the United States have tackled the more obvious and sinister exclusions (based on race, gender and class) attendant to the professionalization process.<sup>13</sup> The story behind the exclusion of alternative models of legal theory has yet to be told.<sup>14</sup>

#### I. KELSEN AND THE POLITICS AND JURISPRUDENCE OF LEGAL REALISM

Immediately upon arriving in the United States, Kelsen was accorded the dignities to which his reputation entitled him. Kelsen's *General Theory of Law and State*<sup>15</sup> was selected as the first volume of the American Academy of Legal Scholars'

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<sup>13</sup> See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (Chapel Hill, NC: University of North Carolina Press, 1983); JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (New York: Oxford University Press, 1976).

<sup>14</sup> In a delightfully iconoclastic essay, John Henry Schlegel provides examples of ways in which powerful figures within the U.S. legal academy effectively opposed proposed pedagogical innovations, but he does not address theoretical exclusions. John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEG. EDUC. 311, 323 (1985).

<sup>15</sup> KELSEN, *GENERAL THEORY OF LAW AND STATE* (Cambridge, Mass.: Harvard University Press, 1945).

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Twentieth Century Legal Philosophy Series.<sup>16</sup> He was also invited to give the inaugural Oliver Wendell Holmes lectures at Harvard Law School, and those lectures were collected in a Harvard publication, *Law and Peace in International Relations*.<sup>17</sup> And yet, although his publications could not have appeared in more prominent venues, they garnered little attention in law journals.<sup>18</sup> As Stanley Paulson noted in his fine essay on the Kelsen reception in the United States, the few detailed discussions of Kelsen's work to appear in U.S. law reviews were written by fellow émigrés who had undertaken a thorough study of the pure theory of law in Europe before coming to America.<sup>19</sup> Most significantly, Kelsen, one of Europe's foremost legal scholars, was unable to obtain a full-time teaching position at any U.S. law school. Instead, he joined the faculty of the political science department of the University of California, Berkeley.<sup>20</sup>

*A. Realist Opposition to Kelsen's Philosophy of Law*

U.S. jurisprudence in the twentieth century and to this day has prided itself on its hard-headed realism, or pragmatism. Not only is it considered a cliché to say that “we are all Realists now;” apparently, it is now recognized as cliché to point out the cliché.<sup>21</sup>

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<sup>16</sup> R. K. Gooch, *Review of Kelsen, GENERAL THEORY OF LAW AND THE STATE*, 32 VA. L. REV. 212, 213 (1945).

<sup>17</sup> Kelsen, *LAW AND PEACE IN INTERNATIONAL RELATIONS* (Cambridge, Mass: Harvard University Press, 1942).

<sup>18</sup> See R. S. Clark, *Hans Kelsen's Pure Theory of Law*, 22 J. LEGAL EDUC. 170, 170 (1969) (“noting that the 1967 translation of Kelsen's PURE THEORY OF LAW had “largely escaped the notice of jurisprudential commentators and citing only two other “substantial” reviews).

<sup>19</sup> Stanley L. Paulson, *Die Rezeption Kelsens in Amerika*, in REINE RECHTSLEHRE IM SPIEGEL IHRER FORTSETZER UND KRITIKER (Ota Winberger & Werner Krawietz (eds.)) (Vienna: Springer, 1988), at 179, 180.

<sup>20</sup> Edwin Patterson, *Hans Kelsen and His Pure Theory of Law*, 40 CAL. L. REV. 5, 5 (1952).

<sup>21</sup> LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-60* (Chapel Hill: University of North Carolina Press, 1986), at 229; Michael Seven Green,

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Thus, to the extent that Kelsen's approach to law appeared to be at odds with Legal Realism, it is not surprising that it was not welcomed by Kelsen's colleagues within the U.S. legal academy.

Before Realism arrived on the scene, U.S. legal scholarship was dominated by a formalist concept of law, which stressed "the purported autonomy and closure of the legal world and the predominance of formal logic within this autonomous universe."<sup>22</sup> Realism defined itself in opposition to this idea of law,<sup>23</sup> and Kelsen's approach must have appeared to the Realists to be a version of the formalism that they had just energetically rejected and were in the process of eliminating from legal pedagogy and legal doctrine. The twin hallmarks of Realism are two forms of rule-skepticism: the view that legal rules are a myth because law consists only of the decisions of courts, and the view that statutes and other legislative creations are too indeterminate to constrain judges or govern their decisions.<sup>24</sup> It is easy to understand that Kelsen's views would wilt in such unforgiving soil.

To this day, most legal scholars in the United States find his work either impenetrable or not worth the bother because his premises contradict the fundamental tenets of the U.S. approach to law.<sup>25</sup> While his new works were frequently reviewed in the decade after he arrived in the United States, the translation of his major theoretical work, the *Pure Theory of Law*, was largely

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*Legal Realism as a Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005).

