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Symposium on *Making Democratic Theory Democratic: Democracy, Law, and Administration after Weber and Kelsen*

Reviews

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Introduction to a Symposium on *Making Democratic Theory Democratic: Democracy, Law, and Administration after Weber and Kelsen* by Stephen Turner and George Mazur

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Stephen Turner and George Mazur
Making Democratic Theory Democratic: Democracy, Law, and Administration after Weber and Kelsen
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INTRODUCTION

Stephen Turner has a reputation as a Weber scholar, as a philosopher of science, and an expert in social theory. Turner has also been engaged with the concept of democracy for decades. His recent book, *Making Democratic Theory Democratic,* is his latest attempt to uncover the meaning of democracy and its modern implications. This book contains ten chapters: a Theoretical Preface, an introduction, and an essay written by Turner and his co-author George Mazur, one essay written by Turner and his long-term collaborator Regis Factor (deceased), and seven essays written by Turner himself. These essays are the subject of this special issue of *Cosmos + Taxis*.

AIMS OF MAKING DEMOCRATIC THEORY DEMOCRATIC

Turner and Mazur have asked why is there a gap between what democracy promises and what the administration actually delivers. But as the subtitle indicates, the topics are broader than just that one issue: *Democracy, Law, and Administration after Weber and Kelsen*. The inclusion of Max Weber and Hans Kelsen contribute to this collection's interest in historical answers to the question of the divergence between ideal and reality. But Turner and Mazur are concerned with the present disparity between democracy and the law and administration. They do not attempt to answer this question, but they are convinced of the need to explicate the "issue itself" (Turner and Mazur 2023, pp. 1-2, 4).

Making Democratic Theory Democratic has two major parts but there are actually three sections. The first section does not have a title and yet contains the most four chapters at four. Part I is entitled "Free Speech, Pluralism, and Toleration" and has two chapters while Part II carries the title "Fundamental Political Theory" and has three chapters. The unnamed first section and Part I tend to be on contemporary topics; Part II is more historical and contains chapters on Michael Oakeshott, Max Weber, and Hans Kelsen. Some readers will prefer the historical material, while many others will find the chapters on contemporary topics to their liking. Regardless of one's preference, every reader of this book will be impressed with the authors' insights, analyses, and their scholarship.

When I sent out invitations to possible contributors, I left the choice of topics open. I was gratified that everyone I contacted enthusiastically consented to write for the special issue. I took this as an indication of their interest in read-

ing what Turner and Mazur had to say and about the present state of democracy. Unfortunately, two withdrew because of other pressing demands and one resigned because of failing health. It is regrettable that those three were unable to write what would have been intriguing responses to this book. The essays which are contained here differ in length and in approach. They are arranged here in three categories: those essays which engage in specific ideas; those which build upon comments; and finally, those which are more personal reflections. Each contributor took his or her task seriously and the result is a kind of dialogue between Turner (and Mazur and Factor) and the contributors themselves. Rather than attempting to summarize the chapters, I will let the contributors speak for themselves. I do want to thank the contributors for their efforts and to thank Leslie Marsh for agreeing to this project.

FINAL COMMENTS

Making Democratic Theory Democratic is not an easy or a comfortable book to read, but it was not intended to be easy or comfortable. Turner and Mazur raise the question of why is there a gap between what democracy promises and that what the administrative state delivers. Turner and Mazur may not provide a final answer to this question but they do eliminate the gap in what an author promises and what that author delivers. Turner and Mazur provide much needed reflection on the idea of democracy and its reality. It is the hope that this Special Issue will prompt people to reflect on what these contributors have offered in response to Turner's and Mazur's book. The Editor and the Contributors also hope that what we have written will also prompt others to read *Making Democratic Theory Democratic* themselves.

Democracy, Law, and Administration. After Weber and Kelsen: A Critical Reading

HUBERT TREIBER

I. PREFATORY REMARK

I should like my contribution to be understood as a critical epilogue or addendum to the impressive book by Stephen Turner and George Mazur. If I am on the right track, the ensuing account shows what we stand to learn if we read their book in the light of pertinent German scholarship on the territory it explores. I consider the role of four thinkers who are especially prominent in their analysis: Max Weber, Hans Kelsen, Woodrow Wilson, and Carl Schmitt. On the grounds of brevity and parsimony, as well as my own competence, I have most to say regarding two relationships: Weber and Kelsen; and Weber and Schmitt.

II. WEBER AND KELSEN ON THE RULE OF LAW AND THE LIMITS OF ADMINISTRATIVE DISCRETION: THE AMERICAN AND GERMAN MECHANISMS OF COUNTERPOISE

Lengthier remarks are needed on Hans Kelsen, who must be viewed as an avowed legal positivist. Among the authors in question, he is the only one whose pure theory of law is connected with a particular theory of democracy.[1] This theory recognises one formal principle: the participation of the ruled in the exercise of rule, without that participation being tied to any particular content or values. For Kelsen, the fact that the pure theory of law and democratic theory can be related (are related) to one another owes itself to a relativism of values which finds its expression, above all, in the idea that political decisions are not tied to a respect for particular values, but rather come into being through a majority will. This gives expression to a "metamorphosis" acknowledged by Kelsen, a regulative idea in the Kantian sense, which assumes that the libertarian ideal of an absence of rule (Herrschaft), distinctive to democracy, must be striven for, but cannot be achieved. Kelsen makes provision to detach the principle of unanimity from the principle of the majority. In turn, this only works if like-minded individuals group together into parties, if the basic tenet of representation is recognised through a proportional voting system, and if compromise is a principle that upholds democracy. In this way, the minority is granted the chance to be heard among the majority, especially since the minority can also become the majority. Kelsen's notion of democracy recognises the principles of both equality and freedom; in applying this formal principle together with the neutrality of values demanded by Kelsen, the greatest possible freedom should be granted to everyone subjected to rule

(Herrschaft). This is closely connected to Kelsen's two debates with Schmitt about parliamentarianism and who the "custodian of the constitution" is. While Kelsen lends his weight to parliamentarianism in the sense outlined above, Schmitt sees its end as having arrived. While Kelsen argues for legal jurisdiction over the constitution, Schmitt rejects the idea that a court can take on this function and ascribes this important function to the President of the Constitution of Weimar (Olechowski 2021, p. 507 ff). Kelsen held to the distinction between *Sein* (be) and *Sollen* (ought), but replaced his original orientation to neo-Kantianism with aligning himself with Cohen.[2] Studies on Kelsen rightly point to his discovery, through Cohen, of the "principle of pure obligation" ("das Prinzip des reinen Sollens"), even they assert that his interpretation of Kant extended "consciously beyond Kant".[3] However, two points are overlooked: first, that Cohen was here picking up the Fischer-Trendelenburg debate; and second, that although he was "seeking to create *proximity* to Kant terminologically and through abundant citation, in reality he succeeded in establishing the greatest conceivable distance to him: 1. by choosing to perceive in the 'Critique of Pure Reason' its opposite, a 'critique of experience' (Erfahrung), whereby 2. he pursued—and had to pursue—a completely independent line of argument against the 'Critique of Pure Reason'. In the process, 3. he selected his quotations solely according to their usefulness for his own theory, without paying any attention whatsoever to their respective value in the 'Critique of Pure Reason'. 4. He uses these quotations and even whole passages dogmatically as entirely objective, autonomous formulations irrespective of their original argumentative function, claiming a terminological and semantic identity of their own in his work and that of Kant" (Köhnke 1986, p. 273 and footnote 2).[4] Cohen's reception made it easier for Kelsen to detach himself from Jellinek's "two-sided doctrine" ("Zwei-Seiten-Lehre"), which he now decisively rejected (Olechowski 2021, p. 331),[5] even though he had initially oriented himself towards Jellinek and had come to Heidelberg because of him.[6] In his theory of the state, Jellinek advocated the "two-sided doctrine". Originally this is not a neo-Kantian "invention", but can be traced back to the example of the symphony found at the beginning of Jellinek's *System der subjektiven öffentlichen Rechte* (Jellinek 1963, p. 147). The distinction drawn there between a "psychological" and a "physiological" view seems to have its origins in Hermann von Helmholtz's 1870 study, *Lehre von den Tonempfindungen als physiologische Grundlage für die Theorie der Musik*.[7]

Stephen Turner's suggestion that "Max Weber and Hans Kelsen may seem unexpected sources for a discussion of the normative concept of the rule of law" (chapter 9) allows me to suggest a comparative consideration of administrative oversight (control) in the American and German contexts, oversight that ought to guarantee everything the "constitutional state" stands for. At the same time, this affords the opportunity, first, to relativize the criticism of the American administrative control (p. XXIIff.), and second to reassess the application of "agency theory … against misrule". An obvious starting-point for this is provided by Scharpf (1970, p. 13) in which he limits himself to "the question of the interaction between democratic and constitutional governance and the oversight of public administration and the comparison between the US and Germany".

In comparison with American administrative control (Verwaltungskontrolle), the German equivalent is distinguished by the fact that it presupposes laws that do not relate to individual cases and that are formulated as generally, but also as precisely, as possible. This implies a "pressure to formulate laws proleptically" (Scharpf 1970, p. ?),[8] which both "reduces the quality and quantity of information that can be used for decisions" and also "favours organised, conflict-ready interests which (can) exercise political influence". If the laws are not formulated precisely enough, their review reaches the administrative courts because in Germany "legal relief for the administration is formulated in the first place as protection through administrative courts, while in the United States the emphasis lies on the legal processes employed by the administration itself" (Scharpf 1970, p. 14). To put it in a more pointed way, "German administrative law (is) primarily substantive law, while the American equivalent is predominantly procedural law; as a rule, German judges check the factual 'correctness' of a contested administrative decision, while their American counterparts check the 'fairness' of the process through which the administration reached its decision" (Ibid). The model in America was the creation of regulatory commissions, the procedure of which became the standard procedure for American administration with its three maxims: notice, hearing, and decision on the

record (Scharpf 1970, p. 17f). "Notice" means that the person affected has the right to be informed "about the subject of the process and the issues of fact and of the law that are relevant to the decision", something which is not the case in Germany. The German model leads to an "expansion of the legal sphere at the cost of the political and administrative spheres", because there it is a question of establishing the "substantively correct decision", which the judge reaches independent of political or administrative considerations and which, thus, cannot be criticised (or set down) (Scharpf 1970, p. 38). As a rule, correctness means "complying exactly with precise regulations". As long as the regulations are expressed precisely, "constitutional legal relief is functionally an instrument of hierarchical administration and discipline for the authorities carrying it out" (Scharpf 1970, p. 40). As soon as administrative regulations are expressed less precisely and require further specification, checking their correctness leads to "displacement in judgement on the matter (...) to the jurisdiction of an administrative court" (Verwaltungsgerichtsbarkeit) (Scharpf 1970, p. 41). This leads to a situation where the lawyerly art (Juristenkunst) is granted primacy over democratic political decisions, i.e. "in Germany adopted laws seem to be freed from the political process that produced them, becoming raw material for juristic work on correct law" (Scharpf 1970, p. 49). Above all, this is the case when general rules or discretionary guidelines (Ermessensrichtlinien) become norms in laws or ordinances and when information is not available in advance. If the German administrative system or parliament wishes to avoid the threat posed by this "review of correctness", then both are compelled to achieve a "legal-technical 'perfectionism'". It is different in the American model (in our simplified presentation). "Purposive programmes" (Luhmann) are imposed on the American administrative system: "here is the problem, deal with it." Here, the emphasis lies not on checking the substance of administrative judgements, but rather on the strict monitoring of the administrative process and on the further development and refinement of its rules (Scharpf 1970, p. 25). Because the influence of organised and conflict-ready interests is smaller in the American administrative system, the administration has:

> the chance in the American model to tackle a task assigned to it in an autonomous way and to seek satisfactory regulations in a pragmatic way. However, the price of this freedom is the risk of possible political intervention at any time. As such, it is (...) compelled to orient itself continuously to the political process when developing its programme or decisions. As a result, Congress and the executive are able to concentrate in their law-making on those decisions that are most important politically, because they also hold the key positions in the administrative system and so maintain the option to intervene at any time in the light of events to correct the administrative course (Scharpf 1970, p. 69f).

In this way, democratically elected politicians strengthen their opportunities to oversee or control the bureaucracy. In simplified terms, the comparison shows a politically oriented system opposing a legally oriented system, "in which key positions are no longer occupied by democratically accountable politicians, but by the jurisdiction of administrative courts, by jurisprudence, and not least by a legally qualified executive bureaucracy" (Scharpf 1970, p. 77).

Through this comparison, Scharpf's discussion relativises Turner's and Mazur's critique of the American model and at the same time reveals that the latter is more prone to manage the "fundamental contradiction between rule and human self-realisation (...) by connecting the programme of the rulers democratically with the demands and interests of the ruled and by structuring, limiting, and monitoring through legal means the power to exercise rule" (Scharpf 1970, p. 9) than the „perfecting of the German constitutional state" would make possible (Scharpf 1970, p. 56). At the very least, it seems to me that Scharpf's comparison is better suited than agency theory to reveal the problems that exist and their possible solutions.

III. WEBER AND WILSON AND THE THIRD PARTY THAT LINKS THEM

1. Preliminary remark on Weber

Even though emphasis is always placed on hierarchy and power of authority (Weisungsrecht), especially in legal publications, empirical studies on "the development of programmes or laws in ministerial organisation" have demonstrated that use is extremely rarely made of the power of authority and that hierarchy is replaced by a process that must be characterised as dialogue between ministers and their departmental specialists (*Fachreferenten*) (Mayntz 1975, pp. 100 ff). The "neutral civil servant" [of Max Weber] has also taken their leave from ministerial organisation (Putnam 1973), pp. 257-290; Steinkemper 1974; Aberbach. Putnam, and Rockman 1981). Jurisprudence holds onto the idea of hierarchy because this should ensure that the "will of the law-maker" (i.e. parliament) is followed without deviation, something that previously applied to the "will of the ruler". That is, it would have to distinguish what it is that particular statements refer to: normative rules or empirically observed practice. Weber is unable to conceive of a "negotiating administration" in the manner that has been proven by numerous implementation studies.[9]

When considering Weber, the following also applies: he did not see that conceptual jurisprudence (*Begriffsjurisprudenz*) was a polemical term introduced by Jhering against pandect science (*Pandektenwissenschaft*) and applied above all to G. F. Puchta—this has been demonstrated only by recent research.[10] Puchta's servitude theory (Servitutenlehre) appeals here because some of Puchta's formulations could be construed as a "conceptual pyramid". Weber conceived his ideal-type of modern bureaucracy with the help of so-called conceptual jurisprudence, which led to an overemphasis of logic.[11] Weber neglected, for example to "measure" Puchta's system against his ideal-typical standard.[12]

Turner and Factor's chapter 8 has to have a question mark applied to it because of Jhering. That question mark derives initially from Joachim Rückert's article "Der Geist des Rechts in Jhering's 'Geist' und Jhering's 'Zweck'" (Rückert 2004, pp. 128-149; 2005, pp. 122-142).[13] As a legal historian, Rückert reveals which particular cognitive interest Jhering was pursuing in these two publications. For Jhering, "Zweck" (purpose) is a shorthand for his book's cognitive interest, namely "to seek out the driving forces and illustrate which of them generate and maintain movement in society (the theory of social mechanics)".[14] In this way, Turner and Factor's reflections in chapter 8 place "Jhering's the law as a means to an end" in a different context, which certainly make sense and is convincing, but which does not match Jhering's own interest. In addition, the reference to Jhering in this chapter makes me realise that there is no evidence that Weber read Jhering's "Zweck im Recht" in the relevant context; Weber was familiar with Jhering's "Zweck im Recht", as his remarks in, among others, *Wirtschaft und Gesellschaft (*WuG*)*: pp. 15, 17; *Economy and Society* (ES): pp. 29, 34, demonstrate: however, these passages relate to Jhering's use of the terms *Brauch*, *Sitte*, and *Konvention*; the mention of Jhering in WuG, p. 464; ES: p. 796, relates to his "Geist des römischen Rechts". This question mark should remind us that even such an outstanding expert on Weber's sources as Marra mentions Jhering in the context claimed by Turner and Factor neither in his preliminary study (Marra 1989, pp. 355-404) nor in his book (1992). Furthermore, we can point to the following notable observation made by G. Dilcher and S. Lepsius (both of whom are renowned legal historians) in their edition of Weber's *Zur Geschichte der Handelsgesellschaften* (*MWG I/1* v. 2018): "The extent to which Weber is influenced here by the critical legal theory of Rudolph von Jhering has hitherto hardly been clarified; only Stephen P. Turner insists strongly on this point" (*MWG I/1*, Einleitung, p. 69 f.). That is to say, the discussion in the section "Jhering's the law as a means to an end" neither matches the latter's cognitive interest, nor is it certain that Weber also shared these ideas.

III.2 On the marginal role of parliament in Weber's Anstalt state—with proof that Weber and Wilson draw on Hegel

It might well seem unusual to put Weber and Wilson together. Let me justify this in what follows. Before that, it must be pointed out that democracy, i.e. parliament, scarcely plays any role in the first of the relevant publications of the two authors. Weber either speaks of rule (*Herrschaft*) or, when he uses the term state, which he actually sought to avoid, of the *Anstalt* state (WuG: 6; ES: 14). In doing so, he turns the legal term *Anstalt* into a sociological one, following the approach set out in his Categories essay.[15] However, as Hermes has shown, Weber remains a prisoner of the legal concept of *Anstalt* in this attempt (Hermes 2006, pp. 184-216; 2007, pp. 81-101). When it comes to democracy or parliament, the evidence presented by Schönberger that parliament played an extremely marginal role in the *Anstalt* state, mirroring the situation in the Bismarckian state is significant (Schönberger 1997).[16] Otto Mayer already stresses the marginal role of parliament when he states: "The monarch made arrangements by organising and planning material and personal resources so that he could rule the country. That is an *Anstalt*. The people, the population, is the object of its influence: privileged members of this mass constituting the bourgeoisie may be able to express their constraining voice in the functioning of this *Anstalt*, but this changes nothing" (Mayer 1908, vol 1, pp. 1-94).[17] Here, Schönberger's additional explanation should not be neglected: "This alignment of monarch, the bureaucratic apparatus, and parliament corresponds entirely to Laband's state law. The monarch is the 'head of this large *Anstalt*' (Mayer), and the representation of the people is able only 'to express their constraining voice' in the operation of the *Anstalt*, without shaping it in any fundamental way. However, in Laband's system, it is the juristic personality of the state with the monarchic bearer of state authority that corresponds exactly to this *Anstalt* apparatus dominated by the monarch. For Laband, it does not represent the constitutional state, but rather the monarchic-bureaucratic apparatus. The identification of the state with the bureaucracy which is so obvious in Wilhelmine Germany becomes particularly vivid in Mayer's description of the "*Anstalt* 'state'" (Mayer 1908, p. 54). It originated in the particular dominance of bureaucracy under the Prussian-German constitutional monarch and was strengthened by the general increase in bureaucratisation analysed by contemporaries such as Otto Hinze and Max Weber" (Schönberger 1997, p. 315).[18]

Although he is not mentioned by a Kelsen expert like Horst Dreier, Hintze analysed Kelsen's 1925 *Allgemeine Staatslehre* thoroughly and engaged with it critically (Hintze 1927, pp. 66-75).[19] Hintze's discussion relies on a broad knowledge of the literature and is characterised by its clear and precise line of thought. According to Hintze, the state is for Kelsen "nothing less (…) than the legal order itself, i.e. a system of norms for the behaviour of people who live together" (Hintze 1927, p. 66). In this sense, Kelsen's "representation of the state [is limited] to a purely juristic standpoint" (Ibid.) and is "guided by the attempt to develop the object from a single basic principle, namely from the idea of the state as a normative coercive order of human behaviour" (Hintze1927, p. 67). Hintze acknowledges that Kelsen sees "democracy as actually the normal and appropriate state form of the present" (Hintze 1927, p. 70). Hintze sees the "identification of the state and the legal order" as "the dogma which underpins the author's entire line of argumentation," (Hintze 1927, p. 73) which has "lost all touch with real life" (Ibid.). This is also demonstrated by the fact that "the concept of revolution has in fact completely disappeared from this system" (Hintze 1927, p. 73). Hintze summarises his critique in the following sentence: "The state is, thus, inconceivable without the law and the law ineffective without the state;[20] but it is an arbitrary assumption that the legal order is therefore simply identical with the state and that the state is nothing other than the legal order itself. The author has not substantiated that claim, not even in his debate with M[ax] Weber (p. 191f)" (Hintze 1927, p. 72). According to Hintze, Weber also drew the logical corollary in his discussion of the development of the state, which led to Kelsen's critique: that we have to distinguish between "different degrees of stateliness" in the "different historically concrete formations known as 'states'" (Ibid.). In the sentence above, Hintze emphasises that "the law is not effective without the state", and he reinforces this, first, by pointing out that "individual will, which is directed towards specific purposes, consistently puts into question the

realisation of the normative collective will" and, second, by emphasising that, "in order to carry out and secure" this collective will, a power is necessary that "is authorised to use violence for this purpose" (Hintze 1927, p. 71). He adds that this "power that secures the legal order, and which is at the same time also rooted in the basic life purpose (Lebenszweck) of protection and defence, came to be designated as the 'state'" (Ibid.).[21] Hintze acknowledges in Kelsen an approach which he refers to as "basically dogmatic and scholarly" because, (Ibid.) out of "the two forms of thought represented by *Sein* (being) and *Sollen* (what ought to be)" Kelsen makes "objective poles of reality and the ideal world of norms, and all connection between the two is lost" (Ibid.). Hintze sees one such example in the "social sphere" and reminds us in this context of Jhering's purposive thinking (Zweckgedanken) with the observation that "the immanent purpose of naturally given groups of people who live together (is) to fulfil the conditions on which this communal living depends" (Ibid.). Insofar as "the norms on which the legal order is based" (Ibid.) belong to these conditions, the latter exist "in a living relationship with reality" (Ibid.). For Hintze, this reality is "nothing other than the objectivised will of collectivised individuals as long as it is directed towards the purposes of the collective" (Ibid.). Kelsen's theory of the state, "which completely excludes the concept of power and which recognises no relationship between states other than the legal," (Hintze 1927, p. 74) is compared by Hintze with "the opposite tendency of radical one-sidedness", which "only wants to recognise power" and through this irreconcilable opposition thereby creates a contemporary reference that applies exclusively to Germany of that time. For Hintze, this contradiction is, "with its harsh, now apparent irreconcilability, a symptom of a dangerous sickness in political life and thought" illustrated nowadays by no people other than the Germans and by them only since the great collapse of the state" (Hintze 1927, p. 75).

Weber and Wilson can be brought together because they both draw on Hegel in their presentation of (modern?) bureaucracy. Schluchter had already seen that "institutional and psychological preconditions for an officialdom that was loyal to the state, aware of the law, and oriented towards service" could be found in Hegel's *Grundlinien der Philosophie des Rechts* (1821):[22] more specifically, "the hierarchical organisation of authorities, the formalised differentiation of competences, the selection of personnel and promotion from above, alimentation by the state, the acquisition of particular skills, and the development of a 'professional ethos', which resulted in 'dispassionate, lawful, and meek behaviour' and conceived service for the state as 'a value in and of itself'" (Schluchter 1972, p. 38). Sager and Rosser (2009) prove that Wilson, who was able to read Hegel in the original, drew on Hegel, for example, in "The Study of Administration",[23] so that this common source (for all their differences, which are also apparent) brings into being a congruence between them. Of course, it is astonishing that an author like Hegel should come into question as the source of an ideal-typical construction of modern bureaucracy for Weber or of proposals for reform for Wilson.