<sup>22</sup> Hanoch Dagan, *The Realist Conception of Law*, 57 TORONTO L.J. 608, 611 (2007).

<sup>23</sup> See *id.* at 612 ("The realist project begins with a critique of this formalist conception of law.").

<sup>24</sup> Green, *Legal Realism*, 46 WM. & MARY L. REV. at 1917-18.

<sup>25</sup> See Paulson, *Die Rezeption Kelsens*, at 180 (noting that the American pragmatic philosophy entailed an aversion to highfalutin philosophizing such as Kelsen's neo-Kantianism).

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ignored and his legal theory on the whole was greeted with indifference outside of the small academic émigré community.<sup>26</sup>

There is a small but significant exception to the general view that “we”—that is, U.S. lawyers—are all Realists now. There seems to be a consensus among U.S. philosophers of law that Realism was “mercifully put to rest by H.L.A. Hart’s decisive critique of ‘rule-skepticism’ in the seventh chapter of *The Concept of Law*.”<sup>27</sup> However, jurisprudence courses taught at U.S. law schools often include several sessions on Realism, and it is hard to imagine a student emerging from a U.S. law school without at least some immersion in Realist theory. Kelsen’s name, by contrast, rarely graces a syllabus at a U.S. law school.<sup>28</sup> Moreover, although Hart’s views are just as diametrically opposed to Realism as are Kelsen’s, Hart and Ronald Dworkin are probably the two philosophers of law with whom U.S. law students are most likely to be familiar. And so, while Kelsen’s opposition to Realism provides some clues as to his lack of influence in the United States, there must be more to it than that.

#### *B. The Rejection of Legal Positivism as Politically Anemic*

A second reason for Kelsen’s failure to reach a U.S. audience has to do with the substantive politics of the U.S. academy in the post-war era. Kelsen’s theory failed political litmus tests because,

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<sup>26</sup> *Id.* at 181. See also Fuller, *The Places and Uses of Jurisprudence*, 1 J. LEGAL EDUC. at 496 (“Despite Kelsen’s world-wide fame, his views are scarcely known among lawyers and law teachers in this country.”).

<sup>27</sup> Green, *Legal Realism*, 46 WM. & MARY L. REV. at 1917. See also Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 270 (1997) (noting that Realism “has had almost no impact upon the mainstream of Anglo-American jurisprudence”).

<sup>28</sup> The exception may prove the rule. When I was a law student, a short excerpt from Kelsen was assigned in only one of the three courses I took that focused exclusively on legal philosophy and legal reasoning. At the class meeting before we were to read Kelsen, our professor told us not to bother as, he assured us, it would be incomprehensible to us. We neither read nor discussed Kelsen in the course.

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although Kelsen personally supported parliamentary democracy, his desire to produce a pure theory of law required him to avoid connecting the system of law to any substantive political theory.<sup>29</sup> As early as 1946, Gustav Radbruch declared that positivism had rendered the German legal profession defenseless against laws with arbitrary or even criminal content.<sup>30</sup> Lon Fuller, one of the most influential philosophers of law in the United States during Kelsen's lifetime, concluded that legal positivism had helped pave the way for the Nazi seizure of power.<sup>31</sup> At a time when fascism

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<sup>29</sup> See KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, at 3 ("One of the objections most frequently raised against the Pure Theory is that by remaining entirely free of all politics, it stands apart from the ebb and flow of life and is therefore worthless in terms of science. No less frequently, however, it is said that the Pure Theory of Law is not in a position to fulfill its own basic methodological requirement, and is itself merely the expression of a certain political value. But which political value?").

<sup>30</sup> Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105, 107 (1946).

<sup>31</sup> Fuller held an endowed chair as Professor of General Jurisprudence at Harvard Law School. In a 1954 essay, Fuller wrote that the Nazis "would never have achieved their control over the German people had there not been waiting to be bent to their sinister ends attitudes towards law and government than had been centuries in the building." These attitudes included being "notoriously deferential to authority" and having "faith in certain fundamental processes of government." Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEG. EDUC. 457, 466 (1954). In a 1958 exchange with H.L.A. Hart, Fuller declared positivistic philosophy incompatible with the ideal of fidelity to law. Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 646 (1958). In the same article, Fuller more closely links German legal positivism to the rise of fascism in Germany. See *id.* at 659 (contending that positivist attitudes in the German legal profession were "helpful to the Nazis"). Although Fuller seems to think his view is the same as Radbruch's, Stanley Paulson argues that they are distinguishable. While Radbruch focused on legal positivism under Nazism – what Paulson calls "the exoneration thesis," – Fuller was interested in legal positivism during the Weimar Republic,