III.3 On Weber's "discovery" of parliament and his often criticised attempt to use a plebiscitary Reichspräsident to create a "counterweight" to mass democracy and increasing bureaucratisation

Already in the (First World) War, Weber published his often cited essay "Parlament und Regierung im Neugeordneten Deutschland" ("Parliament and Government in A Reconstructed Germany"), which, as the title indicates, set government and parliament in opposition to one another.[24] The essay assigned to parliament primarily the following tasks: it was to serve in the selection of individual leaders or politicians;[25] it was to turn parliament into one that was fit to function by introducing the right to decide on the budget (Budgetrecht) and the right of enquiry (Enquêterecht). Through his autonomous legitimacy which was founded in charisma, the plebiscitary President was to constitute a counterweight to the bureaucratisation that could be seen everywhere. These ideas of Weber's were realised in the Weimar constitution because of the influence he was able to exercise through Hugo Preuß.[26] The first demand to select political leaders goes back to the observation that, after Bismarck's resignation, it was not politically aware politicians who stepped forward as his successors but officials, who do not embody the "will to power" and do not have to prove themselves in political struggles. This contradiction goes back to the opposition presented by Weber in his lecture "Politik als Beruf" ("Politics as vocation"): "according to his actual profession (the) real of-

ficial (…) should not undertake politics, but should 'administer'".[27] By contrast, the real politician has to "fight", because: "partisanship, fight, passion—ira et studium—these are the elements of the politician." The right of enquiry, first proposed by Weber in 1908 (Mommsen 1974, pp. 164, 183ff) and adopted in the Weimar constitution, represents a parliament that is fit to function. As can easily be demonstrated, Weber's advocacy of a plebiscitary Reichspräsident has elicited varied reactions. The advantages and disadvantages resulting from a plebiscitary, parliamentary, or federalist head of state played a very important role in this suggestion.[28] What also needs to be considered is that an authority based on "charisma" is relatively unstable, especially as "recognition by the ruled is the cause not the consequence of this legitimacy". Thus, it proceeds from an "anti-authoritarian inversion of charisma" which enables Weber to talk of a "democratic legitimacy".[29] In his standard work *Max Weber und die deutsche Politik*, Mommsen devotes a whole section to the "after-effects of Max Weber's theory of the Reichspresident as a political leader" (Mommsen 1974, pp. 407-415). (With knowledge of the rise of Hitler).[30] Mommsen criticises Weber for having allowed a "power-obsessed politician onto the Presidential seat", "who used charismatic and demagogic means to escape the formal and constitutional limits of his office as leader and exercised his influence outside of those same limits". He brings Weber together with Carl Schmitt by describing Schmitt "as a docile pupil of Max Weber", even if he qualifies this as follows: Weber "never intended in any way to turn the idea of plebiscitary leadership against the party state, let alone its further development into the total rule of Hitler the charismatic politician and his party of followers, the NSDAP, which identified itself with the state, or he considered it possible only in the course of all conceivable passage of time" (Mommsen 1974, pp. S. 407f, 414). Correctly, Mommsen states that the "plebiscitary-charismatic conception of leadership (was) already formulated in 1917, and (…) at first remained predominantly tied to the constitutional parliamentary system. Only in 1919, as a result of the failure of the post-revolution parliaments, did the anti-parliamentary version of this idea fully make its breakthrough, an idea for which Weber coined the term 'plebiscitary Führer democracy'" Mommsen 1974, p. XIV). Clearly Weber could see what he acknowledged in "Parlament und Regierung", namely that "any form of popular election of the highest bearer of authority" in which the confidence of parliament is not requested stands "on the path to those 'pure' forms of Caesarist acclamation."[31] Yet, in the first edition of *Max Weber und die deutsche Politik* in 1959, Mommsen still wrote that Weber had contributed by making "the German people inwardly willing participants in the acclamation of a leader, and in this respect also of Hitler" (Mommsen 1959, p. 410). At the Heidelberg sociologists' conference of 1964, which was supposed to honour Weber and his work in the presence of prominent American and French scholars, papers were instead given and discussions conducted which, according to Adorno, declared Weber to be "at best a turn-of-the-century thinker"[32] accusing him of positivism and his postulate of being value-free (the problematic consequence of positivism). Moreover, Weber was dragged closer to the Third Reich, insofar as he was connected to Carl Schmitt's decisionism or Mommsen's claim was repeated that "Schmitt had been a legitimate pupil of Max Weber" (Stammer 1965, p. 81). In the publication on the sociologists' conference, this formulation was softened, in that Schmitt was now described as "a 'natural' son of Max Weber" (Ibid.). Furthermore, the election of Hitler by the masses was no longer attributed to Weber's advocacy of a plebiscitary presidential election, but rather it was now explained that Weber's "militant late liberalism" had "consequences in the Weimar period that we must ascribe not to Weber but to ourselves when we read Weber here and today" (Ibid.).

Mommsen, whose standard work from 1959 was repeatedly referred to by participants, corrected his claim that "Weber's theory of charismatic Führer rule" contributed "to making the German people inwardly willing participants in the acclamation of Hitler as Führer" (Mommsen 1959, p. 410): in a contribution published in 2001 on "Politik im Vorfeld der 'Hörigkeit der Zukunft': Politische Aspekte der Herrschaftssoziologie Max Webers" ("Politics approaching its 'enslavement to the future': Political aspects of Max Weber's sociology of rule") (Hanke and Mommsen 2001, pp. 301-319). He now conceded that "behind the one-sided and in some respects rash construction of 'plebiscitary Führer democracy' (there stood) equally the motive to try to maintain a system of freedom in a world tending to oppose petrification" (Mommsen 2001, pp. 303-319, here p. 318). Mommsen thereby moved closer to Stefan Breuer's posi-

tion, if not entirely adopting it. As a renowned expert on Weber's sociology of rule (Breuer1994a), the latter sees the "concept of plebiscitary Führer democracy not in a continuity with National Socialism (…), but, by contrast, as illustrating the always problematic attempt to domesticate the charismatic tendencies of modern mass democracy" (Breuer 1994b, pp. 145, 176-187, 202-206).

IV. ON SCHMITT AND WEBER AND HIS CRITIQUE OF PARLIAMENTARIANISM

At this point it is necessary to explore in more detail the contact and meetings between Weber and Carl Schmitt.[33] Schmitt was in the audience when Weber gave his lecture on "Wissenschaft als Beruf" (science as vocation) in November 1917 and on "Politik als Beruf" (politics as vocation) in January 1919, and in the winter semester of 1919/20 he attended Weber's lecture on "Economic and Social history". Accepting an offer from the Handelshochschule in Munich on 1 September 1919, where Melchior Palyi also taught, enabled him to participate in Weber's private seminar every Saturday in the winter of 1919/20 at the latter's invitation.[34] A letter from Weber to his former colleague at Heidelberg, Karl Vossler, who had moved to Munich, attests to this: "We (Rothenbücher, Palyi, Cosack, Landauer, Janetzky, Geiger, v. Aster, Schmitt, Clausing, occasionally Kroyer) [form] a kind of "Eranos" here, a small circle[35] where one of us speaks every fortnight and then we discuss it—possibly many times, one after another. Always Saturday 9-11 at the Staatswirtschaftliche Seminar in my office" (MWG II/10: 924). In short: Carl Schmitt was very familiar with Weber's works and Weber expressed his appreciation for him, as is shown by his invitation to the private seminar and also by the inclusion of Schmitt's political theology.[36]

Schmitt's critique of parliamentarianism discussed in chapters 5 and 8 of the book by Turner and Mazur acquires a different significance if we consider Schmitt's publication "Nationalsozialistisches Rechtsdenken" ("National Socialist Legal Thought") in the journal *Deutsches Recht* in 1934. Here, Schmitt cites the statement by a "world famous, widely travelled, experienced legal scholar over 70 years of age from the United States of America", who told him in a conversation in 1932: "We are experiencing the bankruptcy of the *idées générales*." This statement is said to have prompted Schmitt's turn to National Socialism (Schmitt 1934, p. 225). Or Bassok has proven that the "world famous legal scholar" was Josef Redlich (1869-1936) (Bassok 2021), pp. 694-722). In 1931, Redlich was the Fairchild Professor of Comparative Public Law at Harvard Law School; he was a renowned jurist at Vienna University; and he was Austria's final k.u.k Finance Minister. As such, our attention turns towards Vienna, which means the lecture Max Weber gave on 25.10. 1917 to the Sociological Society on "Probleme der Staatssoziologie" ("Problems of State Sociology"). Redlich was also among the audience and called Weber's lecture "brilliant" (Ehrle 1991). Redlich knew Max Weber from the general assembly of the Verein für Sozialpolitik in Vienna in 1909, but his acquaintance with Alfred Weber went further back. When Weber was living in Vienna in 1917 and 1918, he also met privately with Redlich. A.v. Rosthorn also attended one of these meetings with his wife on 9.5.1918. He had given a talk at the "Eranos" circle in Heidelberg on the origins of Chinese religion and also contributed a piece to the commemorative volume for Weber (Treiber 2021, p. 111ff). In his dissertation written under Wilhelm Hennis, *Max Weber in Wien* (1991), Ehrle reports for the first time on Weber's lecture, which received attention solely because Weber introduced in it a fourth type of legitimacy, the "will of the ruled", which deviates from the three types of legitimacy presented in his sociology of rule. Contrary to the legal theory of the state which was widespread at the time, this type of legitimacy did not proceed from the will of the ruler. Ehrle draws on the report carried by the *Neue Freie Presse* on 26.10.1917, the text of which is now accessible in the sociology of rule in Weber's complete works (MWG I/22-4: 752-755). The *Freie Presse* wrote about this fourth type of legitimacy as follows: "Finally, he [Weber] turned to how the modern development of the western state was characterised by a fourth notion of legitimation, that form of rule which derives its legitimacy, at least officially, from the will of the ruled." There followed a qualification: "In its initial stages, it is far removed from all modern ideas of democracy. However, its specific bearer is the sociological formation of the western city, which differs from all other urban formations of other

periods and peoples in the manner of its development and its sociological purpose in antiquity and the Middle Ages" (MWG I/22-4: 755).

Weber's mention of the "sociological formation of the western city" and the fact that he "discusses non-legitimate rule most frequently in his study on *Die Stadt* (*The City*)" (Breuer 2006, pp. 149-167, here p. 158) immediately suggest that we look in more detail at how Weber characterises the non-legitimate rule of the western city. This has been undertaken by Stefan Breuer, who demonstrates that the examples that Weber once invoked to illustrate non-legitimate rule in the western city[37] are in fact repeated in the final version of the sociology of rule, but they are given "a new interpretation".[38] This new interpretation can apparently be traced back to the fact that Weber was, "from about 1917", observing a "Caesarist element" in mass democracy.[39] For Breuer, this permits the conclusion that "non-legitimate rule [is not] identical with city rule"; non-legitimate rule encompasses "a substantially wider field than city rule" (Breuer 2006, p. 153). This new interpretation recurs in the "anti-authoritarian reinterpretation of charisma".[40] E. Hanke drew a provisional line under this discussion by asserting that Weber had discarded the idea of a fourth type of legitimation "because it could not be incorporated into the strict conceptual logic of his sociology of rule" (Hanke 2022, p. 28).

Carl Schmitt's critique of parliamentarianism acquires a different meaning[41] if we invoke Redlich's statement cited by Schmitt, rather than connecting it, as Bassok does, with the charge of positivism (Positivismusvorwurf) with which German jurists previously "excused" their involvement with National Socialism. For example, since the work of Manfred Walther (1989, pp. 323-354) and Bernd Rüthers, who pointed to the "art of exegesis" practised by jurists in relation to civil law (Rüthers 1988), the critique of positivism can no longer be applied. In his essay "Die Rechtswissenschaften in Deutschland zwischen Grundgesetz 1949 und Stammhein/ Mogadischu 1977—ihre Zielsetzungen, Werkgestaltungen und Rechtswerte" (Rückert 2022, p. 214f?) the legal historian Joachim Rückert? writes of the "positivism legend" in connection with the Radbruch thesis which he criticises. This "legend" shifted "guilt in relation to state injustice, especially in statutory form, onto the intellectual and moral defencelessness of liberal victims". Rüthers distinguishes himself by considering the techniques of conformity developed by jurists in their reinterpretation of civil law under National Socialism in the context of the techniques of conformity which could be "observed in the conformity of legal norms to transformed economic and social circumstances". That is to say, the "interpretative techniques of conformity developed during the collapse of the value of money proved to be suitable also, to a considerable degree, for accommodating civil law to the new basis of political values" (Rüthers 1988, p. 4).

Helpful, by contrast, is Hasso Hofmann, a renowned critic of Schmitt. In his 2002 book *Legitimität gegen Legalität* we can find this additional point: "For Schmitt, the respective concrete situation of the 'existing thinker' is not by nature necessary or self-evident, but rather historical, i.e. ultimately contingent, and furthermore political, which means that the situation that is to be dealt with juristically and the types and forms of human co-existence are constituted, structured, and ruled by particular ideas" (Hofmann 2002, p. 79). According to Schmitt, in Hofmann's argument, "a jurist, in general, and a teacher of state law, in particular," has to practise political theology if he wants to move "beyond simply superficial 'observations' (and) come closer to the 'ideal structure' of juristic concepts". That is, "he has to explore the juristic concept for its political substance and relate the emerging structurally determinative political idea with the 'metaphysical centre' of the intellectual movement that rules the situation" (Ibid.). In Redlich's statement, Schmitt sees his own view confirmed that parliamentarianism is nothing less than the fulfilment of his perception of the requirement to practise political theology. Furthermore, Hofmann establishes a direct connection between the "factive normality" (a phrase coined by Schmitt) assumed by Schmitt in the given of the "historically concrete situation determined and ruled by particular ideas" and Max Weber, who advocated the view that "ideals and values cannot be proven, only believed, and that the object loses its normative character in the empirical examination of what is valid normatively, being necessarily treated as 'being' and no longer as 'valid'." Seen in this way, "the question of normative validity" is transformed into "the question of fundamental beliefs" (Hofmann 2002, p. 80). According to Hofmann, Schmitt thus had to

"always be 'at the forefront of the times'" (Hofmann 2002, p. 82) which made him prone to adopting "the political terminology of his time" (Hofmann 2002, p. 85).[42] It is not by chance that Schmitt concludes his 1934 essay, "Nationalsozialistisches Rechtsdenken", with the sentence: "We are on the side of what is coming!"

Schmitt's critique of parliamentarianism is not only situated "at the forefront of the times" (being prone to borrow from the predominant political terminology) but also asserts the "death of bourgeois-liberal parliamentarianism" with the "loss of the ideal preconditions" (Redlich: "We are experiencing the bankruptcy of the *idées générales*") (Hofmann 2002, pp. 89, 87). The "ideal preconditions" refer to the principles that carry parliamentarianism, such as the public sphere, discussion, and representation" (Hofmann 1986, p.250ff) which Schmitt sees no longer being fulfilled in the actual practice of the parliamentary democracy of his time, because he "measures" them against a standard which did not apply in the 19th century either; and he does not ask himself to what extent these principles could still even have validity in a mass democracy (people's democracy). Kelsen's conception of this "metamorphosis" and the meaning he ascribed to it were presumably not familiar to him. According to Schmitt, if these "ideal preconditions" no longer exist, the institution (parliament) that once rested on them is no longer capable of discharging its function to *create order*." What remains after a profound change of circumstances is only a façade, behind which are hiding completely different political currents and forces, enemies of the constitution even" (Hofmann 2002, p. 91). For Schmitt, the "loss of the ideal preconditions of parliamentarianism" is accompanied by the loss of the principle of legality that legitimises the legislative state, and positivist legality has to be replaced by the "principle of plebiscitary legitimation" which is the only one which remains possible (Hofmann 2002, p. 92f).

When the "idées générales" have become impossible to believe, then the general abstract concepts associated with them have also become meaningless: "The general concepts have then exhausted their role as a means to deal with a *concrete* historical situation; they are no longer the expression of a one-time reality, and in this way namely historically—they are no longer true. They now appear to be dissimulations and obfuscations of reality and thus, as a result of the totality of politics, they appear as particularly infamous political weapons" (Hofmann 2002, p. 158f). This compels to some extent "the necessity of a new political myth that can create order, because it is believed to be unquestionable" (Hofmann 2002, p. 159), through which the conceptual pair "friend—foe" proceeds as the basic category of the political (Ibid.).[43] This then requires a personal confession of faith, i.e. a personal decision.

Seen in this way, Schmitt's critique of parliamentarianism is more than simply a critique of the parliamentarianism of the Weimar period. Rather, Redlich's statement appears to Schmitt as a kind of summary symbol of his "foundational thought", so that he sees himself vindicated and, in view of the friend-foe dichotomy, he sees himself required to make a decision in favour of National Socialism, which gives him the certainty that he is at the "forefront of the times" or, as he formulates it in the final sentence of his publication in *Deutsches Recht*: "We are on the side of what is coming!"

Thus, we can establish the following: Schmitt's critique of parliamentarianism is not simply a critique of the parliamentarianism of the Weimar period, which indicates "the discrepancy between the idea and reality of modern parliamentarianism" (Hoffmann 2002, p. 90) but rather, by "proving" the absence of an idea that provides order, it only serves the purpose of abolishing bourgeois-liberal parliamentarianism in favour of the "'type' of concrete order" that the concrete reality created by National Socialism suggests.[44]

V. A SHORT AFTERWORD WHICH CAN ALSO BE READ AS A FOREWORD

My contribution is understood as an attempt to provide supplementary remarks, where appropriate, to the impressive book *Democracy, Law, and Administration. After Weber and Kelsen*, published by Stephen Turner and George Mazur, which might also make readers aware of relevant German publications.[45]

SIGLEN:

WuG = Wirtschaft und Gesellschaft. *Grundriss der verstehenden Soziologie*. 5. Aufl., hg. v. Johannes Winckelmann. Tübingen: Mohr (Paul Siebeck), 1976 2 Halbbände.

ES = Max Weber, *Economy and Society. An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich. Berkeley, Los Angeles, London: University of California Press 1978.

WL = Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, hg. v. Johannes Winckelmann, 7. Aufl. Tübingen: Mohr (Paul Siebeck), 1988.

Weber 2012 = Max Weber. *Collected methodological writings*, ed. Hans Henrik Bruun and Sam Whimster. London, New York: Routledge 2012.

MWG I/1 = Max Weber, *Zur Geschichte der Handelsgesellschaften im Mittelalter. Schriften 1889-1894*, hg. v. Gerhard Dilcher und Susanne Lepsius. Tübingen: Mohr (Paul Siebeck), 2008

MWG I/17 = Max Weber, *Wissenschaft als Beruf (1917/1919)*; *Politik als Beruf (1919)*, hg. v. Wolfgang J. Mommsen und Wolfgang Schluchter, in Zusammenarbeit mit Birgitt Morgenbrod. Tübingen: Mohr (Paul Siebeck) 1992.

MWG II/10-2: Max Weber, *Briefe 1918-1920*, hg. v. Gerd Krumeich und M. Rainer Lepsius, in Zusammenarbeit mit Uta Hinz, Sybille Oßwald-Bargende und Manfred Schön. 2 Halbbände. Tübingen: Mohr (Paul Siebeck), 2012.

NOTES

1 See Dreier 1986. The following observation in Olechoswski 2021, p. 10 also supports Dreier's view: Horst Dreier has "rediscovered the connection between Kelsen's theory of democracy and his theory of law".

2 The key terms here are "pure thought" ("das reine Denken") or the "logic of pure knowledge" ("Logik der reinen Erkenntnis"). On this, see, for example, Bauer 1968, p. 81.

3 On this, see Dreier 1986, p. 76f.

4 See also the entire section pp. 273-301, where the "core concept of construction", which is founded "on a misunderstanding and a false interpretation of Kant" is discussed, as well as the close proximity of Cohen's "interpretation of Kant" to Plato (ibid., pp. 284, 293). In his published lecture, Carrino 2011, p. 9, footnote 1, mentions Köhnke, but does not elaborate further.

5 The prevailing two-sided doctrine of the time is already rejected in Kelsen's *Allgemeine(r) Staatslehre* of 1925 (ibid., p. 6f.), where he takes the following view: "Only law (can) be the subject of a legal theory, [so] the state (would have to be) legal in nature and only legal, in order to be made the subject of a legal theory". See also Kelsen 1925, pp. 15, 17: "If the state is a system of norms, it can only be the positive legal order, because the validity of another order alongside it must be impossible."

6 In Heidelberg Kelsen only came into close contact with Emil Lederer, who was not an assistant to Weber as Olechowski believes (2021, p. 110), but instead worked at the "archive". On Lederer, see Eßlinger and Lederer 1995, pp. 422-444. Another piece published in this volume (Köhnke 1995, pp. 32-69), illustrates in exemplary fashion the difficulties associated with establishing the philosophy seminar and creating the post of an assistant. See ibid., p. 44f. and footnote 47, where Windelband's collaborator Ruge is shown to have adopted the title "assistant" for himself from 1905 without any justification.

7 On this, see Treiber 2016, pp. 145-260, here p. 147ff.

8 „Zwang zur vorwegnehmenden Formulierung von Gesetzen"

9 For example, Bohne 1981.

10 For example, Haferkamp 2004; Mecke 2009. Knowledge of 19th-century German legal history is essential for understanding Weber. This is shown above all by interpretations of Weber's typology of law, which is often represented as a two-by-two table. The correct interpretation of Weber's typology of law can be found in Treiber 2020, pp. 31-37; 2023, pp. 353-367, 354.

11 See Treiber 2019, pp. 196-224.

12 See Treiber 2020, p. 147ff.

13 I cite it according to the manuscript which is identical to the two publications.

14 Rückert, Manuskript, p. 16, in Jhering Zweck II, p. 1. Jhering held the view that "purpose" was to be seen as the "creator of all law". See the text on the title page of his book: "Motto: Purpose is the creator of all law".

15 WL: 440/ ES: 281, also the definition of "Anstalt", see Wissenschaftslehre (WL): 466/ Weber 2012, p. 296, the translation of "Anstalt" as "institution" does not render the intended meaning. See Treiber 2016b, pp. 62-96, 71f.

16 Where Schönberger (1997, p. 342ff) compares *Anstalt* with *Körperschaft* ("corporation", v. Gierke) and also explores how the church also has the character of an *Anstalt*, something with which Weber agrees. This assertion demonstrates clearly that the faithful (can) claim no right to have their say.

17 Cited according to Schönberger 1997, p. 315. Literal: "Möglicherweise haben die bevorrechtigten Mitglieder dieser Masse, die Bürgerschaft bildend, bei dem Betriebe dieser Anstalt ein hemmendes Wort drein reden zu lassen; das ändert nichts."

18 We must remember that Weber's definition of the state exclusively through the specific method of violence (see WuG: § 17 and p. 30; ES: 54 f.) was adopted from Laband 1911, vol 1, p. 71.

19 I am grateful to my colleague Hinnerk Bruhns (EHESS/ Paris) for the reference to Hintze.

20 See Popitz 1980 and Geiger 1964.

21 In addition to its reference to reality, Weber's concept of the state has an element of validity. See Treiber 2016, pp. 61-97.

22 See Hegel 1821, §§ 278, 283, 294, 295, 297, 205.

23 *Political Science Quarterly* 2(2), 1887.

24 At the beginning, Weber admits of himself that he "voted conservative almost three decades ago and later democrat". See Parlament und Regierung, 1958, p. 309, also ES, vol. 2, appendix II: p. 1381f.

25 For this, Art. 9 of the Reich constitution had to be changed, since it did not allow "someone to be able to be simultaneously a member of Bundesrat and Reichstag". See Parlament und Regierung, 1958, p. 342.

26 My colleague Jörg-Detlef Kühne (2018) wrote the standard work on the Weimar constitution. Kühne also produced the standard work on the *Paulskirchenverfassung* (1985). The expression "Parliament of Professors" is a colloquial description intended to express the fact that the educated middle classes were over-represented in this parliament. The description "Parliament of Officials" would be an accurate one. Cf. Kühne 1985, p. 571, Anlage 1: Plenum: 649 (later 655); academics: 81.7 %; jurists: 60.4 %; civil servants and teachers with that status: 54 %.

27 All quotations in *MWG I/17*: 189f.

28 Weber, *Gesammelte Politische Schriften*, p. 468ff.

29 WuG: p. 156/ ES: p. 268; See Whimster 2004, pp. 133-145, here p. 144.

30 On Hitlers seizure of power see, Lepsius 1986, pp. 53-66.

31 Weber, *Gesammelte Politische Schriften*, p. 394. See also Weber's following formulation: "The meaning of active mass democratisation is that the political leader (…) gains the trust and belief of the masses for himself and so gains power through mass demagogic means. According to the nature of the situation, this represents a Caesarist turning-point in the choice of leader" (p. 393).

32 Adorno according to Gerhardt 2003, pp. 232-266, here p. 244.

33 On this, see Breuer 2012, the chapter on: "Begriffe des Politischen. Carl Schmitt und Max Weber". Also recommended is Breuer 1984, pp. 248-267.

34 Schmitt's esteem for Weber can be seen in the fact that he "proudly pasted in his invitation to the private seminar in 1919/20 (…) into his own copy of *Wirtschaft und Gesellschaft* (Tielke 2015, p. 253, Nachwort). As Breuer (2015, pp. 89-104) has shown, Johannes Winckelmann consulted Schmitt on his edition of *Wirtschaft und Gesellschaft*. See Breuer 2015, pp. 89-104.

35 On the Heidelberg "Eranos", see Treiber 2021.

36 Under the title *Soziologie des Souveränitätsbegriffs und politische Theologie: I. Definition der Souveränität, II, Das Problem der Souveränität als Rechtsform der Entscheidung, III. Politische Theologie) in the Erinnerungsgabe für Max Weber: Hauptprobleme der Soziologie*, ed. Melchior Palyi (Munich, Leipzig: Duncker & Humblot 1923, vol. 2:3-35).

37 He wrote: "The dictators of antiquity and the modern revolutions; the Hellenic *aisymnetai*, tyrants, and demagogues; in Rome Gracchus and his successors, in the Italian city-states the *Capitani del populo* and mayors ant certain types of political leaders in the German cities such as emerges in the democratic dictatorship of Zurich, In modern states the best examples are the dictatorship of Cromwell, and the leaders of the French revolution and of the First and Second Empire," with the addendum "Wherever (…) legitimacy is pursued for this form of rule, it is sought in plebiscitary recognition by the sovereign people " (WuG: 156; ES: 268).

38 On this and as a whole, see Breuer 2006, p. 166.

39 WuG: 862f./ES: 1451; Breuer 2006, p. 166; Hofmann 1986, pp. 181-205.

40 WL: 475-488, p. 487 = Whimster 2004.

41 Kelsen (1925, p. 359) also considers Schmitt's critique of parliamentarianism. According to him "this institution [had] lost its foundation 'in the history of ideas' and [was] standing only as an empty apparatus by virtue of a simple mechanical inertia (…)! (Schmitt)." For Kelsen, this line of argumentation extended to "insinuating that liberal democracy was a metaphysical and, thereby, an absolutist world view". Kelsen orients himself towards neo-Kantianism (see e.g. §§ 2-5), Weber's *Wirtschaft und Gesellschaft* is repeatedly invoked, and particular attention given to Georg Jellinek's *Allgemeine Staatslehre* (1900). On this, see Kersten 2000.

42 Hofmann refers to Hartung 1934/35, p. 543.

43 Hofmann referring to Heller 1929, pp. 321-354, here p. 338.

44 That is, with the seizure of power, National Socialism created a concrete order that the National Socialist state has to secure or, if necessary, to establish.