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and totalitarianism posed genuine threats to the ascendancy of democracy as the global model for governance, Kelsen's theory did not seem to U.S. academics to provide a sufficiently robust defense of democracy or for sufficient safeguards against abuses of the law by fascist or totalitarian governments. Writing in the mid 1950s, Richard Carpenter typified the attitude towards German legal positivism in the U.S. academy when he criticized Germany's advanced culture of science and intellect for its failure to resist the Nazi program.<sup>32</sup>

Far from being a proper cause for surprise, this phenomenon would seem a logical and predictable consequence of the subjective positivism with which the German professors were largely indoctrinated. It would have seemed utterly inconsistent with their avowed philosophy for a well placed positivist to risk life or livelihood by any overt resistance to Nazi theories. If any did so, he must have appeared to his more consistent brethren as an emotional fool or perhaps as a psychopathic masochist with a martyr complex.<sup>33</sup>

At the very least, the *ad hominem* aspect of this criticism is poorly informed.<sup>34</sup> Moreover, in his thorough study of Weimar

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what Paulson calls "the causal thesis." Paulson, *Lon L. Fuller, Gustav Radbruch and the "Positivist" Theses*, 13 LAW & PHIL. 313, 314 (1994).

<sup>32</sup> See Richard V. Carpenter, *The Problem of Value Judgments as Norms of Law*, 7 J. LEGAL EDUC. 163, 167 (1954).

<sup>33</sup> *Id.*

<sup>34</sup> Stanley Paulson notes that "the leading spokesmen for Weimar legal positivism stood very far removed from the Nazi party" and "were known as opponents of the new Nazi regime." Paulson, "*Positivist*" *Theses*, 13 LAW & PHIL., at 347. Specifically, Paulson has in mind: Gerhard Anschütz, who retired rather than teach in a Nazi university; Richard Thoma, who continued to teach but did not do the bidding of the Nazi regime; Walter Jellinek, Hans Kelsen and Hans Nawiasky, all of whom the Nazis purged from their university posts; and Gustav Radbruch, who endured "internal exile" during the Third Reich. *Id.* at 345-46.

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constitutionalism and legal positivism, Peter Caldwell establishes that most Weimar legal theorists were only lukewarm republicans, but he avoids any argument that a more robustly republican constitutional theory could have prevented the collapse of the Weimar Republic.<sup>35</sup> He does so not because legal positivism offered stout opposition to Nazism but because there is no evidence that any form of legal theory has ever stood up any better to anti-democratic threats.

In any case, U.S. critics of Kelsen who focus exclusively on the alleged political shortcomings of his approach to law ignore a vast corpus of legal thought that touches on a vast array of topics. Kelsen published over 400 works during his lifetime, covering not only topics in the field of jurisprudence but also in constitutional law, international law, the history of law and philosophy, contemporary politics and political theory.<sup>36</sup> Although some collections of scholarly essays on Kelsen's work have appeared in English,<sup>37</sup> there has yet to be a serious scholarly monograph on Kelsen's legal theory published in the United States.

On the whole, the U.S. legal academy produced few significant responses to Kelsen's legal philosophy. However, the problem is not simply one of accommodating Kelsen's approach to common law theory or to an Anglo-American tradition of jurisprudence. The U.S. legal academy is not a political or a methodological monolith. Kelsen's politics were not outside of the mainstream, and his neo-Kantian approach to legal theory, while perhaps not as

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<sup>35</sup> PETER C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY AND PRACTICE OF WEIMAR CONSTITUTIONALISM* (1997).

<sup>36</sup> Calsamiglia, 13 *RATIO JURIS*, at 197. Métall provides a listing of over 600 works that Kelsen published up to 1966, but the list includes translations and book reviews. *See* Métall, at 124-155.

<sup>37</sup> *See, e.g.*, *ESSAYS ON KELSEN* (Richard Tur & William Twining (ed.)) (Oxford: Clarendon Press, 1986); *LAW, STATE, AND INTERNATIONAL LEGAL ORDER : ESSAYS IN HONOR OF HANS KELSEN* (Salo Engel (ed.)) (Knoxville, Tenn.: University of Tennessee Press, 1964).

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accessible as that of American or English legal philosophers who worked in the more familiar tradition of twentieth-century Anglo-American philosophy, is not so obscure as to be incomprehensible to the serious student of jurisprudence. Leading philosophers of law in England wrote at length on Kelsen.<sup>38</sup> And so, while philosophical and political opposition to Kelsen is certainly significant, we must also look to other factors in order to more fully comprehend why Kelsen and his work have been largely ignored within the U.S. legal academy.

## II. KELSEN AND THE U.S. LEGAL PROFESSION

Part I of this Essay summarized familiar arguments that explain Kelsen's lack of influence on the U.S. legal academy and the U.S. legal profession more generally. In this Part, the Essay explores additional explanations for Kelsen's lack of influence, sounding in the sociology of both the legal profession and the legal academy in the United States. The aim here is not to discount the significance of the political and theoretical obstacles to the reception of Kelsen's theory in the United States. Rather, this Part aims to supplement our understanding of the myriad reasons for Kelsen's failure to have an impact on the intellectual life of his adopted home. In so doing, this Part offers a case study in the sociology of knowledge and the ways in which, as a necessary part of the process of the formation of a professional ethos or ideology, certain modes of thinking and interacting must be rejected as outside the realm of acceptable professional approaches to the relevant subject matter.

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<sup>38</sup> See, e.g., H. L. A. Hart, *Kelsen Visited and Kelsen's Doctrine of the Unity of Law*, reprinted in H. L. A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* (Oxford: Clarendon Press, 1983), at 286-342; JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* (Oxford: Clarendon Press, 1980) (discussing Kelsen's legal system at 93-120).

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A. *Legal Education: From Trade School to Professional Training*

1. The Transformation of Legal Education in the Early 20th Century United States

Legal education in the United States took a different path from that followed in Europe. While law was one of the four foundational faculties of the medieval European university,<sup>39</sup> it was never integrated into traditional undergraduate education in the United States.<sup>40</sup> Rather, legal education developed along the lines of trade education.<sup>41</sup> Before the Civil War, only 9 of 39 U.S. jurisdictions required some sort of legal education as a necessary qualification for admission to the bar, and the bar examination was oral and casual.<sup>42</sup>

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<sup>39</sup> The University of Bologna granted degrees in the arts, medicine and theology, but it was “pre-eminently a school of civil law.” CHARLES HOMER HASKINS, *THE RISE OF UNIVERSITIES* (3d ed.) (Ithaca, NY: Cornell University Press 1957), at 11-12. By 1231, the University of Paris was divided in the four faculties of arts, law medicine and theology. *Id.* at 16. See also Juergen R. Ostertag, *Legal Education in Germany and the United States – A Structural Comparison*, 26 VAND. J. TRANSNAT’L L. 301, 306-07 (1993) (“The continental medieval university considered law to be one of the classic faculties . . .”). This division of continental European universities into faculties was still in effect during Kelsen’s lifetime. Stefan Riesenfeld, *A Comparison of Continental and American Legal Education*, 36 MICH. L. REV. 31, 33 (1937).

<sup>40</sup> See STEVENS, *LAW SCHOOL*, at 35-36 (noting that law instructors sometimes taught as adjuncts at universities, which lacked law faculties and that students “chose either law school or college, not both”).

<sup>41</sup> Andrew Siegel, the historian of the Litchfield Law School, the first such school in the United States, describes it as “a trade school for well-educated young men, a social club where life long connections were formed and a propaganda mill for the Federalist vision of the social order.” Andrew M. Siegal, “*To Learn and Make Respectable Hereafter*”: *The Litchfield Law School in Cultural Context*, 73 N.Y.U. L. REV. 1978, 1981 (1998).

<sup>42</sup> STEVENS, *LAW SCHOOL*, at 25.

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This changed markedly in the two decades after the Civil War, as some sort of legal study or apprenticeship became mandatory in the majority of jurisdictions and a written bar examination became mandatory in all jurisdictions.<sup>43</sup> Still, although Harvard's law school offered a three-year post-graduate degree by 1899, twenty years later, only a handful of universities required an undergraduate degree as a pre-requisite to the study of law.<sup>44</sup> At the beginning of the 20th century, law schools were still accepting students who could not gain admission into undergraduate programs at the same universities, and there were even concerns that universities were using their law schools to admit athletes otherwise underqualified for admission.<sup>45</sup> As law schools began requiring at least some college education as a pre-requisite to admission in the first decades of the 20th century, enrollments dropped by more than 50 percent.<sup>46</sup> But the victory of the Harvard model was eventually completed. During the 1920s, the American Bar Association (ABA) adopted a policy limiting access to the bar exam to students who had at least two years of college before entering law school. The American Association of Law Schools (AALS) fell in line, as its members made the completion of two years of college a pre-requisite to law school admission.<sup>47</sup> By mid-century, legal education in the United States invariably involved full-time, three-year day programs enrolling almost exclusively college-graduates, all of whom studied a nearly-identical curriculum of private law subjects.<sup>48</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *See id.* at 37 (naming Harvard, the University of Pennsylvania, Stanford, Columbia, Yale and Western Reserve as the only law schools requiring a college degree as of 1921).