See also Schmitt, Nationalsozialistischen Rechtsdenken. In*: Deutsches Recht* 4 (1934), p. 228. On this, see also Hofmann, *Legitimität gegen Legalität*, 2002, p. 87: "Schmitt's turn took place against the background of historical relativism. However, in contrast to Kelsen, he recognised the fruitlessness of fleeing into pure methodology and abstract normativism, into the construction of a purely 'social technicalism'. He was determined to position himself in relation to the reality that had been left behind by neo-Kantianism as simple facticity and *to construct reality as a legal reality*" (my emphasis). On Schmitt's concrete thinking on social order, see also Rüthers, *Die unbegrenzte Auslegung*, 1988, pp. 293-302.

45 I am profoundly grateful to Guy Oakes (Monmouth University) for his critical reading of a draft of this piece and to Matthew Philpotts for completing the challenging task of translating it. I owe Hinnerk Bruhns, EHESS, Paris, the reference to Hintze's review of Kelsen's book.

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On Hans Kelsen's Proceduralist Democracy – Starting from Stephen Turner's Book

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Abstract: Starting from recognizing how both Turner' and Kelsen's work are characterized by a demystifying realism which brings both to recognize the relevance of the proceduralist dimension of modern democracy, the present essay focuses on Kelsen's theory of democracy and why the jurist retained that just a proceduralist approach is useful to understand that "core" of such form of government and coexistence, regardless of which the latter would lose itself.

Keywords: Democracy, proceduralism, freedom, integration, plurality

I. PRELIMINARY REMARKS: ON SOME INTERESTING AFFINITIES BETWEEN HANS KELSEN AND STEPHEN TURNER ON THE PROCEDURALIST CONCEPT OF DEMOCRACY

In his book Stephen Turner investigates the complex interplay between democracy, law and administration, while providing us with a proceduralist concept of democracy. As he writes: "democracy is a largely majoritarian procedure of law making and leader selection for a state with a significant administrative and judicial apparatus": not least, such procedures imply "equal political liberty" (Turner and Mazur 2023, p. x; Przeworski 1999, pp. 23-55). Hans Kelsen immediately comes to mind, being one of the fathers of the 20th century proceduralist theory of democracy (Lagerspetz 2017, pp. 155-179). In Turner's book, the Austrian jurist—along with Max Weber—is one of the main reference points.

At a general glance, the parallel between Turner's point of view and Kelsen's is even more substantial. It is not only a matter of defining democracy in proceduralist terms; it deals more with the common engagement in countering a certain use of the word and concept of democracy that for both is distorted. Turner declares that he opposes "the temptation to claim that a legal order is not really legal or that a democratic electoral procedure through legal democratic process is not democratic" (Turner and Mazur 2023, p. xii).

To me, this is in many respects the same kind of "temptation" that Kelsen himself wanted to fight in his life. But there is more: indeed I think that both for Kelsen and Turner fighting that so-called "temptation" implies taking a clear distance from all those theories where a fundamentally liberal and proceduralist definition of democracy is *not enough* to grasp the most profound significance of the concept and even more to carry out a "good democracy" just

because the proceduralist approach would shut out the dimension of "strong principles" (whatever they might signify) (Turner and Mazur 2023, pp. xvii-xxi). In his book, Turner indeed seems to defend the relevance of the proceduralist dimension of democracy *per se* against what he defines as "valuing claims" such as, for example, Robert Dahl's claim for making the American constitution "more democratic" or John Rawls with his theory of justice (Turner and Mazur 2023, p. xvii) *Mutatis mutandis*, I think that Kelsen developed his democratic theory to give a strong response to a series of ideologies, political movements, and figures who, with diverse intensity and from different perspectives, advocated that a "true democracy" could be achieved only on the condition of carrying out specific principles or values considered as objectively just. In the light of a radical critique of natural law doctrine, Kelsen denied the existence of self-evident, universally true, indisputable values, truths, and principles (Kelsen 1928, 1945). Neither Kelsen, nor Turner intend to ignore the relevance of the dimension of values or principles in democracy: in my opinion, rather they recall our attention to their intrinsic plurality as much as plural are—as Turner argues in many parts of his book—people's ends. It seems to me that starting precisely from recognizing such a plurality and complexity, both Kelsen and Turner search for a definition of democracy that does not necessarily depend on the presence and sharing of strong and common values: both seem to be inspired by a very similar demystifying realism. In the light of this Turner critically addresses Woodrow Wilson's politics as the expression of "anti-democratic ideas to be presented as 'saving democracy', or true democracy, when it is in fact a means of expanding the power of the state, and its discretionary power, which can then be used for 'progressive' ends" (Turner and Mazur 2023, p. 82).

Partly due to their common demystifying realism, both seem to invite us to look at democracy not in terms of "content" but rather in terms of "rules" and "procedures", which means looking at democracy primarily as a set of specific legal procedures by means of which legitimate political decisions are concretely taken and put into effect, while binding the whole community. It is likewise undeniable that Turner, more than Kelsen, poses us much the problem of what determines adherence to procedures and rules, while developing his idea of "ultimate and intermediate ends" (Turner and Mazur 2023, pp. iv-xx, 153f). It is equally clear that Turner's reflection about *Making Democracy more Democratic* is here related to an articulated critical discussion about the rule of law and the huge issue of how to control state abuses (Turner and Mazur 2023, pp. 82, 170). At the same time, it is important to notice and stress that for Kelsen, modern democracy assumed one core, strong principle, i.e. that of freedom (in terms of freedom rights) enabling—as I am going to argue—the functioning of democracy itself. Yet, I think that both in Kelsen and Turner the presence of certain legal procedures represents an integral component of democracy as it has developed within modern States, equipped with a complex and articulated administrative apparatus. In a nutshell, I think that Kelsen and Turner bring us to reflect and focus on the relevance of the proceduralist dimension of democracy within a broader political reflection aiming to separate democratic theory from ideologically connoted contents. In doing so, I think that both end up arguing that in many crucial respects the consciousness of how relevant procedures are in modern democracy, is necessary to comprehend its meaning and functioning. In this essay, starting precisely from recognizing the above-mentioned affinities between Kelsen and Turner, I would like to discuss Kelsen's proceduralist theory and why he retained such a theory capable of identifying—better than other theories—that ultimate "core" regardless of which democracy would lose itself, becoming or risking becoming something radically different.

2. NOT THE PEOPLE: PLURALITY POLITICALLY AND SOCIALLY INTEGRATING

In his book, Turner identifies two "myths" at the very basis of modern democracy: the "myth" of people's rule and that of political representation (Turner and Mazur 2023, p. 66). Precisely these two "myths" are frontally criticized by Kelsen in all his major works on democratic theory. I believe that such a critique is one of the keys to understanding the sense and the reach of his proceduralist theory of democracy.

Since the first edition of *Vom Wesen und Wert der Demokratie* (1920), Kelsen's primary interest was to investigate and understand the meaning of *real* democracy while distinguishing it from the *ideal* one

(Kelsen 192], pp. 1-4). In this sense, Kelsen as a democratic theorist was animated by the will to develop a *realistic* definition of democracy whereby for the term "realistic" I am referring to the belief, which is profoundly rooted in the history of Western political thought, that there is a fundamental distinction between the ideal and real dimension of politics.[1] This is true for all his works on democratic theory from his 1920s essays such as the two editions of *Vom Wesen und Wert der Demokratie* (1920; 1929) until the *Foundations of Democracy* (1955), passing through his *General Theory of Law and State* (1945) that was largely an attempt to bring the American academic audience closer to his *Reine Rechtslehre* (1933). In my opinion, it is precisely by drawing the line between real and ideal democracy that Kelsen wanted to explain what, in his opinion, democracy *actually is* and thus what it *can never be*. In both editions of his *Vom Wesen und Wert der Demokratie*, the Austrian jurist outlined the distinction between ideal and real democracy by directly confronting with Jean Jacques Rousseau whom the Austrian jurist considered the "greatest theorist of ideal democracy" (Kelsen 1920, 1929). To Kelsen, the Geneva philosopher was the one who defined "ideal" democracy as full "self-determination" in terms of citizens' direct participation to public functions, that implied a perfect identity between the rulers and the ruled (Kelsen 1920). Kelsen thus identified ideal democracy with a direct form of democracy. In the specific case of Roussovian theory, democracy assumed the existence of a people as a unitary and homogeneous subject, equipped with the "general will" that stems from the social contract (Rousseau 1762/1945). I think that the "core" of Kelsen's critique of Rousseau's theory of democracy consists of two main philosophical argumentations: on the one hand, the jurist contested the feasibility of a direct democracy because of the objective existence of an inevitably heteronomous social order that implied the hiatus between rulers and ruled. On the other, he challenged the unitary nature of people and the existence of a "general will". As Kelsen argued, nothing like that existed in reality, because even though direct participation of citizens to politics was feasible, "opposition of interests", diverse opinions and ideas could always be possible and thus the dichotomy between majority and minority could always manifest (Kelsen 1920/2006, pp. 4-5; 1929/ 2006, pp. 156-158). The Roussovian distinction between "general will" and "opinions" according to which the will of the minority had ultimately to be seen as an integral part of the "general will" itself was considered by Kelsen as theoretically weak and an unrealistic attempt to combine the principle of the "general will" (and its assumed unitary essence) with the ever-possible existence of a minority (Kelsen 1955/2006, pp. 246-248).[2]

My intention is not so much to discuss the ultimate validity of Kelsen's interpretation of Roussovian democracy—which is undoubtedly more articulated and richer in nuances than what Kelsen retained[3]—as to observe that for Kelsen, no unitary entity called the people, as well as no unitary "general will" pre-existed to real social and political life. In a few words, in Kelsen's view, no political unity preceded social plurality.[4]

I think that we are literally facing a radical *demythization* of the people. How shall we interpret it? In my opinion, it has a lot to do with that radical process of *depersonalization* of legal and political concepts such as the State and sovereignty that Kelsen began to develop since 1911, with his imponent monograph entitled *Die Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre der Rechtssatze*. Here he critically addressed the major representatives of the German-speaking jus-positivist tradition of the late 19th century: from Carl F. von Gerber to Georg Jellinek passing through the "jurist of the Wilhelmine Empire", Paul Laband. For that prestigious school of legal thought, the State was the "sovereign subject" and most importantly it was a "legal person" equipped with its own will, with respect to which, Parliament was a mere "organ", precisely an "organ of the State" (Costa 2007, p. 96f). The very political objective of German jus-positivism was to conceptually separate the ownership of sovereignty both from the figure of the Monarch and from the People, in order to found and legitimate a political order which was imagined as an alternative both to monarchic absolutism and (most importantly) to democracy.[5]

Based on a radical distinction between facts and norms whose roots can be traced to a series of crucial intellectual influences such as Hermann Cohen's Neo-Kantianism, the Vienna Circle and Sigmund Freud's lesson on psychological anthropology, Kelsen rejected any form of *personalisation* applied to the realm of Law. As he argued, the State was nothing but a "legal entity" made up of norms hierarchically organized,

and sovereignty had to be logically reconsidered in the terms of the "quality" of that legal order (Kelsen 1911).

I think that, coherently with such a theory, Kelsen depersonalized the concept of people as well: just as no State as a "person", whose well-defined will was expressed by Parliament existed for him, so no people as a unitary, homogeneous subject equipped with its own will pre-existed to the concrete presence of democratic institutions. As he argued, in empirical reality, people as a unity did not exist; people represented a unity only as "subject" to the same legal order, i.e. in "normative" terms (Kelsen 1929/2006, p. 165). In Kelsen's work, people as a pre-existing, unitary, homogeneous subject was replaced by a social, political, ideal plurality. Accordingly, understanding what real democracy was and how it worked signified for Kelsen to understand how just that plurality socially and politically *integrated* in the form of a democratic government.[6]

I retain that within Kelsen's political reflection, the *integration* of social, political, ideal plurality assumed two key principles underpinning, moreover, all his democratic theory: on the one hand, the recognition of fundamental freedoms to all citizens; on the other, the (for Kelsen) realistic consciousness that within a complex and modern society "labour divisions" and "competence specialization" actually impeded direct participation to public life while rendering a bureaucratic system necessary (Kelsen 1920/2006, pp. 18-20). Kelsen was evidently adopting Weber's sociological lesson which the Austrian jurist openly recalled in the first edition of *Vom Wesen und Wert der Demokratie*.[7] After arguing that the Roussovian concept of the people was unrealistic, Kelsen added that direct participation to public functions was unrealistic too because within modern societies—as the French-speaking Liberal political thinker Benjamin Constant explained much before Max Weber and modern sociology appeared on the scene—citizens did not feel the same necessity to be involved in politics with the same commitment and participatory intensity.[8]

With regards to this, Kelsen thus made a distinction between those who did not even exercise their right of voting and those voting each time a political election was called, then between the latter and those who gathered together forming *political parties* in order to concretely influence political life and decisions (Kelsen 1929/2006, pp. 164-166). In the second edition of *Vom Wesen und Wert der Demokratie*, Kelsen's words leave no room for doubts: "democracy can only exist if individuals group themselves according to their political affinities, to direct the general will towards their political ends, so that between the individual and the state, [...] political parties find their place" (Kelsen 1929/2006, pp. 166). In real democracy the people politically exists when citizens decide to create political parties, that means when they integrate themselves in a variety of political parties "stirring up all those social forces that, in some respects, we can call the people".[9] In this sense, as it has been correctly stressed, Kelsen's theory of real democracy ends up by coinciding with the theory of "political parties' democracy".[10]

The crucial and necessary condition, without which the forming of political parties and thus the process of integration would be unfeasible, was the provision of freedom rights to citizens. With that, the Austrian jurist delivered a serious and direct blow to the modern "myth" of people's rule—that owes much to Rousseau—which means, in my opinion, a direct blow to the idea of democracy as the rule of a unitary and uniform subject equipped with its own pre-existing political will.

Starting from the distinction between ideal and real democracy, Kelsen argued indeed that what we define as the people in democracy should realistically be seen as the result of a social and political integration process that brings citizens together to form political parties to "give a certain direction to the formation of the state will" (Kelsen 1929/2006, p. 166). There would be much to say about how Kelsen's argumentations must resound in the early post war period and chiefly in Weimar Germany when political party pluralism was blamed by many prominent intellectuals for threatening the political unity of the State. Just to mention two significant representatives of that debate, the jurists Carl Schmitt[11] and Heinrich Triepel frontally attacked parliamentary democracy based on political party pluralism as a source of a widespread political instability and moreover as the ultimate source of dangerous divisions into the body politic.[12] With his theory of real democracy, Kelsen instead took a clear stance in favor of political parties as an instrument of integration rather than of division.

3. THE "FICTION" OF POLITICAL REPRESENTATION: PARLIAMENTARISM AS A "SOCIAL TECHNIQUE"

If, in reality, the people as a unitary, homogenic subject, considered as occurring previously to democratic institutions does not exist, the concept and definition of political representation must change as well. Kelsen depersonalized—or maybe it would be much more correct to say demystified the latter, as he did for the concept of the people. To do that, he turned his gaze toward the French Revolution when in Europe the principle of political representation was encoded both in theoretical terms with Emmanuel Joseph Sieyès' popular pamphlet on *Qu'est-ce que le Tiers Ètat?* (1789) and in practical terms with the creation of the National Constituent Assembly (1789-1791) (Manin 2010, pp. 79-93).

In both editions of *Vom Wesen und Wert der Demokratie* Kelsen stressed how since the French Revolution parliamentarism was justified as the representation of the people's real will and thus in the name of people's sovereignty (Kelsen 1929/2006, pp. 176-177). According to the jurist, such a definition, which corresponded to the "ideal" meaning of political representation, tried to "save" the principle of "self-determination" when in an empirical dimension the creation of laws was indirect because it was mediated through the elected legislative body.

In other words, political representation was equivalent for Kelsen to a colossal "fiction" (Kelsen 1920/2006, p. 11; 1929/2006, p. 177): there was no people as a unitary subject equipped with its own well-defined will as well as there was no parliament actually representing people's will. In order to grasp the real meaning of parliamentarism, it was necessary for Kelsen to change perspective, to look at it from a totally different point of view exactly as done for the concept of the people (and earlier, in his legal works, for that of State and sovereignty): parliamentarism did not have to be justified in the name of the "what" (the parliament really represents likewise the real people's will) but rather in the name of the "how". Kelsen indeed argued that parliamentarism was essentially a special instrument that served for "the formation of the executive will of the state through a collegial body elected by the people on the basis of universal and egalitarian suffrage, i.e. democratic, according to the principle of the majority" (Kelsen 1929/2006, p.176). With that, Kelsen delivered a major blow to the "myth" of political representation. Parliamentarism was thus redefined as a "social technique", by means of which citizens equipped with full freedom rights elected those who joined the legislative body whose objective was to create the political content of the "State will",[13] according to the principle of majority. We face a proceduralist and Liberal[14] justification of parliamentarism (and in a broad sense, of real democracy) that assumes both the demythization of the concept of the people as well as that of political representation.

Yet, I think that the abovementioned quote includes two distinct and yet inter-connected elements which deserve to be scrutinized: on the one hand, the issue of choosing (electing) representatives from the below, on the other the peculiar way in which political decisions are taken within parliament, i.e. through the majority principle. Now, I will discuss both aspects. In Kelsen's theory of real democracy, the issue of elections is strictly connected to the relationship between the rulers and the ruled. Once argued that ideal democracy as a direct form of democracy is unfeasible, and therefore the split between rulers and ruled is unavoidable, the crucial issue for Kelsen became understanding how such a split could be combined with the principle of freedom. In other words: if heteronomy could not be eliminated how did it reconcile real democracy with the principle of "equal freedom" to all citizens? According to the jurist, such a reconciliation was made possible in real democracy because of the peculiar way in which "Leaders" were "created" within it. Kelsen was very eloquent on this point: "the creation of numerous Leaders becomes the central problem of real democracy-which, contrary to its ideology, is not a collective without leaders-which stands out from real autocracy not so much for the absence as, rather, for the great number of heads. And so, a special method of selecting leaders from the governed community appears element of real democracy. This method is election" (Kelsen 1929/2006, p. 214). Rulers became such because they were chosen (elected) by the people, which means that the "creation" of the rulers moved from below to the top and this was made possible by the recognition of freedom rights to citizens. If ideal democracy corresponds to the reign of full

political "self-determination", signifying having overcome heteronomy, in terms of the identity between the rulers and the ruled, real democracy corresponds to that social and political system in which the split between rulers and ruled persists, although it is fluid and dynamic: the ruled can become the rulers of tomorrow and the rulers of today can be removed. This is possible because of the peculiar way in which rulers become such, i.e. through elections that imply the recognition of fundamental freedoms. In this way Kelsen reconfigured the concept of heteronomy in the light of the principle of freedom. Not freedom in the Roussovian sense of the word—at least according to Rousseau interpreted by Kelsen—but the freedom in the sense that, by virtue of freedom rights, citizens could "create" their rulers who were removable not only because they were chosen from below for a determined period, but chiefly because, in terms of freedom rights, they were perfectly equal to the ruled. From here, for Kelsen, other specific components of real democracy derived, i.e. the right for the ruled to criticize the rulers' actions and the rulers' political duty to be responsible for their actions before the ruled: "since in democracy—Kelsen writes—rulership has no supernatural quality, and the ruler is created by a rational, publicly controllable procedure, rulership cannot be the permanent monopoly of a single person. Publicity, criticism, and responsibility make it impossible that a ruler becomes irremovable. Democracy is characterized by a more or less quick change of rulership" (Kelsen 1955/20026, p. 291).

As I was observing, Kelsen's definition of parliamentarism also implied a second crucial aspect, related to the particular way in which decisions are taken within the legislative body, i.e. the majority principle. If taken literally, such a principle should be considered the quintessential of heteronomy: the majority decides and imposes its decisions on the minority. Yet, it is not so, at least not for Kelsen. As I previously tried to stress, within Kelsen's reflection, the principle of freedom—i.e. the provision of equal fundamental freedoms to citizens—substantially mitigated the insuppressible heteronomous nature of social order. Similarly, for the jurist such a principle was capable of mitigating the majority principle as well. In order to understand how, it is crucial to focus on the way in which, according to Kelsen, parliamentary life is conducted. Within the legislative body political parties re-organize themselves in the form of a majority and a minority (Kelsen 1929/2006, p. 196f): in this sense, I retain that majority-minority should be seen, in Kelsen's perspective, as a *second, relevant form of political integration*, characterizing real democracy, after the creation of political parties.

In real democracy, the relationship between the majority and minority is everything but oppressive or abusive, according to Kelsen, essentially because the latter enjoy the same fundamental freedoms as the former (Kelsen 1929/2006, pp. 195-197). This has two crucial and interconnected implications within Kelsen's reflection: first, exactly as the relationship between the rulers and the ruled, that between the majority and the minority is fluid, changeable and dynamic as well. In other terms, the minority of today might become the majority of tomorrow and the majority of today is not unmovable; second, political decisions taken in parliament are everything but a "diktat". They are rather, the final result of a "compromise" between the majority and the minority, both provided with the same "amount" of freedom (Kelsen 1929/2006, p. 196). To me, political decisions as the result of the compromise between majority and minority represent *the third and maybe highest level of integration* within real democracy as theorized by Kelsen.

Once argued that the people as a unitary, homogeneous subject equipped with its defined will is a "fiction" as well as the parliament as that body actually representing the people's will, Kelsen's focus shifted from the "what" to the "how". In other terms, the jurist adopted and applied a proceduralist perspective, posing the problem of *how* plurality integrated in the form of a democratic government. In responding to such a crucial issue Kelsen argued that starting from a condition of recognized freedom rights the process of integration took shape through political parties and the dialectic between majority and minority. In a nutshell, even though ideal democracy as complete "self-determination" was unfeasible, Kelsen retained that an effective balance between heteronomy and freedom was possible within real democracy: freedom rights, the dynamic relationship between rulers and ruled as well as laws as the result of a compromise between the majority and the minority, for Kelsen, all contributed to mitigate the heteronomous connotation of social order.

Yet, there is one more aspect to explore: Kelsen's major works on democracy were not conceived within a vacuum: first of all, they were written in order to target specific movements, figures, theories and ideologies that he considered dangerous for the existence of (real) democracy, if applied. In the following paragraph I will show how in doing so Kelsen both delineated what real democracy can never be, without losing itself, while defending just a proceduralist concept of democracy.

4. WHAT REAL DEMOCRACY CAN NEVER BE: IN DEFENSE OF A PROCEDURALIST VIEW OF DEMOCRACY

Behind Kelsen's major essays on democracy there were tangible targets he wanted to address: in my opinion, all of them can be ideally divided into two major groups: on the one hand, those ideologies, movements, figures believing that representative, liberal democracy based on political parties is a form of government that has to be replaced by something radically new or reformulated in its founding principles. On the other, those proposing to modify the representative-parliamentary mechanism in the name of a "better" and "more effective" kind of representation. Within the first group, Kelsen situates, for example, Lenin, the Soviet ideology and—in some key respects—Neo-jusnaturalism; within the second, he situates both the attempt of the early post-war European conservative and reactionary forces to introduce "professional representation", and his former pupil Eric Voegelin's theory of "existential representation".[15] To me, a space apart was occupied by the figure of Friedrich von Hayek whom Kelsen critically addressed for his *The Road to Serfdom* (1944) in which the Austrian economist established a direct connection between democracy and capitalism (Hayek 1944/2005). For the jurist, instead, the existence and health of a democratic system did not depend on a specific economic system (Kelsen 1955/2006, pp. 361-362).

In the first edition of *Vom Wesen und Wert der Demokratie* (1920), Kelsen retained that the major challenge to real democracy came from the new-born Soviet Republic, Bolshevism and notably Lenin. By referring to Lenin's *State and Revolution* (1917), Kelsen argued that the Bolshevik Leader considered the Soviet system as a great and successful experiment of "direct democracy", i.e. as a "true democracy". Here, the point is obviously not so much to critically consider Lenin's point of view as Kelsen's argumentation against him. First of all, to Kelsen, the new Russian political system was far from carrying out a direct democracy since the many Soviets established in the country were for him nothing but a plethora of micro-parliaments, reestablishing the hiatus between rulers and ruled, typical of an indirect form of government (Kelsen 1920/2006, pp. 11-14). Most importantly, the jurist blamed Lenin and the Bolsheviks for creating a government based on a systematic social and political discrimination at the detriment of the bourgeoisie, which was deprived of fundamental freedoms, on the basis of 1918 Russian constitution, while introducing a voting mechanism according to socio-economic criteria rather than to the universality of rights and duties (Kelsen 1920/2006, pp. 23-25). Accordingly, for Kelsen, defining this kind of political system the highest achievement of democracy implied endorsing a completely distorted and perverted significance of this word. In Kelsen's eyes, Soviet Russia was precisely the opposite to a "true democracy" because it established heteronomy without freedom: heteronomy in the sense that the split between rulers and ruled persisted as, for Kelsen, was testified by the widespread network of micro-parliaments (Soviets), while—differently from real democracy—the recognition of the principle of freedom in the terms of universal rights was cancelled. The jurist reiterated a very similar concept many years later in his American work on the *Foundations of Democracy* (1955).