<sup>45</sup> *Id.* at 37-38.

<sup>46</sup> *Id.* at 37.

<sup>47</sup> Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311, 345, 360 (1978).

<sup>48</sup> Schlegel, *Between the Harvard Founders*, 35 J. LEG. EDUC., at 312.

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## 2. Kelsen's Method and the Case Law Method

At the same time as Harvard Law School was spearheading the standardization of legal training, it was also effecting a revolution in legal pedagogy. This was the so-called case method of teaching developed by Harvard's Christopher Columbus Langdell. Langdell's pedagogy was an inductive method based on the natural sciences.<sup>49</sup> Students were expected to experience the development of legal rules through an intensive study of case law rather than by learning legal principles from the study of a treatise.<sup>50</sup> Full-time law instructors who increasingly came to view themselves as scholars replaced part-time teachers who primarily viewed themselves as practitioners. Harvard's approach did not immediately win over the academy and the legal profession. On the contrary, the case method was challenged both within Harvard and in the wider legal community. The Boston University Law School was founded in response to Boston practitioners' dismay at the "technical and historical" orientation of Harvard's approach to legal education.<sup>51</sup> Tensions over this teaching method separated the

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<sup>49</sup> Early defenses of the case method can be found in William A. Keener, *Methods of Legal Education II*, 1 YALE L.J. 143 (1892); Christopher Columbus Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 123 (1887). From today's perspective, it is rather difficult to grasp why or in what way Langdell thought the case method was "scientific." John Henry Schlegel dismisses the notion as "daft," and contends that it was so regarded even in Langdell's time. Schlegel, *Between the Harvard Founders*, 35 J. LEG. EDUC., at 314.

<sup>50</sup> See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (New York, Oxford: Oxford University Press, 1994), at 3 ("In Langdell's formulation, legal education is the study of a few fundamental principles that are found in the original sources – cases – and, by implication, are derived from those cases by the process of induction. Thus the student thinks for himself rather than merely accepts the secondhand formulation of some treatise writer.").

<sup>51</sup> *Id.* at 132.

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main organization representing U.S. lawyers, the ABA, and the 35 law schools organized in 1900 into the AALS.<sup>52</sup>

After the First World War, legal education quickly regularized on the pattern established at the Harvard Law School. In schools as disparate as the University of Montana and the University of Alabama, deans looked to hire full-time faculty trained in the Harvard teaching method.<sup>53</sup> As other law schools increasingly imitated the Harvard model, legal education was transformed. Within fifty years, Langdell's "method and curriculum had taken over legal education" in the United States.<sup>54</sup> As William LaPiana put it, "A system of apprenticeship gave way to academic training dominated by a new division of the profession—full-time teachers of law."<sup>55</sup>

Legal education in the United States on the Harvard model attempted a synthesis of the law office internships that had been the foundation for such education in the nineteenth century and a rather naïve scientism, which the academy quickly outgrew with the advent of Legal Realism. The case method was diametrically opposed to the treatise-based education that preceded it and to the methodology that continental law professors continued to employ when Kelsen was teaching.<sup>56</sup> Writing in 1938, Max Rheinstein described "the main teaching method" in continental law schools as "the systematic lecture course, where a large field of the law would be treated as a coherent, logically structured whole with

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<sup>52</sup> *Id.*, at 148.

<sup>53</sup> *Id.* at 191.

<sup>54</sup> Schlegel, *Between the Harvard Founders*, 35 J. LEG. EDUC., at 314.

<sup>55</sup> LAPIANA, LOGIC AND EXPERIENCE, at 7.

<sup>56</sup> See Riesenfeld, *Comparison*, 36 MICH. L. REV., at 44 (noting a tendency toward "methodological and systematic treatment" in the traditional form of legal education in Germany, the lecture, and also noting that students would often skip lectures and read the materials covered in a text book).

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elaborate, clearcut concepts.”<sup>57</sup> According to Rheinstein, continental students did not habitually come to class especially well prepared, as there were “no assignments to be worked and no cases to be digested.”<sup>58</sup> Where the case method was inductive, the approach to legal education with which Kelsen was familiar was deductive, based on code rules and treatises.<sup>59</sup> Where the case method focused on teaching real-life situations drawn from actual cases, civil law education in Kelsen’s time was based on analysis of concepts, which were compared or contrasted with other abstract concepts, all of which were reconciled within a legal code.<sup>60</sup> Indeed, the case method was more generally ill-suited to Kelsen’s favored topics: so-called “cultural courses,” such as jurisprudence, comparative law or legal history. The Harvard method regarded courses such as jurisprudence, philosophy of law, comparative law, theory of legislation, and criminology as posing a risk of dilution to the “general professional curriculum.”<sup>61</sup>

Thus by the time Kelsen arrived on the scene in the United States, he was doubly dated. His deductive pedagogical approach could not have been more alien to U.S. law students. Indeed, even compared with Anglo-American legal philosophers, Kelsen’s approach eschews concrete examples drawn from real or hypothetical cases or scenarios. In addition, Kelsen’s system proclaimed itself a science of law. His legal positivism could only have struck his Legal Realist colleagues as a return to the naïve

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<sup>57</sup> Max Rheinstein, *Law Faculties and Law Schools. A Comparison of Legal Education in the United States and Germany*, 1938 WIS. L. REV. 5, 18 (1938)

<sup>58</sup> *Id.* at 19.

<sup>59</sup> See Ostertag, *Legal Education in German and the United States*, 26 VAND. J. TRANSNAT’L L., at 328 (contrasting the U.S. “analytical model” to the German “interpretive model,” which focuses on interpreting codes or statutes).

<sup>60</sup> Heinrich Kronstein, *Reflections on the Case Method—In Teaching Civil Law*, 3 J. LEGAL. EDUC. 265, 265 (1950).

<sup>61</sup> Albert A. Ehrenzweig, *The Teaching of Jurisprudence in the United States*, 4 J. LEGAL. ED. 117, 124 (1951) (citing THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817-1917 (1918)).

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formalism of the previous generations. Even though Kelsen's notion of science had far more in common with the human sciences (*Geisteswissenschaften*) such as philosophy or history than with the natural sciences (*Naturwissenschaften*) on which Langdell based his approach to law, the distinction was likely lost on Kelsen colleagues and students within the U.S. legal academy.

*B. The Professionalization of Law and the Legal Academy*

Kelsen entered into a legal culture in the United States that had just completed a dual professionalization process. First, the legal profession was put on a new footing, as legal education had been standardized and barriers to entry had been raised so as to greatly enhance the status of attorneys. In addition, a new profession emerged as disciples of the Harvard pedagogical model assumed full-time teaching positions at law schools throughout the country. Because their professional status and prestige was dependent on their dominance of a market in educational services, the new legal professoriate jealously guarded its position against variant approaches to the law and to legal education.

1. The Development of the Legal Profession

Following Magali Sarfatti Larson, we can conceive of the legal profession as a group of trained experts attempting to establish a monopoly over a market in services. According to Larson, the medical profession was best able to establish such a monopoly because the demand for medical services is always high and because the skills of medical professionals cannot be subjected to peer review as easily as can the work of, for example, lawyers, architects or engineers.<sup>62</sup> Moreover, the demand for the type of services offered by other professions is not as stable as is the demand for medical care. The key to control over a market for professionals other than medical professionals thus becomes control over the production of producers. By limiting the supply of

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<sup>62</sup> MAGALI SARFATTI LARSON, *THE RISE OF THE PROFESSIONS: A SOCIOLOGICAL ANALYSIS* (Berkeley, California: University of California Press, 1977), at 19-39.

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credentialed practitioners, professionals such as lawyers and engineers assure themselves a favorable bargaining position in the market for their knowledge and services.<sup>63</sup>

Generally, expertise, credentialing and autonomy set professions apart from other occupations. Professional expertise and credentialing differ from the training and licensing of craftsmen, technicians, or managers in that they are generally won through schooling rather than through on-the-job experience. In addition, professional education usually includes a measure of theory and the initiation into a professional jargon.<sup>64</sup>

The Langdellian legal academy brilliantly illustrates these principles. When Langdell arrived on the scene, attorneys were not the respected professionals that they are today. Moreover, because there were few barriers to entry, practitioners suffered prodigiously during economic slowdowns. By mid-century, however, the Langdellian revolution was completed. One knew, when one hired a U.S.-educated attorney that he (and it was almost certainly a he) had completed an undergraduate education as well as a three-year course of law school and that he had also passed a rigorous, written examination administered by the state bar association, access to which was, for the most part, restricted to those who had completed a course of study in an accredited law school. Those law schools provided a sort of professional training and credentialing that was specifically designed to elevate the status of the legal profession above that of ordinary laborers or craftsmen.

As Larson points out, professions do not so much meet existing needs as shape or channel the needs of consumers by changing the criteria for an acceptable quality of life.<sup>65</sup> In order for a profession

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<sup>63</sup> *Id.* at 29-30.

<sup>64</sup> Eliot Friedman, *Are Professions Necessary?*, in *THE AUTHORITY OF EXPERTS: STUDIES IN HISTORY AND THEORY* (Thomas L. Haskell (ed.)) (Bloomington, Indiana: Indiana University Press, 1984), 3-27, here 8-9.

<sup>65</sup> LARSON, at 58.