During the Cold War, Kelsen again looked at Soviet Russia as a powerful threat to democracy not least because of the use that Marxism and Leninism made of the word "democracy", by repeating the identification of the Soviet system as a "true democracy" because capable of pursuing "the good of the proletariat". In this way—Kelsen argued—the criterium by which the distinction between a democratic and a not democratic system became the "who" and the "what" for which that system was established. Following just this kind of reasoning for Kelsen meant admitting the dangerous paradox for which a government for the "good of the proletariat" could be considered an example of "true democracy", even though it violated all

fundamental freedoms and the dignity of citizens (Kelsen 1955/2006, pp. 256-258). In this sense, for Kelsen, the "good of the proletariat" ended up for becoming the paravent for establishing an anti-democratic and liberticidal regime: the point is that for the Austrian jurist exactly this kind of situation materialized when democracy was defined and subsequently carried out according to principles—in other words according to the "what"—considered as objectively and universally valid rather than according to a set of *procedures*—i. e. to the "how"—whose function was to mediate between heteronomy and freedom.

In my opinion, Kelsen followed the same kind of argumentation when discussing Neo-jusnaturalism. Kelsen reminded how the post-totalitarian age was characterized by the resurgence of natural law doctrine in the form of the Neo-jusnaturalist school of thought (Kelsen 1955/2006, p. 307 ff). Historically speaking, its blooming was in part due to an attempt in legal and political philosophy to go beyond the ultra-positivist "law is law" that seemed to be co-responsible for the rise of totalitarian ideology and the tragedy of the Holocaust.[16] In *Foundations of Democracy* Kelsen identified three intellectuals in particular as key representatives of Neo-jusnaturalism: the Protestant theologists Emil Brunner and Karl Niebhur, on the one hand, and the Catholic philosopher and pedagogist Jacques Maritain, on the other. Despite their confessional differences, for Kelsen, all of them conceptually operated in the same way and with the same purpose: they proposed to rethink post-WWII democracy in terms of strong religious values, while anchoring democracy to the principle of justice—as Brunner argued—or more precisely to "Christian justice" as advanced by Niebhur, or to the values embedded in the Christian Gospel, according to Maritain (Kelsen 1955/2006, pp. 307-346).

In a nutshell, for Kelsen, there was no substantial difference between the supporters of Soviet ideology and Neo-jusnaturalists because in both cases we would be facing an attempt to justify and found democracy based on principles and values retained as objectively valid and true, i.e. following the "what" rather than the "how". Most importantly, Kelsen argued that just that profound belief in the existence of objectively valid and true values or principles implied for both a lack of attention to the issue of freedom. There would be much to discuss on this sort of equation made by Kelsen between Neo-jusnaturalism and the Soviet ideology, with regard to the issue of freedom. For me, it is controversial to put a religiously oriented kind of philosophical and political movement that was concerned about the refoundation of democracy and the restoration of human dignity after totalitarianism, on the same level of an ideology characterizing a real dictatorship. Yet, what I want to stress now is that within Kelsen's reasoning, the ultimate criteria adopted by the Soviet ideology and by Neo-jusnaturalists to identify what a "true" and good democracy was, ended up becoming functional to the establishing of an undemocratic and illiberal kind of government.

A similar kind of problem emerged for Kelsen when approaching the proposals to reform the political and parliamentary mechanism of representation. In the second edition of *Vom Wesen und Wert der Demokratie* (1929), he addressed the major European conservative and reactionary forces of that time and their plan to combine or replace political with professional representation. This in order to accomplish two objectives: on the one hand, to render the decision-making process more effective during the early post war period when most European parliaments were accused of being nothing but useless "hotbeds of gossip" (Kelsen 1929/2006, p. 182f). On the other, to contain or even dismantle a political system based on the centrality of political party pluralism seen by such forces as a source of instability and growing divisions into the body politic. With his reply Kelsen stressed two main controversies arising from professional representation. In the first instance, since the latter was based on socio-economic criteria rather than on the principle of equal rights for all citizens it would make it extremely difficult for the involved forces to reach a point of encounter: every group represented would perceive itself as radically different from the other and thus less inclined to open dialogue (Kelsen 1929/2006, pp. 190-193).

Also, many problems to discuss would go beyond the specific socio-economic interests of the single groups and this would make decision-making process tremendously problematic and slow. As a result of this, no form of political integration would be possible and therefore socio-economic differences would turn into a source of growing conflict that could be solved only at the condition that one group autocrati-

cally imposed its own agenda on the others: to sum up, for Kelsen, the condition would be to undermine democracy itself (Kelsen 1929/2006, pp. 192-193).

In *Foundations of Democracy,* Kelsen returned to the issue of representation as well: this time in controversy with his former pupil Eric Voegelin's theory of representation as expressed in *The New Science of Politics: An Introduction* (1952). Here, the Austrian political scientist—like Kelsen an *émigré* to the U.S.—stressed the limits of "formal democracy" and traditional political representation ("elemental representation") which, in his opinion, needed to be integrated with what he defined as "existential representation". For Voegelin, the latter indicated the key relationship between ruler/s and the "society as a whole". Voegelin's final judgement was peremptory: if such a relationship failed, democracy was doomed to fail too.[17] Exactly as for professional representation, for Kelsen, the "existential" one could open the doors to an autocratic rule: as the jurist argued, if "existential representation" was more essential to democracy than the "elemental one", once established who the ruler/s was/were and once established that the connection between them and the "society as a whole" actually existed, the issue of how ruler/s would exercise their role, and even the problem of granting fundamental freedoms would become of secondary relevance. Not by chance, Kelsen polemically reminded how Voegelin retained the distinction between political party pluralism and party-monism not that crucial to distinguish between democracy and its exact opposite (Kelsen 1955/2006, pp. 260-269).

As I previously observed, Kelsen's critique of Von Hayek deserves a comment apart: the Austrian economist argued that capitalism served the principle of freedom and thus democracy much better that an economic system controlled by the government like in Socialist countries. At a very first glance, the two Austrians gave the same relevance to the principle of freedom but with one major difference, to me: Kelsen contested the direct and necessary connection between the granting of economic freedom, on the one hand, and that of civil, political freedom, on the other: for the jurist there was indeed no evidence that an economic system controlled by the government would inevitably and always lead to the loss of freedom rights and thus to the end of democracy (Kelsen 1955/2006, pp. 365-369).

Kelsen's critique of this series of targets allows us to better comprehend what real democracy could never be for him and simultaneously what kind of theory was for him the most suitable to explain the meaning and functioning of real democracy: a political system that did not grant full freedoms to all citizens regardless of their socioeconomic status, as well as rejected or drastically limited political representation centered on political parties pluralism and the majority-minority dialectic could not be considered a democracy at all. Likewise, importantly, what Kelsen seemed to strongly dispute in the diverse political and ideological positions discussed so far was their attempt to define democracy according to the "what" rather than on the "how": more precisely according to a "what" retained as objectively valid and true -- the accomplishment of the Marxist-Bolshevik ideology and the refoundation of democracy in the light of Christian values. Accordingly, for Kelsen, we are faced with theories and movements, for him, sharing the same substantial indifference toward the issue of freedom rights and the same substantial inability to admit its centrality in the shaping of real democracy. To the jurist, in other words, all of them appeared as uncapable of thinking, establishing, and justifying a real balance between heteronomy and freedom. Following Kelsen's reasoning, even von Hayek failed to comprehend and coherently justify such a compromise because in hindsight Kelsen retained the necessary relationship posed by the economist between capitalism and freedom nothing but another attempt—although ideologically different from those previously addressed—to found and explain the meaning and functioning of democracy according to the "what" rather than to the "how". Conversely, Kelsen retained that a proceduralist theory of democracy allowed to effectively conceptualize the compromise between heteronomy and freedom: from his perspective, such a theory looked indeed at real democracy as a "government by the people" which assumed the existence of citizens equipped with full freedom rights and "creating" their "Leaders" who were removable and responsible for their actions by virtue of their peculiar selection from below.

5. BRIEF CONCLUDING REMARKS

In this essay, I have tried to delineate what I think are some of the core components of Kelsen's proceduralist theory of democracy. Starting from Stephen Turner's book and recognizing some interesting affinities between the two thinkers with regards to their common demystifying realism and the relevance of proceduralist dimension in democracy, my intent was to explain the internal logic—so to say—to Kelsen's way of conceiving democracy. Once rejected the Roussovian ideal of freedom as "self-determination", while demythizing both the concept of the people and political representation, Kelsen identified real democracy with a form of government based on the balance between the unavoidable heteronomy of social order and freedom, in the sense of freedom rights. For Kelsen such a balance and how it worked could be fully comprehended and well explained particularly if adopting a proceduralist point of view, i.e. by doing without explaining the meaning and functioning of democracy on the basis of the "what". According to the jurist, the compromise between heteronomy and freedom in real democracy indeed turned out to be the final outcome of a peculiar *way in which* political decisions were created: starting from the provision of widespread freedom rights, social, ideal and political plurality integrated through different and gradual steps in the form of a "government by the people". Concretely this consisted of a series of procedures—among which the voting mechanism and parliamentarism were particularly relevant—which allowed to produce binding political decisions on the basis of an authorization process moving from below to the top, i.e. from the ruled to the rulers In other terms, in real democracy, for Kelsen, the dichotomy rulers-ruled could not be eliminated but it could be mitigated just because of *the way in which* political decisions were taken. Understanding this "how"—that is at the center of the proceduralist perspective—meant understanding how, in reality, heteronomy and freedom were combined and reconciled. Yet, in my opinion, the proceduralist connotation of his democratic theory has an even more profound implication: for Kelsen a democratic theory centered on the "how" served the principle of freedom much better than those—of diverse inspiration—centered on the "what". Or to put it differently, a proceduralist theory seriously assumed the principle of freedom and its centrality for understanding how the political content of social order was established within real democracy more than one focused on the "what". In this sense, I think that Kelsen's proceduralism served a view of real democracy that was profoundly and clearly embedded in a Liberal kind of sensitivity and mentality. After all, in my opinion, his controversy with the series of political and ideological movements, schools of thought and figures whom I have previously discussed should be partly interpreted in the light of this.

In conclusion: in the first paragraph of this essay, I argued that Kelsen and Turner seem to share the belief that a proceduralist approach to democracy is actually useful to comprehend the meaning of modern democracy within complex social systems. As for the jurist, I would say that such an approach, which is in my opinion profoundly connected with his close attention paid to the issue of freedom, is *enough* just because in his opinion it allows us to comprehend that ultimate "core" beyond which democracy would vanish giving way to something different. For Kelsen, this "core" is the balance between heteronomy and freedom.

NOTES

1 On this point, see, Schuett and Hollingworth 2018.

2 Kelsen was perfectly aware of Rousseau's hostility toward the minority which was considered by the Geneva philosopher as a dangerous breach into the body politic founded on the social contract. After all, such aversion to the minority is one of the reasons why intellectuals and political thinkers such as Jacob Talmon and Isaiah Berlin defined the Roussovian concept of democracy as animated by an intrinsic "totalitarian" attitude and spirity. See, Talmon 1952 and Berlin 1958/2002.

3 See, Qvortrup 2003.

4 See, Kelsen 1920/2006; 1929/2006; 1945/2009; 1955/2006.

5 After the constitutional revolution of 1848-1849, the major German legal theorists committed to developing a new form of legal science whose most political objective was precisely to legitimate a conservative social and political order (Fioravanti 1979, pp. 56-60).

6 Kelsen used the concept of "integration" in both editions of *Vom Wesen und Wert der Demokratie* even though such a concept became more relevant in the second edition.

7 Kelsen [1920], *Vom Wesen und Wert der Demokratie*, 2006, p. 19.

8 See, Constant 1819.

9 Kelsen [1929], *Vom Wesen und Wert der Demokratie*, 2006, pp. 171-172.

10 See, Dreier 1986.

11 It is interesting to notice that Schmitt was a reader and interpreter of Rousseau's work. On this point, see: Salzborn 2017, pp. 11-34.

12 See, Schmitt 1923/2017; Triepel 1927. On the contrary, within the Weimar debated two intellectuals such as Hermann Heller and Gustav Radbruch who defended political party pluralism, although they were both critical toward Kelsen's theory of Law. See, Dyzenhaus 2003.

13 It is important to remember that for Kelsen the "State will" is a conventional expression with which certain particular "actions" are ascribed to the State itself.

14 In this case I am using the term "Liberal" according to the European tradition of political thought, particularly to that of liberal-democratic thought, as it developed since the late 19th century, centered on the principle according to which civil and political freedoms should be equally recognized to all citizens in the form of individual rights.

15 See, Kelsen 1920/2006; 1929/2006; 1955/2006.

16 See, Facchi 2007.

17 See, Voegelin 1952.

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Restraining the Administrative State: A Lavoiean Approach

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Abstract: Turner and Mazur's *Making Democratic Theory Democratic* provides a robust intellectual platform to critically appraise the evolution and impacts of the modern administrative state. In this paper, I argue that the political economy insights of Don Lavoie complement Turner and Mazur's philosophical criticisms of the administrative state. Lavoie's identification of problems associated with noncomprehensive economic planning transpose to administrative state agencies, especially as entities increasingly interfere with economic and social decisions. A Lavoiean perspective raises incentive, knowledge, and power problems afflicting regulators and other administrative state policy- and lawmakers. The affirmative democratic ethos of Turner and Mazur relates to Lavoie's underappreciated perspectives on democracy, underpinned by precepts of radical openness and participation. The extensive Lavoiean democratic disposition calls for the need to significantly restrain administrative state activities and powers, combining changes to organizational and institutional rules with assorted civil societal "fire alarm" responses against administrative state power abuses.

Keywords: administrative state, democracy, fire alarm, Lavoie, openness, polycentricity

I. INTRODUCTION

An important topic of academic and political inquiry over recent decades has been the operation and effects of modern bureaucratic organization. Given descriptions such as the "deep state" or "administrative state",[1] I refer to a style of public administration exemplified by the ability of government agencies to create, adjudicate, and enforce their own laws and policies. Administrative state entities are empowered to carry out such legal and policymaking activities on behalf of the government, owing to previous acts of delegation by legislators. It is true that the forms and actions of the administrative state will differ by country (and by subnational jurisdiction). The administrative state is certain polities will heavily feature "independent" statutory bodies lacking direct and constant oversight from political executives (Dudley 2021). The extent to which judicial deference to administrative bodies applies will also vary.[2] The definition provided here, even if broad, should be sufficiently coherent to allow identification and analysis of an increasingly critical range of problems in public administration and governance.

Growing attention toward the administrative state is unsurprising. The continuing growth in the scope and size of the public sector throughout the Western world, enabled by the production of legal and regulatory edicts by administrative entities, has given rise to concerns about long-run economic performance. Seismic changes to modes of policymaking, and enforcement of statutes and regulations, under the emergent administrative state raises questions about whether bureaucratic entities are properly subjected to legislative scrutiny, and even whether administrators are conducting themselves in a manner reflecting the democratic aspirations and values of ordinary citizen-voters. Consistent with this, doubts have grown over the constitutional propriety of agencies with immense discretionary powers (e.g., Hamburger 2014)—speaking in the U.S. context Lawson (1994, p. 1231) asserts, "[t]he post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."

Apprehension over the economic, legal, and political implications of the administrative state means that Turner and Mazur's (2023) book, *Making Democratic Theory Democratic*, could not be timelier. Relying upon perspectives from political science, philosophy, and law, the authors bring to the fore the pressing democratic tensions between citizens and the (administrative) state, much of which arises from the increasingly autonomous and discretionary application of coercive powers by regulatory and other administrative state personnel. Inspired by the legal theorist Hans Kelsen, Turner and Mazur put stock on the proposition that politics seeks to "transform" abstract ideas or virtues into concrete policies and laws which, when implemented, produce public order (signified by the realization of such goods as economic productivity and social accord).[3] The Kelsenian transformation idea is a complicated one, consisting of numerous intermediating steps and variables (such as electoral contests), but it is said that a successful politics performs the transformational work effectively.

What is the implication of the administrative state for the democratic promise of effective transformation from political desire to its actualization? Now with the administrative state posing as a fourth branch of government—alongside the executive, legislature, and judiciary—Turner and Mazur indicate the potential for transformative precision has been greatly diminished. Powered by delegation and powered with discretion, the administrative state distorts the metamorphosis between democratic aspiration and law. This distortion resulting from the growing presence of the administrative state in modern life is compounded by arguably other anti-democratic tendencies, such as dilution of checks-and-balances in the form of the separation of powers and centralizing forces within federal systems of government (Reuter and Yoo 2016). In short, something is lost in translation between what citizens want and what the administrative state provides. According to these authors, such developments are prejudicial not only to the operationalization of democracy but to its values.

From a political economy perspective there are useful lessons to be drawn from Turner and Mazur's defense of democracy against the administrative state leviathan. The importance of the rule of law takes the stage as an enabling mechanism for a robust democracy, which then allows for widespread, vigorous discussions amongst democratic equals on a range of politically salient instrumental and expressive considerations. Matters regarding agential arbitrariness and the unjust exercise of compulsion on the part of administrative state agents, and those implications for constitutionally ordered democracy have received due consideration elsewhere (e.g., Spicer 1990; Ostrom 1973/2008; Gibbs 2018; Aligica et al. 2019). In this paper I consider the economically and politically problematized character of administrative state activity from the perspective of the Austrian school economist Don Lavoie (1951-2001), who made original contributions in a variety of relevant fields including critiques of economic planning, the importance of informal norms, and a normative liberal basis for democracy. All of these contributions, it will be argued, are relevant to the study of the administrative state.

Lavoie is noted for his revision of the classic economic calculation problem, originally debated by Ludwig von Mises, Friedrich Hayek, and numerous other scholars during the early twentieth century. Lavoie added that calculational problems not only afflicted entities aiming for comprehensive economic planning, but those engaging in piecemeal, noncomprehensive attempts at productive rearrangement. The

modern administrative state is prone to engage in noncomprehensive planning, which was critiqued at length by Lavoie. Don Lavoie's work is interpreted as broadly intermeshing with that of mainline political economy (Boettke 2012), including the significance of rules in structuring not only economically productive but politically accountable activities. The distinctiveness of Lavoie's study of rules is his emphasis upon informal rules, including cultural norms and how an *explicitly democratic* norm of *openness* facilitates public expression and participation, and, through these, the revelation of citizen-voter preferences. The complicated and largely non-transparent conduct of the administrative state is seen in the Lavoiean sense as being inimical to open democracy. The intellectual advantage of a view through the Lavoiean lens is that it pairs economic diagnoses of the problems of the administrative state, and of bureaucracy in general, with a philosophical account of the virtues of democracy as a constraint upon administratively orchestrated coercive power.

The structure of this paper is as follows. The next section (Sect. II) indicates how the administrative state is afflicted by key political economy problems identified by Lavoie, including incentive, knowledge, and power problems. These problems not only compound the economic harms induced by administrative state discretion but reduce the legitimacy of activities undertaken by entities that have been increasingly positioned as laws unto themselves. Section III relates Lavoie's extensive democratic theories to themes canvassed in Turner and Mazur's book. In the democratic openness precept extolled by Lavoie there is a role of both formal and informal rules, with a distinctive perspective given to the right of so-called "fire alarm" accountabilities to help restrain the predatory proclivities of administrative state agents (McCubbins and Schwartz 1984). Section IV concludes with a summation of arguments.

II. PROBLEMATIZING THE ADMINISTRATIVE STATE USING THE LAVOIEAN APPROACH

The available evidence suggests that the American administrative state has grown substantially over the decades. Commencing with a limited number of administrative agencies, such as the Interstate Commerce Commission, prior to the 1930's "New Deal" agenda under Roosevelt, the number of agencies under U.S. federal administration have expanded over the past century. Although a harmonized count of administrative agencies is unavailable, on some estimates there are well over 400 agencies in existence (Cato Institute 2022). Classificational issues similarly bedevil the task of establishing a rigorous count of the number of administrative staff employees. Aligica et al. (2019) refer to *regulatory* agency staffing exceeding 250,000 people during the 2000s, but it is safely assumed this number has grown since that time.[4]

The amount of regulation presided over by administrative state entities has been the subject of considerable research interest, given that they, too, have risen over the years. The U.S. Code of Federal Regulations, which codifies the number of general and permanent rules by federal government departments and agencies, contains 242 volumes and exceeds 185,000 pages. This is four times as large as the U.S. Code of Laws passed by Congress, containing fewer than 44,000 pages (Dudley 2021, pp. 33-34). Friedman (2019) indicates that the number of pages contained within the Code of Federal Regulations increased from 22,877 pages in 1960 to 178,277 by 2016. According to the Cato Institute (op. cit., p. 112), the Biden Administration in 2021 alone issued over 3,200 regulations with the force and effect of law whereas Congress passed 81 laws during that time.

The growth of the administrative state is a curious phenomenon. After all, many would argue that the economic lessons stemming from the collapse of Soviet communism have been heeded, meaning that comprehensive, whole-of-economy planning is infeasible as a public administrative agenda. The reality suggested by the incessant growth of the administrative state—featuring the accumulating quantum of laws and policies generated by administrative entities throughout the West—is that political appetites for *non*comprehensive planning remain insatiable.[5] The concept of noncomprehensive planning, including analysis of the operation and impact of such schemes, is given in political economy its most comprehensive treatment courtesy of the writings of Don Lavoie (1985/2016). Noncomprehensive planning may be defined as the ac-

tivation of fiscal, legal, and regulatory involvements by the state which affect *certain sectors* of an economy, but largely leaving the remainder of that economy intact and, thus, conditioned by market forces.

Lavoie clearly spells out that comprehensive and noncomprehensive planning vary in degree rather than in kind. This is because both planning modes share the characteristic of involving "policy measures that involve concentrating power to shape the economy in a special government agency" (Ibid., p. 2). Noncomprehensive planning doctrines may well be inspired by desires which are shared by those advancing comprehensive attempts at planning. This could include that of controlling or otherwise suppressing the supposed chaos of rivalrous market competition (Lavoie 1985/2015). But as Lavoie sees it, an obvious difference between the two planning modalities is that "advocates of noncomprehensive planning have wisely abandoned comprehensive planning and accepted the need for markets in some sense" (Lavoie 1985/2016, p. 4). To this may be added the considerations brought forth by Friedman (2019) that administration associated with noncomprehensive planning efforts are likely to be associated with a highly stratified epistemic division of labor. This is because administrators, who are often referred to as "technocrats," tend to be highly credentialled individuals possessing specialist information and knowledge about the peculiar problems deemed to fall within their domain of interest.

Lavoie's critical perspectives on noncomprehensive planning are of great relevance to the study of modern public administrative activity. At least in the U.S. it is noted that the history of the administrative state is marked by an evolution in focus from "regimenting production in *key* economic sectors, often at the expense of consumers" to *piecemeal* social controls which have been "mainly concerned with promoting personal consumption and, more broadly, personal welfare and dignity" (DeMuth 2016, p. 125; emphases added). More recently, the generation of new environmental and climate change laws, policies, and regulations, many of which are applicable at firm or sectoral levels, have become a driver for administrative state growth, not only in the U.S. but elsewhere. Interestingly, Lavoie critiqued noncomprehensive industrial policy doctrines—including those aimed at promoting decarbonization technology productions, such as solar—which has witnessed something of a revival in Western economies (Mazzucato 2013; c.f., McCloskey and Mingardi 2020).

Noncomprehensive and comprehensive planning are both considered to be species of planning, and Lavoie's critical insight is that noncomprehensive planning is subject to the critiques levelled against comprehensive planning. Arguably the most important criticism of planning by Austrian economists, which includes Lavoie, is that political actors would not possess the knowledge necessary to coordinate economic activities in an efficient or effective manner. The significant capacity of the modern administrative state to collect data and information concerning economic, financial, and other phenomena may give technocrats, and their legislative sponsors, grounds to believe that planning is feasible, at least on a noncomprehensive scale. However, Lavoie (1985/2016) carefully explains that economic knowledge is *not reducible* to data, because knowledge is inclusive of contextualized perspectives that could be practically demonstrated, or acted upon, but might not be clearly articulated or codified for the benefit of others. As indicated by Lavoie:

> … While a planning bureau can gather data, it cannot gather the knowledge that would be needed for rational planning. Such knowledge is dispersed among market participants. It is embedded in their various skills and specialties, and is generated by their competitive contention with one another. Yet without such knowledge the planning bureau would be unable to justify intervening in ignorance into the workings of the market process (Ibid., p. 6).

The distinction between data and knowledge has significant implications for planning capability and effectiveness: "[i]f knowledge is dependent upon the process of context from which it springs, then any partial interference with either of them (as with noncomprehensive planning) may, if significant and persistent enough, threaten to subvert that knowledge itself" (Ibid.). Austrian economists have indicated that competitive rivalry on the part of economic entrepreneurs is an efficacious means through which relevant knowledge about what to produce, how, and when, and what cost, is distilled. But "[a] modern economy can

generate and disperse the knowledge its operation requires only by permitting a competitive process to operate in an unplanned manner" (Ibid., p. 8). Most certainly, Lavoie and other Austrians have indicated that public sector administrative and other entities are unable to marshal the separate and decentralized plans of individuals into a unified and coherent whole for policy purposes, but nor can administrative decisions substitute for decentralized market process. Therefore, the *knowledge problem* is identified as a key reason for his observation that "[p]ublic policy *is* being conducted in abysmal ignorance of its likely consequences, and this inadequate knowledge of how to achieve goals rationally *does* largely explain the policy failures that surround us" (Ibid., p. 55).

Concerns about the appropriateness of the administrative state are not restricted to the epistemic deficiencies of noncomprehensive planning. In a general sense, "[g]overnments are vested with special coercive powers in the hope of placing themselves above the social order so that they can try to give to that order a measure of overall cohesiveness and guidance" (Ibid., pp. 41-42). For reasons of limited political expertise, the desire to reduce decision costs, and so on, governments have oftentimes delegated their coercive powers onto administrative state personnel. In effect, entities comprising the administrative state are the beneficiaries of a political "pass the parcel" game of public powers from the political executive and legislature. To the extent that the administrative state enjoys significant room to act in a discretionary manner in response to a variety of economic, social, and other problems, and can conduct its delegated responsibilities with limited oversight, the concern is that the administrative state would be prone to abuse these powers. Indeed, as stated by Lavoie (Ibid., p. 4), "there is a political danger in concentrating so much power into the hands of a planning agency."

Lavoie's reservations about the *power problem* are not restricted to a concern over the anti-democratic implications of a substantial delegation of powers to the administrative state. Transferring powers to administrative state agencies are, as indicated, often justified on the supposed epistemic prowess of technocrats to resolve complex policy problems, but there is the potential problem that "power will instead be wielded in response to political clout rather than careful debate" (Ibid., p. 201). One way in which these issues manifest themselves is in how a politically powerful administrative state transforms into a focal point of political struggle between rivalrous groups that devote their time and energy toward influencing administrative decision-makers for *political* profit, rather than investing entrepreneurial talent in the market in the quest for *economic* profit (Baumol 1990). Lobbying by firms and other nonstate actors, and other patterns of rent seeking behavior, is encouraged by the lucrative prospect of using "government power to rigidify the existing structure of industries, to carve up the market among the established firms, and to protect their investments by shielding them from the potential competition of as-yet unestablished or politically impotent firms" (Lavoie 1985/2016, p. 221).

Lavoie's identification of the power problem is a recurring theme in mainline political economy literature on public administration and governance. In his best-selling tract, *Road to Serfdom*, Hayek (1944/2007) warns about the risks of administrative delegation as a mechanism that would ultimately be suppressive of democratic decision-making. There is a certain tension between delegation for noncomprehensive planning purposes and the idealizations of those who yearn for comprehensive planning: "[t]he expedient of delegation cannot really remove the causes which make all the advocates of comprehensive planning so impatient with the impotence of democracy" (Hayek 1944/2007, p. 107). But it should be said that even if comprehensive planning could be achieved, this is predicted to come at a hefty democratic cost: "[i]f democracy resolves on a task which necessarily involves the use of power which cannot be guided by fixed rules, it must become arbitrary power" (Ibid., p. 111). It should be noted that similar sentiments have been expressed in recent decades by those who have identified a "democratic deficit" arising from the delegation of political powers to administrative state entities.

Thus far we have considered how Lavoie's knowledge and power problem perspectives apply to administrative state activity. These issues are regarded as interdependent in their effect: "[p]lanning in practice is characterized precisely by this public image of comprehensive control combined with an intense concentration of arbitrary government power but inevitably lacking the detailed knowledge to exercise that

power intelligently" (Lavoie 1985/2016, p. 225). This confluence of knowledge and power problems raises additional questions as to whether the administrative state is reliably able to conduct itself in accordance with public interest. There is an extensive public choice literature that identifies the prospect of self-interested behavior on the part of bureaucratic actors, whose objectives are not restricted to the optimization of salaries and in-kind public sector employment benefits but extend to the capacity to wield political influence (Niskanen 1971). As Lavoie mused, "[a]ctions taken by governments seem to reflect the conscious will of their own personnel, or of wealthy or powerful special interests, more often than the will of society as a whole" (Lavoie 1985/2016, p. 17). In summary, I am referring to the *incentive problem*.

It is posited in this paper that noncomprehensive planning is the predominant mode of operation for the contemporary administrative state. Whilst this pattern of conduct does not have an effect of eviscerating the market economy as is the case under comprehensive, central planning, it does have the effect of obstructing and distorting the market process in significant ways (Ibid., p. 228). A range of empirical evidence suggests that regulations generated and enforced by administrative state entities are associated with reduced economic growth and similar indicators of economic performance (e.g., Dawson and Seater 2013; Coffey et al. 2020; Crews 2021). The critiques of noncomprehensive planning that have been identified by Don Lavoie, centered upon knowledge, power and incentive problems, provides the underlying theoretical basis for considering why economic concerns over administrative state actions persist.

III. RESTRAINING THE ADMINISTRATIVE STATE: DEMOCRATIC CHECKS AND REMEDIES

The problematic attributes of administrative state operations, and associated implications for public governance, are not limited to economic considerations. Indeed, especially as suggested by my previous discussion about the power problem, a set of profound questions are being asked about the democratic implications of the administrative state. Turner and Mazur's book lucidly outlines the key issues at hand. Democratic systems of public government idealize a relationship between citizens (principals) and legislators (agents), wherein the latter are periodically selected by the former to discharge a variety of policy roles and responsibilities at the behest of the public. This is, of course, a delegatory relation. Periodic elections, and other elements of governmental machinery such as judicial scrutiny of statutes, operate with the intent of ensuring intertemporal consistency in respect of the ability of legislators to meet the demands of the citizens who vote for them.[6] In the framing of political process offered by Kelsen, which is embraced by Turner and Mazur, an idealized democratic outcome would yield a perfect correspondence between the democratic desires of the people and the laws which are produced by legislators on behalf of the same body of people.

Perfection, of course, is not for this world. In practice, legislators have delegated a vast array of functions to administrative state bodies. It is reasonable to suggest that the existence of the administrative state creates the basis of multiple principal-agent relationships because, in this case, "parliament is the principal, and the bureaucracy is the agent" (Turner and Mazur 2023, p. 11). If principal-agent problems exist between citizens and legislators, on account of the inability or unwillingness of the latter to conduct themselves pursuant to the interests of the former, then there is little reason to doubt that similar principal-agent problems may arise between legislators and administrative state personnel. The democratic problem argues goes further than this, because increasingly the administrative state benefits from the exercise of a substantial degree of discretionary power and even—as is apparently the case under the U.S. Chevron deference principle—a level of effective immunity from prosecution. Carrying out the substantive work of government, the administrative state is claimed to subvert democratic accountabilities and procedures. Indeed, "the realities of administration produced a gap between state action and both law and the people" (Turner and Mazur 2023, p. 11).

The tension between the administrative state and democracy is apparent in any critical reading of the intellectual legacies of the Progressive and New Deal era in the U.S. The American intellectual-cum-politician Woodrow Wilson articulated a set of principles favoring a centralized, bureaucratic version of public

administration which would supposedly be immune to political pressures and be able to promulgate public policies with the assistance of technocratic expertise. Wilson's arguments laid an argumentative platform for the entrenchment of the administrative state during the twentieth and now twenty-first centuries. The crucial matter then becomes how the administrative state may be restrained, not only being justified in an aspiration to unleash productive market-oriented economic activities but to maintain the integrity of the democratic mode of public governance.

As criticisms of the administrative state have mounted in recent years there have been no shortage of counteracting solutions proposed to restrain administrative state activity. A spectrum of measures—ranging from a defunding and closing agencies through to strengthening conventional public accountability and transparency safeguards, such as independent auditing and legislative oversight procedures—have been the currency of contemporary administrative state reform discussions. It is commonly argued that public choice theories have inspired so-called "new public management" (NPM) methods of promoting competition and contestability not only between agencies, but between agencies and nonstate entities that offer alternative, self-governing regulatory standards (Dunleavy 2019). Some have argued that the effectiveness of these piecemeal initiatives have been mixed, with the cause of such results not restricted to the self-interested incentives of administrative state personnel to resist changes to their privileged political status (Ibid.). Similarly, the practical complexities of certain NPM commitments, such as contracting out, and their broader logistical and political implications continue to be debated.

The administrative state reform emphasis upon the use of countervailing legal and policy instruments should not be considered as the sum total of redress that may be advanced in the interest of filling in the administratively-driven democratic deficit. Consistent with the Madisonian political tradition of instituting arrangements that pit factions against one another, a broader proposition is to use the emergent processes of democratic political exchange to constrain the predatory appetites of the administrative state, including any proclivity toward undue policy self-aggrandizement. Don Lavoie is considered to have offered a radical theory of democratic collective action which has the potential to incentivize administrative state restraint. As has been indicated above, Lavoie offered original accounts concerning the socialist calculation problem and its extension to cases of noncomprehensive planning (Boettke 2023). A small number of exceptions aside (Goodman 2019; Novak 2021), what is arguably far less appreciated, even among mainline political economists, is Lavoie's democratic theory, which I shall briefly summarize here before moving on to its application to administrative state issues.

To contextualize the distinctiveness of the Lavoiean *extensive* approach to democracy, it is useful to briefly consider mainline political economy treatments of democratic political activity. The mainline approach to democracy has primarily focused upon the effectiveness of voting practices in transforming individual political preferences into aggregative political responses (for example, the provision of public goods at implicit "tax-prices" that the mass of citizen-voters prefer). This literature has evolved considerably over time, but it is reasonable to condense mainline political economy conclusions about voting into two categories of concern. The first is that voters are disincentivized from expressing an informed choice when lodging their ballot, or even presenting themselves at the voting booth under voluntary voting regimes, because the probability that an individual voter will be decisive in determining the election outcome is infinitesimal. Under such circumstances the costs of acquiring political information exceeds the benefits from doing so and, thus, it is rational to remain politically ignorant. This is the much-touted "rational ignorance" thesis (Downs 1957). In light of observations that individual voters enthusiastically participate in elections, the alternative mainline position on voting is that people will conspicuously vote in accordance with their values and beliefs instead of any instrumental cost-benefit concern about the effects of policies being offered by rival electoral candidates (Caplan 2007; Holcombe 2023).

The standard conclusion taken from the mainline political economy perspective is that voting is a poor method of translating individual political preferences into optimized (or at least an improvement of) social welfare. Of course, the implicit idea that citizen-voters cannot be reliably trusted to deliver coherent democratic responses provides ammunition to arguments favoring an epistocratic (and technocratic) ad-

ministrative state, wherein credentialled "betters" are charged with the humbling, yet privileged, task of allocating for the benefit of the supposed apathetic and ignorant "lessers" amongst the citizenry. Lavoie's economic arguments that administrative state activity is prone to abuse have already been articulated, but there is another distinct theoretical message emanating from his writings. For Lavoie democracy is not reducible to the arguably impersonal or perfunctory acts of voting every few years and, for that matter, in his hermeneutist philosophical approach, markets are much greater than supposedly impersonal and fleeting acts of buying and selling (Goodman 2019, p. 143). Lavoie, who is most assuredly identifiable as a mainline political economist, is intellectual distinctive for he is not only an economic liberal but a *principled democrat*.

Don Lavoie's democratic approach, stretching beyond the confines of majoritarian voting procedure, relies upon a criterion of *openness* for its operationalization. Openness is manifested not only in an embrace of the multi-faceted and dynamic basis for democratic decision-making. This position accepts, both on positive and normative grounds, the capability of politically-free individuals to vote upon whichever motivations or bases they choose—meaning an individual can change their mind over time regarding preferred positions on issues and candidates (or parties).[7] The open democratic criterion of Lavoie also lends support for the contributions to multiple constituencies and interests to have their concerns and wishes articulated in continually deliberative, and related, processes of political articulation. It is in respect of these concerns that one discerns the foundations of Lavoie's orientation to democratic action:

> … It seems to me that this openness and publicness, not some particular theory of how to elect the personnel of government, is the essence of democracy. Like the market, a democratic polity exhibits a kind of distributed intelligence, not representable by any single organization which may claim to act on society's behalf. Democracy is not a quality of the conscious will of a representative organization that has been legitimated by the public, but a quality of the discursive process of the distributed wills of the public itself (Lavoie 1993, p. 111).

It is clear from this perspective that measures that disable perspectival diversities from revealing themselves peacefully through political argumentation, not matter how contrarian to conventional belief they may be, would narrow, if not potentially debilitate, the openness of the democratic system (Novak 2021).

Lavoiean democracy is inclusive of dynamic, even if contentious, activities that are consistent with an objective of restraining the administrative state. Consider the contributions of "whistleblowers," such as public officials who publicly expose allegations of impropriety with respect to the conduct of administrative state agencies. Like other staffers within administrative agencies, whistleblowers benefit from information asymmetries vis-à-vis legislators and members of the general public concerning the operational and governance standards of an agency. But the act of publicly airing allegations of corruption, misconduct, and other kinds of improper behavior by administrators takes on the form of a "private provision of a public good by revealing otherwise unknown information to citizens and legislators" (Coyne et al. 2009, p. 4). It is in the case of whistleblowing that the epistemic advantages procured by administrative state staff could be converted into broader public benefit, by bridging knowledge gaps between technocrats, legislators, and the public on the terms and conditions of opportunistic, even predatory, administrative actions.

The connection between whistleblowing actions and Lavoie's principle of open democracy is neatly encapsulated by Nathan Goodman, as part of his general discussion about the dialectical properties of Lavoiean theory:

> … democracy is defined less by a nation-state's periodic elections and more by the openness of discussion within a society. … Democracy looks like Chelsea Manning, Edward Snowden, Thomas Drake, John Kiriakou, and other whistleblowers alerting the public to opportunistic acts that the state would keep secret (Goodman 2019, p. 143).

The whistleblowing-democracy connection is effectuated to the extent that whistleblowing conduct elicits concrete measures to restrain predatory administrative state activities. This could occur if whistleblowing disclosures subsequently generate constructive anti-corruption and related policy remedies by political executives and legislatives, or instigates legal procedures. Alternatively, a successful act of whistleblowing could bring forth the public spectacle of an official inquiry which could test whistleblower claims and, if proven to be credible may cause embarrassment to administrative state personnel, and perhaps lead to more concrete redress mechanisms such as legal sanctions, rule changes, and other public governance reforms. Even the credible threat of whistleblowing could have a restraining effect upon the exercise of administrative opportunism in the future, which is partly the rationale as to why considerable political stock is placed upon developing strong whistleblower protection statutes (allowing, for example, whistleblower immunities from prosecution).

In combination with, or separate from, whistleblowing, a Lavoiean democratic framework provides collective avenues for the effective curtailment of administrative state abuses. An open democracy represents an emergent arena within which innumerable kinds of organizations and networks can form to publicly express various political concerns and press for political change. Watchdog organizations can play an important role in constantly monitoring the actions of administrative state entities and their personnel, and publicly exposing bureaucracy for acts which are perceived to pose as breaches of public trust. A great assortment of social movements, which tend to assume more fluid organizational, or perhaps networked, forms, may emerge to organize protests in response to allegations of public sector predation, or otherwise to allow people to mobilize to express their dissatisfaction with policy plans being orchestrated by administrative agencies and other governmental entities (Novak 2021).

Protests are one way in which social movement participants can respond to actual, or threatened, administrative state abuses. The reality is that the dynamism of democratic life has yielded an array of contentious tactical innovations over time through which people collectively express disagreement with administrative state activities, benefiting in the process from social learnings, resource accumulation, and organizational efficacy (Ibid.). Civil disobedience techniques, such as withholding tax payments or failing to comply with regulatory requirements (Sharp 1973), have been identified as methods which aim to delegitimize or otherwise frustrate the administrative state when its actions are perceived to harm citizen-voters and breach democratic trust. One recent contribution considers the ethical appropriateness of civil disobedience against regulatory agencies whose actions have subverted rule of law precepts (Murray 2015).

The preceding analysis is consistent with political science literature emphasizing the constraining effects of "fire alarm" oversight mechanisms. The fire alarm concept encapsulates the efforts of individuals and collective entities that are external to government in triggering concerns about administrative state abuses, and bringing these abuses to the attention of legislators who may be able to respond with stronger oversight powers, as well as legislative and policy changes (Coyne et al. op. cit.; Damonte et al. 2014; McCubbins and Schwartz op. cit.). Whereas fire alarms may conveniently economize for the need by legislators to maintain detailed information about the conduct of administrative state agencies, there is the potential for fire alarm disclosures to be effectively—say, if external third parties have incorrect information, or wish strategically to deceive legislators with false disclosures, about agency conduct (Lupia and McCubbins 1994). A mainline political economy literature has spawned over recent decades in reference to how implicit "reputational markets" emerge to signal credible disclosures to interested parties (e.g., Klein 1997). The implication of this literature is that the desire to develop a reputation (or favorable status) as a credible fire alarm is likely to disincentivize the production of erroneous or deceitful allegations against administrative agencies and other organs of the state. An outstanding question is to what extent funding and regulatory relationships between state and nonstate actors dampens the effectiveness of fire alarm oversights.

The reality of the administrative state is that of a dynamic flurry of interactions between public administrative personnel and legislators, as well as between the administrative state and assorted for-profit, non-profit, and other nonstate entities. Subsequent to Lavoie's contributions, Wagner (2016) has depicted

political economy as being of an "entangled" nature—regulatory and other public officials constantly intermingle, in both competitive and collaborative relational contexts, amongst themselves, with staff from interest groups, corporations, social enterprises, as well as individual members of the public. Nor should it be presumed that a unified "administrative brain" is carrying out the diverse legal, regulatory, and policy-making undertakings of the administrative state. As Koppl (2018, p. 222) indicates the administrative state features a "multiplicity of competing, parochial, and inconsistent features."

Observations concerning entanglement seem on the surface to be key to Lavoie's normative democratic project. The existence of diverse and idiosyncratic political actors empirically acknowledge as well as normatively gives rise to a constructive role for *oppositional* interests in the quest to contain predatory administrative behavior. Indeed, a lack of unity in an entangled public governance system may reduce the cost of whistleblowing, social movement organization, and other anti-hegemonic maneuvers that, in turn, undermine administrative state predation. However, there is a potential counterargument to suggest that entanglement could have the opposite effect. Factors such as self-interested incentive structures on the part of administrators, and an institutional environment departing from the exercise of rule of law, could have the perverse effect of *exacerbating* predatory behavior on the part of administrative entities.[8] Acknowledgement of these opposing effects arising from entanglement reinforces the need for case studies and similar empirical investigations.

It is presumed throughout this discussion that the extensive democratic action that Lavoie endorses occurs within the context of institutional rules. What is important to recognize is that Lavoie's open democratic orientation is grounded in the importance of informal rules, especially cultural norms which facilitate the expression of a diversity of views concerning the appropriateness of administrative state activity. These informal rules extend to the political domain, and encompass classic liberal principles such as freedom of assembly and expression—in practical terms, these principles embody freedom of speech and plurality of public discussions, the freedom to organize and protest against unpopular political decisions, and equal treatment of all under the law. As Lavoie conceived of it, these cultural ramparts of institutional infrastructure lend itself to a vision of a radical interpretation of democracy, whose domain of action is not ringfenced by electoral contests and voting behavior. The chief proposition here is that in response to fiscal, legal, and regulatory abuses by administrative state entities, a Lavoiean democratic approach would call for restraint through *more democracy, and not less*.

The importance placed upon the informal institutional properties of democracy is not to ignore the significance of formal rules. The need for stronger constitutional and legal protections against administrative state predation is not only the subject of an extensive contemporary political debate, between defenders and critics of this now-entrenched fourth branch of government (e.g., Hamburger op. cit.; Marini 2019; Sunstein and Vermeule 2020). A focus upon formal rules to constrain predatory political activity is endorsed by public choice theory and Virginia political economy, both being represented by the theories of James Buchanan. According to Buchanan (1987), if actions under a given framework of rules persistently deliver undesirable outcomes then attention should turn to the need to reconfigure the rules themselves—using a sporting metaphor, a *better game* can be produced by *better rules of the game*.

Much of the piecemeal correctives to administrative state expansion outlined above fall under the category of "police patrol" constraints. These are largely intra-governmental mechanisms aimed at better monitoring bureaucratic behavior, including through oversight, and imposing sanctions for departures from acceptable conduct on the part of regulators and other administrative state personnel (McCubbins and Schwartz op. cit.). These may be interpreted as actions within the boundaries of a *given* institutional framework for the polity. But the relevance of the point about the possibility for fundamental shifts in formal rules as a restraining factor upon the administrative state is made clearly by Vincent Ostrom, a prominent critic of the Woodrow Wilson style of bureaucratic (as opposed to democratic) public administration, who stated that "[w]hen administrators act, they constitute as well as manage" (Ostrom 1973/2008, p. 19).

In a broad sense a project that aims to reconstruct formal institutional rules would presumably address the need for stronger procedural and organizational constraints upon the administrative state. This would

be expected to include stronger punishments against deviations from stated formal rules. A renewed "constitutional moment" to restrain the administrative state is likely to take the reformist exercise even further. Specifically, it could focus upon the need for clearer limitations upon the scope and scale of governmental fiscal and regulatory powers (Brennan and Buchanan 1980/2000; Epstein 2014). Whilst the bulk of Lavoie's work did not engage directly with Buchanan's constitutional political economy position, I assume that the contributions of Lavoie on comparative institutional analysis, together with discussions of the failings of noncomprehensive planning, imply an endorsement of reforms to formal institutions as part of a broad suite of remedial measures to restrain the administrative state.

IV. CONCLUSION

Turner and Mazur provides a rousing defense of the democratic temper in the Western world, one which is increasingly threatened by a host of challenges. One of those challenges, which is the focus of the authors' deliberations, is that of an increasingly powerful, yet unaccountable and consequently anti-democratic, administrative state that not only threatens the productivity of advanced economies but is increasingly operating in contradiction to cherished democratic values. An implication of Turner and Mazur's treatment is that the incessant expansionism of the administrative state is an indication of a false dawn for liberalism. Widely declared to be triumphant at the end of the Cold War with the collapse of communistic comprehensive planning, liberals find themselves having to face the immense challenges to liberalism from within. In the case of the administrative state, its growth has eroded the realization of the bountiful promises of liberty, slowly but surely, over many decades. As indicated by Turner and Mazur it is well beyond time that the abuses of the administrative state to the economy, polity, and society are to be confronted.

This paper seeks to complement Turner and Mazur's contribution by bringing the perspectives of mainline political economist Don Lavoie into the picture of administrative state critique. With its operations representing a contemporary species of noncomprehensive planning, the administrative state would be seen by Lavoie to be compromised by fundamental problems in decision-making and governance. Technocrats seem to be all too often assumed to be all-knowing and infinitely other-regarding, but these assumptions mask the realities of administrative decisions continuously wracked by failures stemming from combinations of incentive, knowledge, and power problems.

The administrative state is not simply reflective of government failure in an economic sense. It is fundamentally anti-democratic, because administrators are actively working toward attaining the privileged status of being above the law within what is otherwise meant to be a socio-political ecology of democratic equals. The democratic radicalism of Don Lavoie calls for more democracy as a defense against unwarranted power accumulations by democratically-distanced administrative state entities. A Lavoiean democracy is an open one with extremely active whistleblowers, watchdogs, protestors, and an active citizenry all combining to identify and repel abuses by the administrative state.

The discussion in this paper is not intended to be an exhaustive account of Lavoie's many original contributions to economic and political understanding. Nevertheless, I attempt to illustrate what key principles from Lavoie's work could animate a project of democratic recovery. If effective restraint of the administrative state is to be achieved, including in a way that meets Lavoie's openly democratic perspective, then the creeping reversion to an aristocratic, even neo-feudal, system of public governance may yet be avoided.

NOTES

1 Henceforth the term "administrative state" will be used in this essay. The "deep state" vernacular not only appears more prevalent in contemporary political discussions, especially in the U.S., but also has specific meaning in reference to bureaucratic modalities in the Middle East and surrounding regions (e.g., Gingeras 2010; Fukuyama 2023).

2 A (in)famous case of this is the so-called "Chevron deference principle," following a 1984 U.S. Supreme Court decision wherein "in the face of ambiguous statutory language, courts should defer to an agency's interpretation of its statutory authority as long as it is reasonable, even if it is not the best interpretation" (Dudley 2021, p. 42).

3 The suggestion that the state is an institutional order designed to facilitate transformations is nothing new. Ostrom (1973/2008) refers to at least two versions of undertakings along these lines—(a) the transformation of political preferences into an array of public goods, as indicated by public choice theorists, or (b) as articulated by Woodrow Wilson and other adherents of the administrative state, the transformation of a social problem into a policy solution.

4 Strauss (2021) reports that the U.S. federal administration now employs over two million Americans. This figure does not include contractors and others with meaningful economic connections to government, nor those dependent upon public sector financial transfers, subsidies, and other benefits.

5 Note, in this regard, Buchanan's (1990, pp. 7-8) observation that "[t]here remains a residual unwillingness to leave things alone, to allow the free market to organise itself (within a legal framework) in producing and evaluating that which persons value. … Politics will not work, but there is no generalised willingness to leave things alone."

6 This time dimension is intended to encompass the possibility that under a dynamic and contestable democratic regime citizens reserve the right to adjust their preferences toward politically salient issues and controversies (Buchanan 1954).

7 Alongside Buchanan (1954) canonical article on social choice, the justificatory idea for intertemporal variability in voting motive and decision finds expression in Hayek's (1960/2011, p. 174) declaration that "[i]t is in its dynamic, rather than in its static, aspects that the value of democracy proves itself."

8 For example, corrupting behavior on the part of administrative state personnel may be facilitated within an informal political culture that views rent seeking as acceptable modes of conduct (Choi and Storr 2019). Under this scenario bribes and gifts may be demanded by staff within administrative state agencies in return for favorable legal and policy outcomes for citizens who interact with government.

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Defending Democracy: Hans Kelsen and Intelligence in International Society

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1. INTRODUCTION

Hans Kelsen's stature in jurisprudence, philosophy, and political and International Relations (IR) theory is widely acknowledged, often heralded as a preeminent figure in the realm of global legal thought or global legalism of a liberal Kantian provenance. While most interpretations focus on Kelsen the jurist and philosopher of law and discuss Kelsen within the broader realm of legal positivism (Olechowski 2020; Dyzenhaus 2022), from a politics perspective Kelsen's classical liberalism affords a realistic core and depth that surpasses the simplistic, often reductive Schmittian portrayals of Kelsen as a naïve political idealist (Lagi 2020; Schuett 2021, 2024). And then there is Stephen Turner and George Mazur's (2023) bold and timely attempt at metapolitical thinking in *Making Democratic Theory Democratic: Democracy, Law, and Administration after Weber and Kelsen* to engage in proper Kelsenian ideology critique (discussed by Schuett 2024).