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to succeed, it needs to convince society as a whole that its services are necessary and that only people with a certain kind of expertise and credentialing are qualified to provide such services. Larson divides the characteristics of professions according to their cognitive, normative, and evaluative dimensions:

The cognitive dimension is centered on the body of knowledge and techniques which the professionals apply in their work, and on the training necessary to master such knowledge and skills; the normative dimension covers the service orientation of professionals, and their distinctive ethics, which justify the privilege of self-regulation granted them by society; the evaluative dimension implicitly compares professions to other occupations, underscoring the professions' singular characteristics of autonomy and prestige.<sup>66</sup>

The cognitive attributes of the professions are perhaps most obvious to the uncritical observer. Professionals undergo highly specialized and advanced education, and this education legitimizes the normative and evaluative advantages professionals enjoy. It was thus crucial to the legitimacy of the legal profession in the United States that legal education become graduate education and that the qualifications of lawyers be standardized.

But professionals themselves see their positions as a “calling” and as a responsibility. They abide by special codes of professional conduct, and they are committed to a certain degree of altruism or public service. The rise of the Harvard model thus coincided with the ABA’s promulgation of a code of professional ethics, which was quickly adopted at the state level.<sup>67</sup> Once adopted, this code of ethics remained in place, unchallenged for over half a century.<sup>68</sup> The twentieth-century legal profession quickly developed into a stable structure. Lawyers shared a

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

<sup>67</sup> AUERBACH, *UNEQUAL JUSTICE*, at 40-42.

<sup>68</sup> *See id.* at 284 (noting that the ABA undertook a review of professional ethics in 1964 for the first time in more than half a century).

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common professional ethos that remained unchanged for generations. That ethos was tied both to the status of lawyers as professionals engaged in an altruistic calling, a public service, and to the high status of lawyers as members of an exclusive association of trained experts.

Finally, professionals are evaluated through rigorous competency tests and examinations, which result in their eventual licensing. In order for the legal profession to enjoy enhanced status, it was thus necessary for bar examinations to become more regularized across the country. Indeed, bar exams became more rigorous during the Great Depression of the 1930s, as state bar associations came to view the exam as a means to restrict entry into the profession while also shielding the public from incompetent attorneys.<sup>69</sup> Those who acquired the cognitive, normative and evaluative attributes that came to be associated with the legal profession reaped significant rewards in terms of high social prestige, relatively high economic rewards, and autonomy.

## 2. The Creation of the Profession of Legal Scholars

While the specifics of the professionalization of legal scholars are unique, that process is also part of a trend whereby academic disciplines were professionalized in the United States beginning in the nineteenth century.<sup>70</sup> Like all professions, the legal professoriate needed to create an identifiable product, exclude competitors from the market for their product and create a professional ideology and ethos to justify their domination of that market.<sup>71</sup> In law, the professionalization process was twofold, as creation of a new academic discipline of legal scholarship

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<sup>69</sup> STEVENS, LAW SCHOOL, at 178.

<sup>70</sup> For a good discussion of the process of professionalization in the social sciences in the United States, see Dorothy Ross, *The Development of the Social Sciences*, in THE ORGANIZATION OF KNOWLEDGE IN MODERN AMERICA, 1860-1920 (Alexandra Oleson & John Voss, ed.) (Baltimore: Johns Hopkins University Press, 1979), 107-38.

<sup>71</sup> Schlegel, *Between the Harvard Founders*, 35 J. LEG. EDUC., at 320 (relying on Larson's analysis in THE RISE OF THE PROFESSIONS).

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accompanied the strengthening of the professional ethos among practicing attorneys. Langdellian teacher/scholars sought to remove teachers/practitioners from their midst while also convincing non-teaching practitioners that their pedagogical methods would result in better-trained lawyers, indeed in an entirely better *breed* of attorneys. Like other professionalizing professoriates, legal scholars sought to delineate their turf by associating it with a certain type of individual—the legal scholar—and to eliminate their amateur predecessors from that turf.<sup>72</sup>

Through the case method, Langdell and the Harvard Law School not only solidified the professional status of lawyers, it also created a new profession—that of full-time law teachers.<sup>73</sup> In order to do so, it had to overcome significant opposition from adherents of older, less successful professional models.<sup>74</sup> When Kelsen arrived in the United States, the profession of legal academics had just emerged victorious in a bruising struggle against all comers—including formalists and devotees of deductive teaching methods as well as practitioners who wanted legal education to continue to take the form of a vocational apprenticeship. The legal academy was effectively closed to methodological, pedagogical and theoretical perspectives that might have threatened the ascendancy of the newly created legal professoriate. Indeed, because certain modes of discourse, associated with the case method, Socratic teaching approaches, and Realism had become associated with the ethos of legal academia, the alternative approaches to legal theory and to legal education that Kelsen represented threatened to undermine the status and authority of the new legal professoriate.