Here, I want to suggest that the continued relevance of Kelsen's political thinking manifests when scrutinizing its implications for hard matters of national security, notably in the context of intelligence. It is argued that Kelsen's conceptual framework of democracy, law, and administration furnishes a nuanced lens for comprehending the role and salience of intelligence in contemporary dynamics of power, transcending the simplistic dichotomy of *raison d'état*-based approaches (section 3) or a categorical rejectionism (section 4). In the conclusion, I argue that—from a Kelsenian perspective—the praxis of intelligence serves not merely as a political instrument for the pursuit of a democracy's interests but also as an institutional pillar within the framework of international society (section 5). I seek to open a research agenda on this question, with the understanding that this is not the final word—it can't be anyways. There is nothing like a last word in a democracy.

In the next section, I will begin with making some preliminary comments about the analytical and normative necessity of connecting Kelsen's theory of democracy with intelligence theorization. I do so within the broader context of Turner and Mazur's (2023) thought-provoking lead.

2. KELSENIANS OLD AND NEW

Hans Kelsen is a hard sell. He always was, alas. But in today's political climate and culture of ideological excess, identity politics, and much absolutized moral self-righteousness on display on both the left and right in western democracy, it's particularly hard to be a Kelsenian. A deep

and lasting commitment to the ideal of individual freedom and to the pursuit of justice as happiness, of which he spoke so loud and clear and passionate in his Berkeley farewell lecture (listen to Kelsen 1952), will likely continue to demand too much from those theorists, ideologues, and fellow citizens who believe in the Freudian illusion of "an outside authority competent to tell them what is right and wrong" (Kelsen 1955, p. 40). From first to last, the Kelsenian credo has been a simple and critical yet also very powerful one. Beware of the sweet cent of higher laws, handed down to You and Me by either Nature, Reason, or God. Beware of the anti-liberal lure of Schmittian decisionists, no matter how bad the political or strategic situation.

But then what is to be done in the face of existential threats to a democracy? What ought we be doing as individuals and as society when we perceive the state of democracy, either on the domestic or international scene, becoming worse? Surely these are practical questions, and they are highly relevant; but they have a theoretical, if not philosophical, core because in order to say that we assess or perceive a situation to become better or worse, implies that we, either implicitly or explicitly, have an idea about what is good. Which means in this case that we presuppose what a democracy is, for otherwise we couldn't possibly know what makes an enemy of democracy, or a friend. Which in turn is to say that depending on the type of answer we get about the nature and value of a democracy, a democratic polity will discriminate politically between who is good, who is bad, and who are the "ugly" ones out there to want to destroy democracy—and accordingly, a democratic government will chose its means of power to either deal, or perhaps strike deals, with potentially old friends or quite possibly new foes.

There is, and always was, Kelsen the political realist. From Kelsen's classical liberalism we learn that the form of democratic government is the messy politics of a certain social form of living-together. It cannot really be avoided—only ameliorated—that the Rousseauian ideal of the free-spirited noble savage is set to metamorphose into a new reality. Which is a Weberian one of a mostly unforgiving type. Political orders are coercive social structures, monopolizing the use of force, exercising the very will of the majority through legal procedures and administrative bodies involving both delegated and even more discretionary authority on behalf of the executive and judicial branches of government. It is that very transformation of natural freedom into political freedom, that is, the modern metamorphoses of an impenetrable multitude of material interests and subjective values voiced by citizens through the ballot box into bureaucratic actions taken by state organs (to use Kelsenian parlance here), which risks putting even more pressure on political alienation and populistic resentment. For if the gap between the ideal and the real, between what people will and what government does, actually is or is perceived to be too wide in a democratic polity, society, and culture, then there's the real risk of a democracy dying slowly but surely.

Of particular importance, therefore, is Turner and Mazur's (2023) critical reminder that to be a theorist of democracy is one thing, while it is quite another to hold substantive views about what the content of democratic norms *ought to be* or, worse, *are to be* for any given polity to pass the test of being, as one might say, a "real" democracy. Turner and Mazur argue quite rightly that the value of Kelsen's theory of law, the state, and international legal order is its methodological ability, which is based on realism and positivism, to unmask what "is ideological sleight of hand, by which the particular policy preferences of the author are said to be implied by the concept of democracy" (p. xi). Little wonder that Kelsen in his time, as well as Kelsenians old and new have had few friends.

Taking seriously the challenge posed by Turner and Mazur's reaching back to Kelsen and Weber, it is my purpose here—without being able, however, to resolve all the many different and subtle issues there are—to deal with a special realm or bureaucratic practice of the administrative state. It is one where the potential danger of Rousseauian facts metamorphosing into bureaucratic fiction is always salient, and where it is particularly pressing a democratic concern in an age of fierce political polarization at home and a renewed great power competition between the West, China, and Russia. By that special realm or practice I mean the notoriously secretive government business of intelligence, domestic and foreign. My aim is, therefore, to connect Kelsen's theory of democracy, and his democratic thinking along open society lines (Schuett 2021), with the question of intelligence as a means by which democracies defend themselves

against enemies from within and abroad in international society. On the face of it, establishing such a connection may seem odd; hence, the whole rest of the article must be the full explanation.

At this stage I should point to a caveat, though. Here, much in line with Robert Schuett and John Williams' (2024) recent attempt in terms of a specific form of English School (ES) IR theory intelligence theorization, I am not reinventing what intelligence is. Nor am I in general against the *raison d'état* intelligence orthodoxy, let alone against recent innovations in attempts in intelligence studies to theorize what has long been seen as extremely hard to theorize (Gill and Phythian 2018; Gaspard and Pili 2022; Ward et al. 2024). Rather, I seek to open up a debate about the potential use and value of a specific Kelsenian style intelligence theorisation rooted in Kelsen's theory of law, the state, and international legal order, to wherever it may lead us. As the iconic British Prime Minister Benjamin Disraeli (1859) once said: "Finality is not the language of politics." Which really is quintessential Kelsenian political realism, and which is one that had its admirers or followers.

According to Hans J. Morgenthau (1964, p. 210)—the Jewish escapee from Nazi Germany who went on to become one of America's finest twentieth-century public intellectuals coming out of a broadly Atlantic tradition of political thought and foreign policy realism (see Specter 2022)—it "is one of the lasting merits of Hans Kelsen's theory of law and state to have demonstrated the unity of the legal and political order, domestic and international." Contributing to a Festschrift for Kelsen on the thirtieth anniversary of the publication of the *Reine Rechtslehre* (Kelsen 1934) what Morgenthau concerned himself was the question of the partiality or impartiality of policing. He did thus by speaking to both the conventional law-enforcement setting within any given political community or state, and regarding the idea of an international police force in a disarmed world. The main reason on behalf of Morgenthau to look into this question was that the very idea or notion of international policing figures prominently in Kelsen's (1944) normative proposal of a "peace through law," albeit in the sense that even though establishing an international police was the consequential next step in order to bring about an international court with compulsory jurisdiction, it would imply the erection of nothing short of a world state, that is, it would mean "a radical restriction, if not the total destruction, of the sovereignty of the States" (pp. 19-20). Kelsen, the realist, was, of course, very much aware that a centralized executive international authority or power, like a global police force, should not serve as the starting point for any genuine attempt at global reform; instead, and realistically, international policing with real teeth "can only be one of the last steps" (ibid., p. 20) in what has to be an evolutionary process in terms of ever bringing in more and more elements of a coercive legal order into the principles and values of international society.

What Morgenthau (1964) sought to show—through the example of Kelsen—was that policing within the state is as much dependent on the legal context, which is at one and the same time the political context, as international policing in international society and its specific legal-political context: For the police, like any other government function, is "an integral element of the legal and political order and [therefore] performs legal and political functions for it" (p. 210). Indeed, Kelsen (1941) put the point even more realistically or brutally when, in effect, he argued that it was a truism that in a modern state (Rechtsstaat), the legal is intrinsically political and that, therefore, the state is nothing but a centralized coercive order. Thus, going radically against much Hegelian idealism and so, to Kelsen the state is a through-and-through political organization where the unambiguously political portion of it "consists in nothing but the element of coercion" (p. 82). Thus, the police force, necessary as it is for any type of political community to maintain order and peace, has to be partial regarding the very positivized system of norms, be it a Constitution, Verfassung, or Grundgesetz, because the police is that part of the executive branch of government, with a body of armed state organs, that has been erected by law to protect and defend that law. To claim that the police is impartial is a mere ideological illusion that serves an important ideological purpose: that of upholding any given status quo.

Forever the Kelsenian style political theorist of an ideology critical bent, Morgenthau—who once said it out loud that it was "Hans Kelsen, who has taught us through his example how to speak Truth to Power (Morgenthau 1970: p. v)—was quite blunt about it. Presenting the police as the impartial state organs en-

forcing an objective reality of law, rather than stressing that the police are bureaucratic agents of a particular legal-political order at a specific point in history bolsters public obedience with the law and acceptance of police authority (Morgenthau 1964, p. 213). Perhaps even more blunt, albeit most certainly realistic to the core, Morgenthau maintains that the decidedly political function of the police becomes most apparent when "dealing with all-out challenges to the legal order and the political, social, and economic status quo itself" (ibid., p. 211). For when a democratic polity is faced with security threats or all-out challenges, it will be for everyone to see what the Weberian notion of the state's monopoly on the legitimate use of physical force really means.

Though analogy—empirical, theoretical, and philosophical—this raises the question of the political nature of intelligence agencies as part of the bureaucratic apparatus and the limits of such secretive institutions in a democracy's confrontation with its adversaries.

Therefore, I will now outline and critically discuss three of primary positions, or ideal types, regarding intelligence in the context of democratic theory and practice. This debate gives rise to two main camps: the realists (section 3) and rejectionists (section 4), each presenting distinct perspectives. Alongside them is a third: It is the Kelsenian position, offering a unique viewpoint within the discourse (sections 4 and 5).

3. MOVING BEYOND *RAISON D'ÉTAT*

From where I stand, the *raison d'état* attitude to intelligence is simple, too simple indeed. In essence, one might say that realists advocate for a kind of anything-goes style of stealing secrets. That said, matters are more complicated as becomes apparent when digging a bit deeper into the so-called Realist tradition, which is one with many breaks, splits, and internal dissent (Kirshner 2022; Schuett 2022; Edinger 2024).

In the theory and practice of politics and international relations, the realist logic seems not only powerful but also straightforward. Where spying said to be the second oldest profession in the world (Joffe 2016); where in a post-Ukraine global politics of contestation and struggle the fate of the entire post-1945 liberal international order hangs in the balance (Brands 2024); where nothing of strategic significance—state, sovereignty, space, survival—is ever over (Friedman 2015); where history bears out what intelligence historian Calder Walton (2023) aptly calls the "epic intelligence war" between the United States and Europe vs. China and Russia; and where, quite rightly so, Amy Zegart (2022, p. 145) says that what we now have is an "intelligence jungle out there" where trust is low and uncertainty about one another's intentions all the higher—If we do find ourselves in such a setting of political and international life, then it can't be that surprising that realists tend to be quite casual about the legitimacy question surrounding intelligence. For the question whether government-sanctioned acts such as espionage, subversion, and sabotage are morally justified is not something about which we should be too bothered. In a dog-eat-dog world of Darwinian international anarchy without any meaningful protection against enemies large or small, domestic or international, other than through one's own power and capabilities, intelligence is a means for survival, a technique to prevent strategic surprise (Wirtz 2024); it's the fuzzy realm where intelligence is seen as process, product, and operation (Lowenthal 2022, p. 10)—And what's more, at least thus the realist argument goes, "states do not need to morally justify [intelligence] in the first place" (Bitton 2014, p. 1015).

Now, I don't mind the analysis of the political and international situation we're in—it's a most challenging one to be sure (putting it mildly)—but from the analytical and moral standpoint of Kelsenian theory of democracy, the *raison d'état* approach to intelligence is far too narrow. To me it is wholly inadequate for (at least) three reasons.

The first reason is that much of today's political and IR realism is actually a kind of crude thinking that may be called a form of pseudo-realism which has not much do with the tradition of thought known as *political* realism. That may sound somewhat harsh indeed; but Kelsenian style sensitivity towards methodological and epistemological foundations of certain types of political theory suggests that behind or beneath the conceptual framework of the realist world outlook lies oftentimes a body of crude natural law theorizing hidden in Scientific's clothing. It is one thing to attempt to make political studies, notably the

study of international relations, more scientific, more analytical, more methodical, thereby hoping to rid a modernized subject of political science from the tutelage of human nature (Schuett 2010)—which is exactly what the early proponents of behaviorism, such as Morton Kaplan (1957), were hoping to achieve when pushing for political science at the expense of political theory as if these were two different things when they aren't; when pushing for causal analysis of aggregative data sets using quantitative research methods; when pushing what are now seen as so-called classical approaches associated with Morgenthau (1946) or Hedley Bull (1966) to the sidelines, academic and intellectual. It is quite another thing, however, to shift the realist study of politics—a most venerable and surely controversial tradition of *political* thinking that reaches back to the likes of Thucydides, Kautilya, Livy, and Augustine (Schuett and Hollingworth 2018)—to the structural, third level of analysis, which today is most associated with the neorealism or structural realism popularized by the early lead of Kenneth N. Waltz (1979) and, later, by John J. Mearsheimer (2001). To put it bluntly, nearly everything that once constituted prime concerns for realists since ancient times—human nature, the state, and the issue of nationalism—has either been deemed unscientific or relegated to the level of black-box phenomena within subsystems.

In post-Waltzian IR realism, deep-rooted structural forces arising from the security dilemma are said to explain state behavior under conditions of international anarchy, which is driven and reinforced by the absence of a centralized world pacifier. Whether states like it or not, whether they are large or small, democratic or authoritarian, as Waltz (1979, p. 187) once put it, they "have to live with their security dilemma, which is produced not by their wills but by their situations. A dilemma cannot be solved." In presenting foreign affairs as if it were an objective order of things out there, impervious to preferences, needs, and deeds, it is only a small step to get to Mearsheimer's (2001, p. 36) "offensive" world with a clear strategic, political and moral dictate: the "best way for a state to survive in anarchy is to take advantage of other states and gain power at their expense. The best defense is good offense. Since this message is widely understood, ceaseless security competition ensues." It is that very world, these realists say, that we sort of tragically inherited (from whom?); it's the one with which we will have to live (for how long?) but also the one where the national interest (whose interest?) is thought of as the final yet daily judge of what constitutes a "good" offense—and that of course includes the question of "good" intelligence as well as where, and when, to conduct "good" espionage, good subversion, or good sabotage. Surely this is a line of strategic thinking and a kind of realpolitik attitude that speaks to the hearts and minds of conventional realists; for if the world we're facing is one not of our choosing but one that history and structure has forced upon us where there is so little that we can do to change that reality in fundamental ways, then we might as well fight back as hard as we can against our adversaries with pretty much all means available to us.

Needless to say, that very position or vision or lack of vision of realism is a controversial one which even political and IR theorists coming out of the realist tradition find lacking in many ways. Lacking in political substance, lacking in diplomatic outlook, lacking in democratic depth, lacking in a democracy's ethics of individual freedom.

The second reason then why a *raison d'état* approach to intelligence isn't something with which Kelsenian democratic theorists can ever be satisfied concerns the ever-present—and very real—political danger inherent in a crude the-end-justifies-the-means logic. One doesn't have to be a Kantian moralist to be very much alarmed by putting aside questions of what makes a just or decent government conduct in light of clear and present danger or strategic and future threats. It will just be enough to be a Weberian political ethicist of responsibility. One of the kind that the realist Morgenthau was (Turner and Mazur 2009), a political and international relations thinker in every sense of the word from whom we can draw important lessons facing the twilight zone where power, interests, and morality meet relentlessly and in unforgiving ways. On the one hand, Morgenthau is the very one who like few others (Reinhold Niebuhr too) knew that international politics, like all politics, has its roots in baffling psychoanalytic dynamics that makes foreign affairs the messy realm of striving for power. As he puts it unmistakably clear in *Politics among Nations*: "Whatever the ultimate aim of international politics, power is always the immediate aim" (Morgenthau 1948/1967, p. 25). The effect of which is this: propaganda on all sides, for few actors on the diplomatic scene

would dare to say out loud their interests and ideas that often run against longstanding norms and practices in international society. Therefore, spycraft is a real necessity. For if the realm of politics, strategy, diplomacy, war, and great power management was the realm of truth, there wouldn't be any need for speaking truth to power in the first place.

Yet that doesn't mean that Morgenthau was a particular fan of intelligence agencies. He, it seems, wasn't. For one, Morgenthau believed in the power of compromise and accommodation through means of diplomacy, which, although conducted behind closed doors, has to come out at some point in the negotiating process "required by the principles of democracy, for without there can be no democratic control of foreign policy" (ibid, p. 533). What's more, and to the best of my knowledge, Morgenthau had little, if any, interest in intelligence matters. That is save for one occasion. And that's the one where he had something very critical—and important—to point out to the public. The occasion in question led to an essay, written in March 1967, that Morgenthau (1967/1970) aptly titled "How Totalitarianism Starts: The Domestic Involvement of the CIA." Like so many others, he was shocked by the corroborated revelations of a clandestine CIA operation that took financial control of the National Student Association from the early 1950s until its exposure by the muckraking *Ramparts* magazine in February 1967; that was the time in the Cold War where both Washington and Moscow perceived student politics across America to be a very important ideological battleground over public opinion in their ever more rigid great power rivalry (Paget 2015). Quite rightly, Morgenthau (1967/1970, p. 52) did see the costs of such a domestic betrayal, and particularly when such a betrayal takes place among the young in what we would now call a safe space of free-spirited academic learning and personal development. In terms of politics as well as strategy, Morgenthau also critically feared that it is exactly that through such clandestine yet also ultimately ineffective means by which life-liberty-property America might become the kind of autocratic type of polity that it so fervently wants to defend itself against. And he concludes his criticism of CIA conduct quite realistically "that, had the government had more confidence in the strength of a free democracy than in the efficiency of pseudo-totalitarian methods, it could have served the national interest without paying so heavy a price." Intelligence agencies are not, and can't be, neutral but they must follow the rules—legal, political, moral—of the polity that they are tasked with to protect.

The third reason why a purely realpolitik legitimation of intelligence must be taken with a heavy dose of skepticism concerns the question of how we all get out alive of the Hobbesian *bellum omnium contra omnes* situation. Here, the case of the realist John H. Herz—who coined the concept of the security dilemma (Stirk 2005) and who in the early 1930s was one of Kelsen's first doctoral students in Cologne to where Kelsen had fled from Vienna when there the political situation became ever more untenable for him—is an important one and rather symptomatic of the overall *raison d'état*/intelligence relationship. Talking tough is one thing; but some of these classical realists' positions about the role of intelligence in national and international security are far more interesting (and far more interesting to explore at greater length and depth elsewhere) than some hardnosed realpolitik theorists and practitioners would have us believe. Surely, it's all too easy to say (and from the standpoint in times of crises and war quite understandable), as did Vice President Dick Cheney (2001) in the wake of the 9/11 terrorist attacks, that when the chips are down there is little choice but to the really walk as long as it takes the "dark side […] in the shadows of the intelligence world." But then the immediate question is how realistic success is, and hence who the real realists are in these matters. Some will continue to say that in fighting or revenging, let's say, Al Qaeda's 9/11 brutality, it is fair game for a democracy to start a so-called global war on terror (GWoT) and that in such a war, the standard of what is permissible and what is not, is as low as is necessary for ensuring battlefield success. If it is deemed necessary that we operate on largely covert programs of mass surveillance at home and abroad, set up programs of targeted killings and torture, and also of extraordinary renditions, then that's the chosen path of a democracy: either through the politics of little if any deeper moral justification for such policies and priorities, or by intellectual justifying these programs in the language of a kind of "lesser evil morality" (Ignatieff 2004), which many see as some kind of dangerous attitude to "fight fire with fire" (Steel

2004). Now, that's one way of dealing with crises and threats, and one where the role of intelligence agencies becomes that of a kind of ersatz fighting force.

To others, that marks a dangerous event or phase in the life, politics, and culture of a democratic polity. Theorists, pundits, intellectuals and commentators of all stripes have shown to be concerned with a kind of "realism" that is at best a dangerous short-term illusion and at worst the beginning of long-term, existential decay of democratic standards, potentially to point of no return or at least from where it is hard to recover in democratic spirit and morality. George Soros (2006, p. 7), a most realistic open society intellectual, points out quite accurately that in the end, "the war-on-terror concept has led to the erosion of the moral authority of the United States and has made the world a more dangerous place." It wasn't only the hard-nosed human nature realist, Morgenthau, who was worried about the moral standing of democracies vis-à-vis autocracies in international society: after all, the very idea of an international society as opposed to merely an international system presupposes the recognition of international law, balance of power politics, and legitimate ethics as constitutive practices to which members of international society in good standing apply in their conduct with one another. Herz seems to have even been more concerned about the societal notion inherent in international relations. He had equally very little to say on nature, role, and value of intelligence—and that little that he did say was not all too supportive of the secretive cause. In contrast to Morgenthau, Herz did have some professional intelligence experience, serving as he did (like so many other Jewish escapees from Nazi Germany) during World War Two in the Central European section inside the United States' Office of Strategic Service's Research and Analysis branch. In his otherwise highly readable, dramatic and tragic autobiography, *Vom Überleben [Of Surivival]* (1984), though, Herz had nothing of substance to say as regards intelligence other than some bits of gossiping about how those higher up on the bureaucratic ladder did not really care what sort of analyses or foresight the scores of underlings were producing on a daily basis—which to him was particularly frustrating since at the time the American intelligence community was staffed with some of the finest, most intelligent and also experienced European émigré scholars (Katz 1989).

The aim here is not to unfairly criticize intelligence agencies, chiefs, analysts or the likes. Instead, it is to illustrate, through the examples of Morgenthau and Herz—both associated with the realist camp and both students of Kelsen operating within a broadly Kelsenian theory of democracy —that even within the broad realm of political realism, the issue of intelligence in democracies and their interactions isn't devoid of friction. This is, actually, positive as it truly opens up room for further contemplation.

4. THE INADEQUACY OF REJECTIONISM

To say that realists such as Morgenthau and Herz deviate from the *raison d'état* position is not to imply that some such political thinkers and their political and IR theories have had inbuilt in their foreign policy ideas a sort of democratic soft spot. To the contrary, indeed. Political thinkers like these have argued that we need to be as protective as possible of what are the sensitive values of a democracy and manage international society as best as is realistically possible in the face of an impenetrable number of interests and ideas *not* because out of weakness but because they are so very much aware of the fragility of any given human order, large or small. One might say that if, only if, one really understands and thinks through every little thing in the depth and universality of the individual and collective struggle for power (as in Morgenthau), as well as the existential uncertainty that comes with the security dilemma (as in Herz), does one appreciate that realism and idealism—conventionally seen as totally opposing modes of political and IR thought—are quite close to another. For who looks reality really in the eyes, cannot but realize that humanity must work unceasingly towards a better reality. As the late Henry A. Kissinger (2009) put it so beautifully: "There is no realism without an element of idealism."

To summarize what I have been saying thus far: The conventional *raison d'état* argument for intelligence in democracies sees it as a necessary tool of state authority at home and statecraft abroad in a democratic government's defense against strategic risks and existential threats. While this perspective is not en-

tirely wrong, it is not wholly correct either. It fails to grasp the nuanced ethical considerations inherent in the world of intelligence operations. As I conclude (section 5), a robust framework of political and IR theory inspired by Kelsenian democratic theory combined with English School style IR theory may offer a more comprehensive approach to understanding intelligence within democratic contexts. It is a potentially fruitful third way—middle position—between the realpolitik logic (section 3) and the logic of rejectionism that says we can dispense with intelligence agencies.

Although it must look like an almost abstruse question for all those in the *raison d'état* or realpolitik camp, it is most certainly a most legitimate question to ask whether democracies and civil societies really do need intelligence agencies. It has long been a truism that democracy and secrecy in general, and democracy and the game of secret intelligence in particular, have always been at odds with one another. Tensions between these two "worlds", one for You and Me to see day in, day out, while the other one tends to operate in the shadows, have been deep ever since political philosophy started to grapple with the dilemma of delineating a boundary line between where an individual's right to liberty begins or ends and the imperative of providing a democratic society with fundamental protection and security amidst the ever-shifting sands of circumstances kicks in. These are not only conceptual or theoretical questions for philosophers in the abstract; rather they are questions to be dealt with at the frontline of politics.

Two brief real-world examples will suffice. The first speaks to the initial reluctancy by President Harry S. Truman to afford a newly created American foreign intelligence enterprise—the office of the Director of Central Intelligence (DCI) and the CIA in the late 1940s—with too much power. As Amy B. Zegart (2022, p. 50) captures Truman's mindset so aptly, "he feared creating an American Gestapo and insisted the new intelligence agency have no domestic intelligence-gathering or law enforcement capabilities." In the early days, the primary task of a professional post-war centralized US foreign intelligence agency was to gather and analyze intelligence collected by various branches of the US government, then distilling it into neatly packaged reports to be sent or disseminated to the president, akin to a sort of specialized daily newspaper focused on foreign affairs (see Walton 2023, pp. 127-134). One might argue that these humble beginnings marked the inception of a US intelligence community that has since evolved into something markedly distinct. No more reading a lot, thinking a lot, distilling a lot and then sending (still) a lot. Rather, intelligence agencies today have the capability and capacity both to analyze threats to national and international security and to execute covert programs involving torture and rendition, conducting extensive domestic and global surveillance operations, and providing support to warfighters on the battlefield, if they do not directly engage in open or covert warfare. Hence, concerning intelligence theorization and the difficult question how to catch the very meaning of intelligence, Mark Stout and Michael Warner (2018) raise a valid point by asserting that intelligence is a government function whose objectives, tasks and means are set forth by politics and bureaucrats—"intelligence is as intelligence does," as they say.

But what ought intelligence be doing? How much authority and powers ought we give to spooks so that they can do what a democracy tells them to do? And again, do we really need this kind of pre-emptive, if not at times even preventive, form of real state power?

Secondly, the example of Germany serves as a strong illustration, both in terms of caution and outright rejection. The post-war German security and intelligence apparatus operates on the principle of the so-called German Trennungsgebot, or "separation rule" (Schwartz 2017, pp. 72-78). Rooted in what is known to be the Polizeibrief, that is, the "police letter" that the Western Allied military governors had sent to the Parliamentary Council in Bonn in mid-April of 1949, was the authorization for post-war Germany to re-establish federal law enforcement agencies as well as to have in a new, democratic post-war Germany an office for the collection, analysis and dissemination of information regarding subversive threats against the federal government. They were, however, two conditions attached to that very authorization. One was that these two federal functions or bodies (police, intelligence) are to be strictly separated. The second condition spoke to the authority, capabilities and means of a new domestic intelligence agency—it must not have any police powers. The Germany complied.

Today, in short, out of Berlin operates the Bundesnachrichtendienst (BND), that is, Germany's foreign intelligence agency. The BND differs markedly from other major agencies in its emphasis on strategic open-source (OSINT) analysis instead of engaging in secretive human intelligence (HUMINT) collection on the scale of, let's say, the Secret Intelligence Service (MI6) of His Majesty's Government out of London. As for domestic security in Germany, there is the Bundeskriminalamt (BKA), which is the federal investigative policy authority or federal criminal politics based in Wiesbaden (Hessen). And true to the 1949 separation rule, the BKA is strictly separated from the so-called Bundesamt für Verfassungsschutz (BfV), that is, the Federal Office for the Protection of the Constitution, i.e., the domestic intelligence agency headquartered in Cologne (North Rhine-Westphalia). To safeguard the German democratic state against existential threats, particularly subversion, a post-war domestic intelligence agency was established with the mission of repelling adversaries of democracy without any policing authority or powers to that effect. And: To safeguard the fundamental idea of democracy in Germany, the entire national security apparatus was crafted with checks and balances. This design prevents the threat of democracy from within its own intelligence agencies, which inherently possess means that often conflict with democratic ideals, values, and practices.

From this perspective, it's almost surreal that Hans-Georg Maassen, the former head of the BfV who was dismissed in 2018 and went on to found his own right-wing party, the Werteunion (Values Union), is now officially under surveillance (for good reasons) by the very intelligence agency he once led, for his alleged right-wing extremist affiliations. What we see at present in Germany is a situation where a former spy chief is accused for being a potential threat to the German Constitution—but accused by a domestic intelligence agency, the scandal-ridden BfV, which in turn has long been accused itself (for good reasons) of operating with elements of the German far-right or at least turning a blind eye to right-wing extremism. This is particularly troubling in the context of the rise of the far-right, anti-immigrant Alternative für Deutschland (AfD) party, which, despite its popularity in polls, espouses populist and nationalistic views.

Enter rejectionists. Additionally, considering the numerous scandals, notably the NSU scandal, where neo-Nazi terrorists were able to murder nine immigrants over seven years despite the presence of paid informants within the National Socialist Underground (NSU) militants by German domestic intelligence (BfV), it's understandable that there are calls to dismantle the BfV and abolish domestic intelligence agencies altogether. Only recently, in an op-ed for the Frankfurter Allgemeine Zeitung (FAZ), one of Germany's leading high-quality newspapers, Horst Meier and Claus Leggewie (2024)—the former a jurist, the latter the distinguished Ludwig-Börne-Professor of Political Science at the University of Gießen and critical public intellectual—questioned the use and legitimacy of the BfV. In short, the rejectionist argument they have to offer has two elements. In essence, the rejectionist argument they present comprises two elements: empirical and theoretical, specifically within the realm of democratic theory. Their empirical standpoint addresses the longstanding question of how the public and civil society can trust secretive agencies that refrain from disclosing the threats or attacks they have thwarted. Additionally, they raise the thought-provoking question of why democracies require intelligence agencies, especially when, as in Germany, there is evidently a significant issue with political and violent right-wing extremism.

Thus, Meier and Leggewie argue that to defend democracy effectively, the real focus should be on what politics and civil society is capable of doing against political extremism, while pursuing those who blatantly violate the law through federal criminal police (BKA) and other law enforcement agencies, rather than passively collecting information through legalized yet pseudo-democratic means. They highlight the risk of casting the intelligence net too wide, potentially ensnaring innocent citizens, including those with unconventional political views who pose no real threat. One might say that for Meier and Leggewie—and they have it quite rightly—democracy is too important to be left to spooks and interestingly, they bring in Kelsen's political thinking to substantiate their (controversial) claim through quoting from Kelsen's Berkeley farewell lecture entitled "What is Justice" (reprinted in Kelsen 1957). In essence, the line being quoted from Kelsen (1957, p. 23, my emphasis) is this: "But can a democracy be tolerant in its defense against antidemocratic tendencies? It can—to the extent that it *must not* suppress the *peaceful* expression of anti-democratic ideas. It is just by such tolerance that democracy distinguishes itself from autocracy."

Kelsen's democratic philosophy inherently incorporates the idea of tolerance, as he argues that tolerance is essential to the overarching principle of democracy—freedom, specifically the freedom of the individual. This, in turn, defines democracy as a just form of government. Surely, I would argue, in line with Sara Lagi (2021), that Kelsen's theory of democracy is founded on four key principles: pluralism of interests and ideas; constitutionalism characterized by the rule of law (and the identity thesis of law and state); relativism concerning philosophical, political, and epistemological positions in political and international spheres; and proceduralism as a method for generating political decisions and creating and revising laws (see also Schuett 2021). That said, what we might call here is Kelsen's "pure" theory of democracy is a rather thin notion of democracy. By that I mean—with positive reference to Turner and Mazur's (2023) critical point that post-Dahlian democratic theory has metamorphosed into something like a politics with way too much content or substance already inbuilt—that Kelsen appears to be quite realistic. In other words, Kelsen's realism lies in his recognition of the importance of allowing ample cultural space for political dissent, even including outright anti-democratic dissent, within a democracy. This approach aims to prevent the gradual transformation of democracy into autocracy. As every political realist knows full well: having good intentions is one thing; achieving good outcomes is quite another.

It gets tricker still, though. For Kelsen seems not to be the go-to person for rejectionist arguments against intelligence agencies per se. It is entirely appropriate to enlist Kelsen in demonstrating that, in terms of philosophy, theory and politics, the fundamental distinction between democracy and autocracy lies in the twin values of freedom and tolerance. Therefore, Kelsen (1957, p. 23) goes on to say: "We have a right to reject autocracy and to be proud of our democratic from of government as long as we maintain this difference." This point holds particular, if not existential, significance for our time, where the tolerance level between perceived notions of "good" and "bad" or "evil" appears to be decreasing, yet simultaneously becoming more absolute and resolute. Thus, Kelsen aptly warns us in the simplest and most stark terms: "Democracy cannot defend itself by giving itself up." It's not just a warning; it's also a subtle yet important call to political action, urging everyone in the democracy camp to champion democracy and its principle and values, while combatting all extremists through political means.

However, there's another aspect of Kelsen's (ibid.) perspective that warrants quoting in its entirety:

> But to suppress and prevent any attempt to overthrow the government by force is the right of any government and has nothing to do with the principles of government in general and tolerance in particular. Sometimes it may be difficult to draw a clear boundary line between the mere expression of ideas and the preparation of the use of force; but on the possibility of finding such a boundary line involves a certain risk. But it is the essence and honor of democracy to run such a risk, and if democracy could not stand such risk, it would not be worthy of being defended.

What Kelsen articulates here is remarkably realistic. He acknowledges—as he always does in his writings, explicitly or implicitly—that politics, like all forms of social interaction in what are essentially conflict groups, is inherently messy, entailing a complex web of power dynamics. This complexity extends to law, statecraft, and administration, which often involve delegated and discretionary authority, particularly within the executive and judicial branches. Kelsen understood like few other jurists and liberal political philosophers that the state, at its core, is a political entity—a space where power intersects with power, interest with interests, values with values.

Moreover, Kelsen recognizes the precarious nature of democracy, where the transition from expressing anti-democratic sentiments to engaging in violent actions to overthrow the established legal and political order can be swift. Without robust intelligence capabilities to gather both domestic and international information, a democracy risks losing sight of its true allies and identifying its genuine adversaries. In essence, without intelligence, we would be flying blind.

5. CONCLUSION

The Kelsenian approach sheds light on the intricate relationship between intelligence activities and the functioning of democratic societies, prompting a re-evaluation of intelligence practices and policies within such contexts. Kelsen's insights have also far-reaching implications for the development of future intelligence theories.

In the realm of intelligence theorization, I have challenged two predominant positions within the theory and practice of politics and international relations. The conventional view of intelligence, rooted in the principles of *raison d'état* or realpolitik, proves not only conceptually and morally deficient but also lacks the unity it ostensibly presents; indeed, the realist position appears to be somewhat overrated. Similarly, dismissing the notion that a democratic polity can forgo what is undeniably a potent—albeit potentially hazardous—governmental early-warning system inherent in spycraft, aligns with the perspective of Kelsenian theory of democracy. However, it ultimately risks discarding valuable resources along with legitimate concerns; to deprive a government of the tools intelligence offers would be somewhat naïve. As I have argued, the key appears to lie in adopting a Kelsenian middle position that endeavors to bridge democratic theory with pragmatic political and IR perspectives, thereby integrating their primary concerns—freedom and security, respectively—into a unified approach to political intelligence theorization. I believe that English School (ES) IR theory is a rich source of intellectual inspiration. ES thinking is realistic enough to recognize territoriality, sovereignty, diplomacy, war, and great power management as constitutive principles among nations and states. Yet, through its co-focus on the social construction of security and international anarchy, it takes seriously ethics, history, law, and culture in the contingent creation of international society, which constitute both friends and foes, and everyone in-between.

As I have also sought to demonstrate, this foundation must rest upon a thin account of democracy, characterized by a robust concept of freedom and tolerance. The contemporary cottage industry dedicated to defending democracy must clearly define what they mean by this form of government that requires defense. Revisiting the works of Kelsen (and Weber) serves as a necessary and important corrective to the prevailing zeitgeist, which often idealizes democracy to such an extent that there's a real danger of viewing anyone who doesn't conform to this ideal as an enemy of democracy.

This, in turn, carries significant implications for intelligence policy. If You and Me, as members of a democratic polity, transform the concept of democracy into an overly exclusive club with numerous membership prerequisites, we risk ending up with a short list of members. I don't mean to trivialize the essence of democracy here—it's far more than just a club, of course. My point is the importance of maintaining a realistic perspective; and in reality, demanding too much often leads to gaining too little, aside from causing significant political trouble. I'm not referring to mere disagreements over policy, but rather to the possibility of fundamental disputes over the very nature of politics within a democracy. If the democratic club becomes increasingly exclusive, there is a heightened risk that those in power, particularly during times of perceived or real crisis or conflict, will be more inclined to utilize every facet of executive authority to target both real and perceived adversaries. This includes leveraging domestic and foreign intelligence capabilities, especially during times of war. Drawing on Morgenthau's Kelsenian insights into the partiality of the police, I acknowledge of course the necessity of insulating intelligence from politicization, but Kelsen's theory of law and state teaches us that intelligence, like any other governmental function, is not a purely technical or value-neutral domain within a democracy's bureaucratic apparatus. Intelligence serves a political purpose, and it is left to lawmakers and policymakers to ensure that intelligence agencies, domestic and foreign, are kept out as long as possible from the normal politics of a democracy.

In accordance with Kelsen's perspective, the normal functioning of a democracy encompasses the presence of individuals who oppose it, even if they express unusual or objectionable or outright ugly views. As long as their actions remain lawful or peaceful, as Kelsen suggests, there is no need for the subtle brutality of an intelligence agency to intervene. The dynamic shifts, however, when anti-democratic individuals begin preparing for violence and subversion. In such instances, intelligence collection becomes impera-

tive. What remains then is the fact that intelligence—whether we like it or not—is the governmental realm where the state can demonstrate real preventive powers. This necessitates a robust system of checks and balances, ensuring that relevant state organs within security apparatuses garner trust from the legislative, executive, and judicial branches of government.

Above all, when tasked with safeguarding the nation and defending democracy from both domestic threats and foreign adversaries, intelligence agencies must earn the trust of those they serve—the people. While this may not sound particularly Kelsenian, it is rooted in the radically realistic recognition underlying Kelsen's formalistic account of democracy, law, and administration. Kelsen acknowledges that the norms we uphold are merely a reflection of a certain distribution of power at a specific point in history. In a democratic society, where power struggles are inherent rather than exceptional, the utilization of intelligence must be structured, regulated, and justified in a manner consistent with democratic principles of public oversight and accountability.

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Some Observations

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My initial statement about how this book should be read relates to the commendation of Robert Schuett (2003, pp. 11-12) and his claim about the book's potential:

> [It] deals with topics and questions that are central to any political science curriculum.

I would suggest that Schuett is right to see the consequences of the view set forth in *Making Democratic Theory Democratic* for "any political science curriculum". But Turner and Mazur are setting forth a perspective concerned with the way political education *per se* has been taken up so that democratic theory has, seemingly, lost its true character. "Democratic theory" presumably has lost its democratic connections.

I read the book as the authors' argument that political education needs to be reformed in a comprehensive way. And so a "political science curriculum" is only one of the consequential destinations of a political education that would make democratic theory democratic. Yes, secondary school education or political science courses at college and university must also have an important rôle in education concerned with democracy, law and public administration. But political parties too, if they are not to remain merely as electoral "combine harvesters", should be reformed in their *modus operandi* so that they demonstrate their civic *bona fides* in cogent and helpful ways via a political educative service for all electors and the polity in its diverse institutional settings.

As I read this book, it would seem that the political education that arises from its "theory", should also have a decisive impact in the forms by which mass-media journalism contributes to the political education of "the people", the "demos"/δῆμος, the electors, those to whom those elected to govern, to administer are accountable. Political reports are the "bread and butter" of mass-media, whether it be from established journalistic "outlets" or from the efforts of dissenters who wish to keep away from the "mainline" in order to preserve the integrity of their own political message. But even with their emphasis on "theory", Turner and Mazur have not produced a book that is concerned with "making democratic theory academic" still less with "making democratic theory merely conceptual and abstract."

In the terms by which our authors set forth their "hypothesis" to ensure that "democratic theory is to be made democratic again" (Schuett 2023, p. 11), or maybe more exactly, to be put on the democratic path to becoming so, it would seem that *political parties,* having apprised themselves of Turner and Mazur's argument, and agreed with

them, would then engage in "returning discourse about democracy to the people" (Schuett 2023, p. 18-22). That would mean that political parties would also make their return evident, and do so by taking up their civic responsibility by reforming their efforts to engage in fair and fearless political education.

Can they, as associations formed to promote a political vision, actually engage in co-operative civic public respect for the electors, those who vote for their pre-selected candidate as well as those electors who vote for their candidate's opponents? Can political parties engage in educating electors about all extant political viewpoints, theories and ideologies of citizens and their parties and groups as co-participants in the process of public governance? Or are they to continue in their presumed role as gatekeepers to preserve the interests as the organized *claque* (Turner 2015, p. 63).[1] of their preferred political elite. To take on what I am suggesting in the Turner and Mazur line of reform would mean that any party's political educative work, on the basis of its own political beliefs, would provide a genuine educative deepening of the citizenry. Such education would explain why it is close to some other political options based on other beliefs, and why it is further away from others, but not trying to pretend that it has no beliefs of its own to defend.

But for such political education to become part of a political party's work would mean it would have to critically, fairly and openly inform the "people" about their own political outlook, their legislative intentions and do so by salient comparison and contrast with the other extant political outlooks and legislative agendas. In this sense the political education that such parties would take up would avoid any "zero-sum game", the ruling idea of which is that there can only ever be two approaches:

> the wrong approach that is presented by our opponents and the self-evidently superior political view which is our own.

When that outlook is the shared bi-partisan approach then any such proposed political education is not only futile, it is completely useless and political education becomes political miseducation. At least that is how I am reading them Turner and Mazur. They are clearly concerned with seeing positive, non-superficial political education advance. And that is why they have put together "nine chapters on democracy, law and administration" even if "this book is not concerned with deciding the issues between them" (Turner and Mazur 2003, p. 1). Another way of saying this is that it is a book of political science not a law book, "laying down the law".

I read what I have just written and will admit that these comments may demonstrate the impact of my own "legal education" from the British television series "Rumpole of the Bailey."[2] That good-natured courtroom drama provides stories of Horace Rumpole (he is in his own terms a "Bailey hack") a defense lawyer who generally ends up with the most hopeless cases in criminal trials. His approach is to take up and develop the prosecution's case and regularly succeeds in arguing it better than the prosecution can do. The next step in his defence is to *then* (and we might add "only then") disclose the fallacy or the fundamental error that the prosecutors have overlooked in their own case. Such a reasoned legal outlook - albeit in a competitive mode within the British court - has an eye to the "competition" that requires arguing the other guy's position better than the other guy can argue it. This is applicable to scholarly discourse where theoretical presuppositions and logical argument are liable to clash with the result that there is no meeting of minds. Scholars regularly argue with proposition and counter-proposition in ways that regularly talk "passed each other." And this "method" of Rumpole comes to mind for "political discourse" when reading Turner and Mazur's volume. What they have presented is their attempt to "make democratic theory democratic again" even as they limit themselves in a highly disciplined discussion about

> a small set of political concepts, particularly democracy, law, and administration, and an equally small set of meta-political concepts, particularly ideology and various related concepts, such as the fact-value distinction, legal science, pure theories, and expertise (Turner and Mazur 2003, henceforth MDTD, p. ix).

Our authors have contributed a volume well aware that the kind of Rumpolean discourse I have suggested is so very hard to find in the "democratic discourse" proffered by "left" and "right" these days. It may in fact be almost completely absent when "democratic discourse" continues on in the vein that the elector remains wedged irrevocably between the alleged self-evident directions of "left" or "right".

Of course MDTD has been published in a political context that is dominated, as we well know, by political discourse in which liberal-democratic dogmatisms of various kinds prevail, but also, of late in the USA where Make America Great Again (MAGA) has loomed into prominence with its carefully calibrated menaces. The publishing outlook of Turner and Mazur suggests that political education should reach beyond schools and universities, since theorising about democracy remains an integral part of the framing of public policy and the disclosure of viable legislative agendas. It must also be part of citizen-crafting just as much as it is state-crafting and forming a just international legal order.

Let me go further in my comment on this 185-page expansive and detailed effort to re-democratise democratic theory, by pointing to a *fact* that stands out from my reading and re-reading of this volume.

It is an easily verifiable *fact,* as I state it below. Having noted it, I will then go on to give closer, albeit very brief, attention to what the authors explicitly say will be contained in their book's pages and they do so by contrasting what they then discuss with what will *not* be up for discussion in these pages.

And that will be my contribution, an even smaller first step than the authors have given, as I describe how I have read their publishing intention. Might this give some assistance to others? I hope so. The book anticipates further discussion about the consequences of this attempt to renew a Kelsen/Weber outlook in "democratic theory." And these consequences will not only be for what we might call Kelsen studies (Turner 2022, pp. 11-21) and Weber[3] studies or even for studies of Stephen Turner's extensive and many-sided contribution to social and political theory and the history and historiography of the social sciences (Turner 2015, pp. 51-64). [4]

Consider the publishing *facts:* Stephen Turner and George Mazur have gone ahead and authorized the publication of this 2023 volume, with an academic publisher, Routledge with head offices in New York and Abingdon. Their work has been classified for academic and commercial purposes as "Government/ Social Theory". According to Routledge advertising on the cover blurb, the book

> addresses a timely and fundamental problematic: the gap between the aims that people attempt to realize democratically and the law and administrative practices that actually result.

Even in these terms, what is remarkable is the restraint of these authors. This restraint is confirmed by the commendation of two fellow academics (Robert Schuett and Peter Baehr) that the publisher has placed on the back cover and the first page inside the front cover.

What I call this volume's remarkable restraint may well frustrate those who are attracted to the book by its title. The volume refrains from discussing "issues" that would be in the forefront of a potential buyer's mind. Let me try to guess at what the instinctive questions might arise for a politically astute New York or London resident (the two locations identified in the copyright page) who has taken down the book from the shelf in her local bookshop because she is seeking some kind of wisdom to understand the political issues of the day, not least those that are very "close to home":

> So what does this book in its contribution to "fundamental political theory"[5] contribute to our understanding of the 2016 US presidential election, by which that wealthy fellow who featured himself in the television reality show The Apprentice, was elected President and what this has meant for US politics and the world in the aftermath of his presidency?
> or
> What about the Brexit political process by which the United Kingdom departed from the European Union, following a referendum of 23 June 2016 and its formal conclusion with departure

on 31st January 2020? What does the theoretical discussion of "democracy, law and administration" tell us about this as a lawful decision?

As I have said already, what is remarkable in MDTD is the disciplined[6] absence of discussion of specific political and politicized issues that, if they were included in the text of the discussion, might then serve to illustrate what Turner and Mazur might want to affirm from their own political standpoints. Quite so. But their point is that that isn't the purpose of this book. Such a "line" would distract attention from what they are seeking to do in a work "in the category of fundamental political theory."

Of course, these big political issues must take our everyday attention, they cannot be avoided. In reading this book by taking due notice of the disciplined focus of the authors, I was nevertheless repeatedly reminding myself of local "political issues"[7] and, as I read on, I reassured myself that Turner and Mazur would also be fully aware of the issues in their own context, *even if they are not to be front and centre in this published discussion*. And as I have said, we should not lose sight of the *fact* that MDTD resonates with MAGA in its own ironic and critically perceptive way. They are both concerned with "making" something "again"—as Robert Schuett's review has noted for MDTD.

But even now, as I type this on my lap-top, having turned off my internet connections to concentrate on what I am doing, having already breakfasted on my daily diet of "what has been happening in the world" from mass-media, I note what our authors call "the issues" and recall many mass-media panel discussions I see these days that sound very much like a political science tutorial, or perhaps what they were once upon a time in the "olden days". I am assuming that Turner and Mazur are highly aware of that "appearance". They are seeking in their own way, via this publication, to not only *distinguish* between a public and political discussion of "democratic theory" (even including a measured and balanced discussion from various sides) and a scholarly *theoretical* discussion, so as to engage and encourage, as much as possible, the making of a disciplined "democratic theory" that stays, or tries to stay, strictly within *theoretical* lines.

In that sense, I have viewed the "Theoretical Preface" (pp. ix-xxviii), along with sections in the Introduction, with "Why it is Salient Now" (pp. 1-4) and "Returning Discourse About Democracy to the People" (pp. 18-22) as functioning as something like a memorandum, an *aide memoire,* they have written to themselves, as they have proceeded to edit the volume, having vowed, via a strict "ordinance of self-denial", seeking to keep discussion "on track", a theoretical discussion about what is basic to democratic theory.

"Democratic theory" in their terms does not ignore the international or global fact of complex intersections between "democratic theory, law and administration" (the "issues"), and they are not only manifest within the US polity. Even so, within that polity they seem, at this point in the disclosure of the "American experiment,"[8] to be on the verge of exploding with global consequences.

By giving attention to "democratic theory" as we read this book, with US political developments not be entirely written out of the book's content, we note how, philosophically at least, the theory as it is stated is seeming to test an hypothesis about what "democratic theory" has meant, means and will mean for the USA.

1776 and the Declaration of Independence cannot be completely absent from our reflections as we seek to follow the authors and stay within its set disciplined focus. But is the Declaration a hypothesis for an experiment in which the theory of democracy is being put to the test? Indeed, in what sense can we say that the USA is an experiment?

Some of us outside the USA, who are also involved in thinking about the basis of "fundamental political theory" and the problems of democratic public governance in our own polities, are not so distant as we thought we were, from the machinations of American political life, at least in a day-to-day sense.

But how are the allies of the US to see and respond to the unwieldy intersection of US federalism, the separation of powers, the courts making judgements left, right and centre, with political party pork-barrelling and electoral gerrymandering a taken-for-granted part of US politics. MTDT is not addressing these "issues" and still we will have heard how the next chapter of this US story is being played out, as we turn the pages in this book. We have lived through the "democratic" 20th century in the aftermath of Woodrow

Wilson's plea that the US enter the Great War in order to "Make the World Safe for Democracy" (2 April, 1917). But that was a time when the "American experiment" brought the "issues" of the time to the forefront of US political life that sounds strange to ears accustomed to the "normality" of "multi-culturalism."

> President Wilson, who had already proclaimed that any "man who carries a hyphen about him carries a dagger that he is ready to plunge into the vitals of this Republic," and who championed universal service as a way to mold a new nation, now thundered in words of dangerously unifying excess:
>
> > There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life. . . . Such creatures of passion, disloyalty, and anarchy must be crushed out . . . The hand of our power should close over them at once (Bethke-Elshtain 2010, pp. 22-23).

What we have experienced in recent decades are issues that have come to the fore with what one astute colleague has called the emergence within the story of liberalism of the "choice enhancement state" (Koyzis 2019, pp. 40-56).