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<sup>72</sup> Schlegel, *Between the Harvard Founders*, 35 J. LEG. EDUC., at 314.

<sup>73</sup> LAPIANA, LOGIC AND EXPERIENCE, at 7.

<sup>74</sup> See, e.g., Roscoe Pound, *Some Comments on Law Teachers and Law Teaching*, 3 J. LEGAL EDUC. 519, 520 (1951) (noting resistance to the notion of full-time law professors from leading members of the American Bar Association and celebrating the “complete victory” of university law education over a system of law apprenticeship).

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In their analyses of professional behavior, sociologists now increasingly focus on expertise, prestige, and the creation of monopolies over markets or expertise.<sup>75</sup> The core of professionalization is the monopolization of the processes that lead to the production of professionals in a given field or practice. Universities come to monopolize not only the processes through which professionals receive credentials essential to their employment but also the production of knowledge in a given field. Modern professions are structures that link “the production of knowledge to its application in a market of services” and universities become “the training institutions . . . in which this linkage is effected.”<sup>76</sup> Such a monopoly over a market in services, and over the educational structures supporting such a market, increases the distance between professionals and the lay people they serve, thus enhancing the status and authority of professionals.

In introducing the case method as the core of legal education, Langdell assumed the role as initiator of a discursive practice. As Michel Foucault has described them, discursive practices “are not purely and simply ways of producing discourse.” Rather they “become embodied in technical processes, in institutions, in patterns for general behavior, in forms for transmission and diffusion, and in pedagogical forms.”<sup>77</sup> There has been extraordinary stability in legal education since Langdell’s time. Not only has there been remarkably little change in the pedagogy and curriculum of U.S. law schools, some of the cases included in casebooks and taught in private law courses in Langdell’s era are still staples of legal education today.<sup>78</sup> Langdell’s discursive

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<sup>75</sup> LARSON, *THE RISE OF PROFESSIONALISM*, at 17.

<sup>76</sup> *Id.* at 50-51.

<sup>77</sup> Michel Foucault, *History of Systems of Thought, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS BY MICHEL FOUCAULT* (Donald F. Bouchard (ed.)) (Ithaca, NY: Cornell University Press, 1977), at 199, 200.

<sup>78</sup> For example, in “*Dear Sister Antillico . . .*” *The Story of Kirksey v. Kirksey*, 94 GEORGETOWN L.J. 321, 373 (2006), William R. Casto and

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practice in the realm of legal pedagogy has survived despite its association with an outmoded legal formalism.<sup>79</sup> The U.S. legal profession was transformed in myriad ways as a result of the Langdellian innovations begun at Harvard. That transformation could not stop to pause and consider Kelsenian perspectives.

#### CONCLUSION

The limited literature on the Kelsen reception in the United States largely explains his small impact on the U.S. legal academy in terms of the political and philosophical rejection of his legal theory. But that explanation is inadequate. Kelsen's politics were not out of the mainstream. He, like many leading German legal positivists, demonstrated his personal refusal to accommodate his approach to that of the Nazis, and he suffered for his principled opposition to the Nazi version of law. Only a tiny minority of U.S. legal professors could articulate criticisms of Kelsen's legal philosophy that would not also be criticisms of H.L.A. Hart's legal philosophy. Yet, Hart's jurisprudence is usually at the center of such discussions of legal theory as take place in U.S. law schools. Political and philosophical opposition to Kelsen's perspectives certainly existed, but that opposition provides only a partial explanation of U.S. legal community's persistent ignorance of Kelsen's thought.

It is thus useful to supplement discussions of political and philosophical opposition to Kelsen with a sociological perspective. Kelsen had little impact in the U.S. legal academy not only

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Val D. Ricks explain that the case of *Kirksey v. Kirksey* made its way into casebooks because Samuel Williston (Langdell's contemporary) took an interest in it and included it in the 1903 edition of his contracts casebook. It has been part of the standard first-year contracts curriculum even since.

<sup>79</sup> See Ostertag, *Legal Education in German and the United States*, 26 VAND. J. TRANSNAT'L L., at 328-29 (observing that neither Realism nor subsequent movements such as legal process or law and economics have had a significant impact on the case method as the preferred method of legal education in the United States).

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because his brand of legal positivism was uncongenial to a U.S. audience. He also had little impact because he arrived in the United States just as the twin innovations of Legal Realism and the professionalization of legal academy were solidifying their monopolistic grips on the U.S. legal community. His mode of legal thought and his approach to legal education could not be accommodated within the newly-created discursive practice of the legal professoriate, and there was thus little possibility that he could be discussed or taken seriously in that realm.