And now we marvel at the internal complexity and seeming entrenched ambiguity of a polity in which, it would seem, the citizenry is in need of being instructed ("again") about its own constitution and what that implies, not just for their "political life", but for the health of the body politic in all of its dimensions, on all its local, state and federal levels. And dare we say it: for their own health as citizens, in their non-political responsibilities, let alone as citizens of an international order.

In my contribution to this symposium I have effectively limited myself to discuss the title of this book and what the authors say they have intended to do by posing what they call the problem of "making democratic theory democratic."

I have endeavoured to look intensely at the opening 2 pages of the "Theoretical Preface" and so openly concede that this is no normal(!) review—much more needs to be said before an adequate immanent critique can be set forth.[9]

So this is but a few pages of reflection about the framing questions raised by Turner and Mazur, my own response to what I have read of these opening statements. These set the stage, in John Locke's terms "clearing the ground",[10] hoping to encourage a contribution that gives detailed consideration of this expansive and detailed attempt to promote a disciplined reconsideration of what the authors call "democratic theory" within political science. Their aim is evidently to enable political science to contribute as it should to democracy, law and administration.

That brings us straight away to the title of the book: *Making Democratic Theory Democratic*. Another way of saying what the book's title says is found in the heading of the concluding section of the initial chapter "Introduction: Nine Chapters on Democracy, Law and Administration"—"Returning Discourse About Democracy to the People" (Turner and Mazur 2003, pp. 18-22).

In the explanation given at the outset of that Introduction we read why Turner and Mazur have decided that the goal of their book shall be "returning discourse about democracy to the people" or "making democratic theory democratic", or in the terms of Robert Schuett's review "that democratic theory is to be made democratic again" (Schuett 2024, p. 11). It is set forth in these terms:

> What the problem of democracy, law, and administration is, who is the problem and how it is understood vary radically between political standpoints. Although this book is not concerned with deciding the issues between them, it is concerned with explicating the issue itself (Turner and Masur 2023, p. 1).

I read this and had to dwell on it for some time to overcome my uncertainty about what the authors were setting forth. Reading those two sentences and trying to gauge their intent brings us to the "*them*" in the second sentence, by which the authors convey to us that with which they are ***not*** concerned, that is with "deciding the issues between *them*." And then, as we read on we confront first the "left" and then, 6 lines later a reference to a "right" version, competing with the "left" view of the problem—the authors concede these are descriptions of what they see and experience in the American (i.e. US) polity—and hence we attend to the authors' stated concern is in the realm of "making democratic theory" not with moderating political standpoints that are, at root, opposed to each other. The *them* refers to the diverse and diverging political standpoints and not to "the issues" that are part of the functioning of democratic polities: the way democracy is understood and configured, the law, the administration of the polity and the major agents who make political life problematic in an ongoing way. But then we read on to consider the brief description of how these views manifest themselves in radically divergent ways.

> The "left" version of this problem, in its American form, is this: in principle, the goal of reform politics is to bring economic life under the control of a participatory, deliberative, public process which, through its egalitarian character, would bring about a consensual democratic socialism that provides flourishing for all people, largely through emancipation from the bad consequences of capitalism (Ibid.).

What I have noted about one word ("*them*") in the first four lines of the opening section, "Why It is Salient Now" of the Introduction, is no mere quibble. The statement gains in clarity as we read on. In the next six lines the authors begin to describe the conflicting political viewpoints, beginning with "the left version" (line 4), to follow on with the "right" (line 9). At least that is what I assumed when I first read it:

> ... The "right" engages in deceptive tactics to prevent the realization of such [emancipatory] policies [designed to counter the bad consequences of capitalism], especially (but not only) by inventing pro-capitalist legal constraints on government action, often in collusion with conservative academics ... (Ibid.).

But as I read on it becomes apparent that the description of politics of the "right" in line 9 is the "right" as view from the "left" political outlook. This is the "left's" view of the "right"—the "left" view of "who is the problem?" See the initial sentence of page one.

And it is not until we are half-way down page 2 that we get the "right" view, presumably more in line with the way the "right" conceives of their own view with their implicit critique of the "left's" bias toward a victimological view of human rights, that then leads to government overreach into people's lives.

And in those first few pages Turner and Mazur, by contrasting "left" and "right" describe how it is that the major sides of US politics talk passed each other.

As I have said, I have limited my discussion to what can be inferred from the title of the book and the opening pages of the "Theoretical Preface". This is not written as a normal(!) review—it is not in any way comprehensive. It is but a few pages of reflections about the questions that need to be answered in an expansive and detailed response to this expansive and detailed effort to re-democratise democratic theory. Or to put it another way: it is to put forward these questions about the opening statements that reveal some basic questions to which Turner and Mazur have set themselves to answer.

As I understand it, Turner and Mazur are making an appeal to the legal positivism of Kelsen the social democrat (with his concept of metamorphoses as "leit-motif") and the liberal aristocratic Weber's "ideal type" (his methodological attempt to avoid absolute historical relativism by appeal to the distinction between facts and values) and thereby suggest a path for an enriched empirically sensitized "theorising" about the ongoing (democratic) development of democracy in terms of "rule of law" and the "administration" thereof.

I read Turner and Mazur's emphasis upon presenting the position of one's (political/theoretical) opponents (advocates of an alternative democratic idea) in a way that the opponent can recognise, as a welcome signal to how they recognize democratic polity-formation or state-crafting as a corporate undertaking that works with due respect to the way one's fellow citizens understand themselves and their place in the political sphere.

It is the problematic *political* context in which the book has been published, which, it seems, the authors are seeking to understand and thereby promote a way of tackling that by *first* developing what they call "democratic theory", "making democratic theory democratic." With the authors we, as readers, are confronted with the complexity of crisis-ridden political life that is complex and understood by ourselves and our fellow citizens in diverse and competing ways in which political problems are "understood [to] vary radically between political standpoints."

Some of my critical questions about the theoretical agenda of MDTD are suggested by what I have touched on above. I would only suggest, for starters, that the inherent ambiguity of the book's title should provoke further critical reflection and discussion. Is democracy a theory, such that democratic theory is what one formulates in order to work politically with the hypothesis that public governance, or state crafting, is an experiment? If state-crafting is an experiment what then are we to understand of the experiments that proceed *scientifically* within scientific laboratories?

I do not read MDTD as irredentist although I do note that there is an ironic echo in the book's title and clearly what that title echoes is certainly an irredentist outlook of political life and which deeply trouble the book's authors as well as this writer.

NOTES

1 A term quoted by Turner from his critic Peter Baehr in Turner 2015. It is a term I had not come across before and the Online Dictionary says it refers to a group of people hired to applaud (or heckle) a performer or public speaker.

2 "Rumpole of the Bailey" was a British TV series and ran from 1978 to 1992. Rumpole sees himself as an "Old Bailey Hack", a barrister who persists in avoiding promotion to QC or Circuit Judge, delighting in the duels of cross examination and asking the right questions of witnesses. The series was devised by John Mortimore (1923-2009), himself a barrister, a QC, who also wrote books and plays.

3 Turner 2024, p. 22, footnote 2: "The specifics of Weber's unusual view of democracy is not discussed here, but an account of them. This present volume adds a vital dimension to be taken into account by scholars concerned with "Stephen Turner studies".

4 This is the author's response in a Symposium on Turner (ed. Nichols 2015) which attempted to also give an account, *inter alia*, of the way in which sociology might make a contribution to democratic discussion but he was alarmed at the way sociology had adopted a methodological stance that sees the discipline's ethic as one of denunciation and exclusion (2015, p. 62). For outsiders like myself to the institutional context of American sociology the "Editor's Introduction" (Nichols 2015, pp. 1-10) provides a helpful "insider view" of the *disciplinary* problem faced by sociology, if not of political science, that is of concern to Turner.

5 Turner and Mazur 2023, "Theoretical Preface", p. ix.

6 Turner and Mazur 2023, p. ix. The discussion concerns the "commentary"—in this case the contribution to "Kelsen studies" and "Weber studies"—as a means of gaining perspective on what is identified in the subtitle to the "Theoretical Preface", the *divergent values* about democratic theory, law and administration.

7 I live in Australia and issue after issue from my own attempts to keep track of political debate and legislation over the past 25 years come to mind. In recent time there was the change to the Marriage Act 2017 and the circumstances of the departure from democratic and parliamentary convention on many

fronts that was required by the major political parties to arrive at what we now have in the Marriage Act. Last year there was the Referendum on a change to the Constitution to enshrine an "Indigenous Voice" that was transformed by the Prime Minister and Leader of the Opposition into a debate between their major parties, and not as the indigenous leaders had framed it. So that is on my mind as I write this essay, limiting my comment on such vital issues to this brief footnote.

8 The American Experiment. https://www.historians.org/teaching-and-learning/teaching-resources-for-historians/sixteen-months-to-sumter/newspaper-index/new-york-daily-tribune/the-american-experiment *New-York Daily Tribune*, November 27, 1860.

9 This essay is more like the kind of "exegetical essay" I required of my advanced social theory students when I gave them a quote of about 300 words by a prominent social theorist that provided the gist of that author's own interpretation of his/her contribution to sociological theory. They would then write their "exegesis" in 3,000 words.

10 The quote is from Locke (1690): "It is ambition enough to be employed as an under-labourer in clearing the ground a little, and removing some of the rubbish which lies in the way to knowledge."

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From the "Ideology" to the "Reality" of Democracy

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I. INTRODUCTION[1]

Austro-American legal scholar Hans Kelsen (1881–1973) developed the "Pure Theory of Law", one of the most influential teachings of the 20th century. In the USA, however, it is still "a path not taken"[2] and, apart from a few specialists, largely unknown.[3] This applies even more to his theory of democracy, which was overshadowed by the Pure Theory even in German-speaking countries for a long time. This is of course also due to the language barrier, especially as Kelsen's most important work in this field, "Vom Wesen und Wert der Demokratie (The Essence and Value of Democracy)" (first edition 1920; second, substantially modified edition 1929) was written in German and not published in English during the author's lifetime.[4] However, Kelsen's last and most detailed treatment of the subject of "democracy" was in English: "Foundations of Democracy", written in 1956, is about three times as long as "The Essence" (Kelsen 1956/2006). But even this article has so far received little response in the USA.

These findings could change with the publication of the new book by Stephen Turner and George Mazur. Based on the American discourse on democracy, they attempt to make use of Kelsen's theories, but also those of Max Weber (which are similar in many respects). They rightly described Kelsen as a "key thinker" of democracy (Turner and Mazur 2023, p. ix). And he was not only a thinker but also a creator of democracy: In 1919, he drafted the Austrian Federal Constitutional Act (*Bundes-Verfassungsgesetz, abbr. B-VG*) of 1920, which is still in force today.[5] Thirdly, he was a member of the Constitutional Court for ten years, which was established with this constitution, and thus also contributed to the establishment of democracy in Austria. From this position, he not only succeeded in providing a theoretical justification for democracy, but also in providing an answer to the problem that the democracies we encounter in reality—be it Austria, be it the USA, or others—do not fulfil the high democratic ideal: In order to exist in reality, the democratic idea must undergo a series of metamorphoses (Turner and Mazur 2023, pp. x and 7). Individual freedom is being replaced by the freedom of the majority. Instead of self-determination, decisions are made by elected representatives. Only the insight into the necessity of these metamorphoses makes it possible to recognize and affirm the real existing democracies as democracies. In the following lines, this will be illustrated by a few important points.

II. THE PROBLEM OF PARLIAMENTARISM

The first point is to analyze the relationship between democracy and parliamentarism. For Kelsen, "modern democracy" was "a parliamentary one," and parliamentarism appeared to him, "at least according to past experiences, to be the only possible form in which democracy can be realized within today's social reality" (Kelsen 1926/2006, pp. 121-122). This observation was undoubtedly correct, but it also compelled Kelsen to engage with those critics who saw parliamentarism as fundamentally incompatible with democracy. Already in 18th century, Rousseau commented: "The English populace regards itself as free, but that's quite wrong; it is free only during the election of members of parliament. As soon as they are elected, the populace goes into slavery, and is nothing" (Rousseau 1762/1996, p. 350).[6] And many years later Lenin came to almost the same conclusion: "To decide once every few years which members of the ruling class are to repress and crush the people through parliament—this is the real essence of bourgeois parliamentarism, not only in parliamentary-constitutional monarchies but also in the most democratic republics" (Lenin 1918/2014,p. 83). The strikingly similar criticisms of Rousseau and Lenin centered on the fact that nearly all theories of parliamentarism assumed that the people were the sovereign and the deputies merely representatives of their voters. However, these representatives could override the wishes of those they represented, thanks to the principle of free mandate (notably, the Soviet Russian Constitution sought to circumvent this by replacing the free mandate with the principle of imperative mandate) (Kelsen 1965, p. 150).

Kelsen justified parliamentarism without aligning it with the theory of popular sovereignty. On the contrary, Kelsen criticized the theory of representation, which had "handed the opponents the argument that democracy was based on a palpable untruth" (Kelsen 1926/2006, p. 123; cf. 1929/2006, p. 31).[7] For him, the "assertion that it was the people who, through their parliament, formed the state's will" was an "obvious fiction" (Kelsen 1926/2006, p. 122). This surprising result becomes understandable when one considers Kelsen's works in legal theory, in which he consistently distinguished between "ought", the objective meaning of a norm, and "will", the real psychological process in a person.[8] As a psychological function, willing is inseparably connected to a person. Even if the will of the representative is bound to that of the represented, it still involves two distinct wills. "Still more patent is the fiction of identity of will, where the will of the representative is not bound by the will of the represented, as in the case of statutory representation of the individual lacking the capacity to act or the representation of the people by a modern parliament whose members, in the exercise of their functions are politically independent" (Kelsen 1960/1967, p. 300). Kelsen spoke here of the "fiction of a fiction" (Kelsen 1920/2006, p. 11). In reality, the relationship between MP's and their voters is a specifically normative-legal construction that could offer certain advantages, and there is nothing to contest as long as one remains aware of its nature. It is unjustified, however, when "by characterizing the parliament as the representative of the people´s self-determination is essentially modified where this principle is restricted to the election of the parliament by a more or less extensive group of citizens" (Kelsen 1960/1967, p. 302).

The justification for parliamentarism must therefore be sought in a completely different place. And Kelsen found it in "the indispensable need for division of labor, the unyielding tendency toward social differentiation" (Kelsen 1926/2006, p. 122). The resulting and essential compromise is parliamentarism: the transfer of state functions to a dedicated body is necessary because modern society, for practical reasons is not capable of directly and personally engaging in the "truly creative activity of forming the state's will." The people must limit itself to, "the creation and control of the actual governing apparatus" (Kelsen 1929/2013, p. 49).[9]

Thus, while Kelsen generally agreed with the principle of parliamentary democracy, he was also open to reforming parliamentarism on specific points: he considered „the lack of accountability of the representative towards his constituents" to be „one of the central causes of the ill-feeling that exists towards the institution of parliament today" (Kelsen 1929/2013, p. 40).[10] Although he rejected the concept of an imperative mandate (perhaps thinking more of the old system of estate-based assemblies than the Soviet system) (Kelsen 1925b, pp. 8, 13), he still found it conceivable that a representative could lose his mandate if he left

or was expelled from the party for which he had been elected. This, he believed, was only a natural consequence, where "voting occurs by party lists" (Kelsen 1929/2013, p. 60; Hofmann and Riescher 1999, p. 98). Kelsen noted the extensive flexibility granted by the Soviet Russian Constitution of 1918 in this regard and deemed it quite positive.[11] In contrast, parliamentary immunity was a thorn in Kelsen's side, as it appeared to him as a privilege that might have been justified during the monarchy, but had entirely lost its rationale now that, „the executive is nothing more than an extension of parliament" (Kelsen 1925b, p. 15; 1929/2013, p. 59; 1929/2006, p. 186; 1925a, p. 355f).[12]

Kelsen also advocated for an enhancement of direct democratic measures, such as referendums. Ideally, these should be applied during the legislative process, for instance, in cases of conflict between the two parliamentary chambers, when decreed by the head of state, or when demanded by a qualified minority of Parliament. Whether this would improve the quality of legislation, Kelsen left open, but he believed that direct democratic measures could at least help counter the argument of elitism (*Volksfremdheit*) which was often directed against parliamentarism (Kelsen 1925b, p. 12; 1929/2013, p. 57; Hofmann and Riescher 1999, p. 98).

The idea of a parliament composed of experts was rejected by Kelsen, even though parliamentary committees already offer a preliminary step in this direction. Most issues would be rarely confined to a single field. For similar reasons, Kelsen also rejected a vocational system, as it was widely advocated at that time.[13] Individuals should not face the state in isolation, but should be grouped together by occupation (those working in agriculture, in industry, in transport, etc.). Employers and employees should regularly be united in such a vocational group, thus overcoming a 'class struggle' in the Marxist sense.[14] The "realization of this idea", according to Kelsen, "faces extraordinary, partly insurmountable, difficulties". That is, because "vocational interests compete with other, entirely different and often vital, interests (religious, broadly ethical, and aesthetic concerns, for example)" (Kelsen 1925b, p. 21; 1929/2013, p. 63).[15] Being a farmer doesn't mean sharing the opinions of other farmers in non-professional matters. But even where economic matters are concerned, corporative representations are only suitable for solving internal problems. For the cooperation of multiple vocational groups, the corporative principle provides no course of action; "the only possible solution is to give the final decision over conflicts of interest between vocational groups to an authority, which is constituted according to non-corporative principles." Thus, the formula "each group should be given a share in government according to its relevance to the whole" proves to be „completely empty and useless" (Kelsen 1925b, p. 23; 1929/2013, p. 64). Following a detailed analysis of these concepts and demonstrating their inherent flaws, Kelsen reached the devastating conclusion that the adoption of a vocational system would lead toward „the dictatorial rule of one class over another" (Kelsen 1929/2013, p. 66).

II. A MAJORITY OR A PROPORTIONAL VOTING SYSTEM?

In addition to the principle of representation, the democratic ideal of freedom is further constrained by a second principle: the principle of majority rule. Perfect freedom would only exist if decisions were made unanimously, meaning that only laws that each individual had consented to would apply—which is not feasible in practice. However, Kelsen succeeded in demonstrating that "the principle of an absolute, not a qualified majority represents the relatively greatest approximation to the idea of freedom" (Kelsen 1929/2013, p. 31; Turner and Mazur 2023, p. 58). Kelsen recognized the problem that in a democracy, the majority governs over the minority. He insisted, however, that the minority is not condemned to complete and lasting powerlessness. If it were, it would eventually "forgo its merely formal participation in the formation of the community will, which is not only worthless but even harmful to it; thereby depriving the majority—which conceptually cannot exist without a minority—of its character as such." This interaction and mutual dependence between majority and minority, this compulsion to compromise, is what characterizes the functioning of a parliamentary democracy. Then if "the specifically dialectical process within parliament has a deeper meaning, then surely it is that the opposition of the thesis and antithesis of political interests somehow results in a synthesis" (Kelsen 1929/2013, p. 70; 1929/2006, p. 197f).[16]

The nature of parliamentary democracy as a cooperation between majority and minority automatically provides an answer to the question of which electoral system should be preferred, the majority system or the proportional representation system: "The decision must be made in favor of the latter" (Kelsen 1929/2013, p. 70).

Kelsen's argument is as follows: just as the ideal of freedom is only fully realized when only those laws apply that the individual has also helped enact, it is also only fully realized when the representative, who is to decide in place of the voter, is truly elected by them. If all people wanted the same thing, only one representative would be necessary. If each person wanted something different, there would need to be as many representatives as there are voters. Both are unrealistic extremes between which realistic possibilities lie. But assuming some diversity of opinions in the population, the ideal of freedom is better realized the more representatives can be elected: "In the ideal case, there are no losers in a proportional vote, because no majorities are formed." In this way, the idea of proportional representation fits into the ideology of democracy (Kelsen 1929/2013, p. 70; Somek 2001, p. 35).[17] But proportional representation also aligns better with the parliamentary idea than majority system: if majorization happens not at the election stage, but during votes in Parliament, the will of the state is created only in Parliament, while "the parliamentary election itself ... should create as clear a picture as possible of the political grouping of the people as the preconditions under which the eventual formation of a majority must occur" (Kelsen 1925a, p. 347).

The majority voting system, on the other hand, means that the majority overrules the minority already at the election stage. If there were a pure majority system, unadulterated by constituencies, "then only the majority and no minority would be represented." Since this is politically undesirable, the population is divided into constituencies before the election, designed in such a way that in some districts, one party can gain a majority, while in others, the other party can gain a majority. This would create an opposition in an artificial way. "Proportional representation basically represents nothing more than a rationalization of the very goal pursued by combining the majority system with the division into districts: an assurance of the existence of an opposition, without which the parliamentary process would be unable to fulfill its true purpose" (Kelsen 1929/2013, p. 72).

Special attention must be drawn to the great significance Kelsen attributes to parties in democracy: "Not only does the proportional representation system ... presuppose more than any other the division of the politically entitled into political parties", but Kelsen generally concludes that democracy "necessarily and unavoidably is a party state." Any other division of the population—such as by vocational groups—was dismissed by him as arbitrary and unnatural: the democratic general will arises from various individual interests, and parties are those that articulate these interests. Therefore, Kelsen also advocated to anchor "political parties constitutionally and to fashion them legally into what they factually already are—into organs of government" (Kelsen 1929/2013, p. 38; cf. Saage 2002, p. 13). These demands in particular show how strongly Kelsen is influenced by European constitutional traditions and perhaps explain why he is still unpopular in the USA today. In fact, after World War II, there were also many efforts in Europe to push back the omnipotence of the parties. The individual position of each member of parliament was to be strengthened by a "personal voting system" i.e. a majority voting system. In fact, most European electoral systems, such as Germany and Italy, are actually mixed systems of proportional and majority voting. Austria, perhaps following Kelsen, only expanded the proportional voting system even further after 1945. But there is no lack of discussions about reform here either.

III. DEMOCRACY AND THE EXECUTIVE POWER

The close connection between legal theory and political theory is also evident in Kelsen's views on administration and judiciary.[18] "Traditional legal doctrine places the judiciary as a form of jurisdiction or court system in a fundamental contrast to administration," he asserts, viewing the origin of this doctrine in the traditional dualism of law and state: the judiciary is seen as a legal function; (only) it is understood by traditional doctrine as applying the law created in legislation In contrast, administration is "understood nei-

ther as lawmaking nor as law application, but as an inherently different function from the legal function of the state, serving not legal purposes, but those of power or culture" (Kelsen 1925b, pp. 1, 4). However, if one accepts the insight that the state is identical with its legal order,[19] then administration also reveals itself as a legal function, as it, too, is an execution of the law. Accordingly, in his drafts for the Austrian Federal Constitutional Act (B-VG), Kelsen did not divide the state's functions into the usual triad of legislation, administration, and judiciary. Instead, he contrasted "federal legislative power" with "federal executive power", which he further subdivided into "federal administration" and "judiciary" (Schmitz 1981, p. 45).[20] Both administration and judiciary, however, have not only a law-enforcing but also a law-creating function: according to the doctrine of the hierarchical structure of the legal order (cf. Turner and Mazur 2023, p. 165), the law-making process occurs in several stages, of which legislation is only one. The judiciary and administration are tasked with progressively "concretizing" the laws by issuing judicial judgments and administrative acts. It is empirically observable that legislation leaves much less room for the judiciary than for the administration, which has comparatively more discretionary powers. This circumstance—explainable not by legal logic, but only historically—is the reason why judges are independent, while administrative officials are subject to directives: "If the creation of general norms, i.e., legislation, belongs to the monarch, he is all the more interested in the legal binding of the judge, as the courts are 'independent' of him... The exact opposite relationship exists in other areas of law" (Kelsen 1925b, p. 9; Jabloner 2007, p. 19). Thus, the legal density of civil and criminal law is directly connected to the independence of the authorities tasked with their enforcement.

Once judiciary and administration are recognized as legal functions, as "decision-making of the second stage" after legislation, a serious problem arises in democratic theory: "The demand for democracy has so far been contented with calling for a specific organisation of the legislative body ... Now, however, once this demand had been met, the problem of democratising of the process of state decision-making of the second stage arose" (Kelsen 1929/2013, p. 82).

Kelsen's further considerations on this topic cannot be understood without the historical context, which is to be summarized briefly here.[21] The administrative organization in Austria was traditionally characterized by a dualism principle whereby, at least in theory, each (central) state administrative area—province (*Land*), district (*Bezirk*), municipality (*Gemeinde*)—was meant to correspond to a self-governing body.[22] The implementation of this principle varied greatly under the monarchy: at the lowest, municipal level, the municipal organs handled both an "own" sphere of competence and an "assigned sphere of competence," while at the provincial level, there was an imperial governorship parallel to an autonomously elected provincial committee and provincial governor. A similar arrangement was intended to be introduced at the district level, but it was only realized in a few crown lands. In 1918, the imperial governorships were dissolved, and their responsibilities were transferred to the provincial governor (*Landeshauptmann*), thus democratizing provincial administration: "Only district administration is still autocratic, as in old Austria: through appointed district governors (*Bezirkshauptleute*)," noted Kelsen (1921, p. 7f).

The Social Democrat Karl Renner had already made initial considerations for the democratization of district administration during World War I. After his election as head of government (State Chancellor) in 1918, he made it his personal mission.[23] However, he was overtaken by developments in Russia, where Lenin had disempowered the old bureaucracy and attempted to establish an administration by councils (Soviets),[24] comprised of people from all social classes, which also meant untrained individuals. This, as Kelsen later expressed, led to an "administrative catastrophe": "The very anti-bureaucratic edge of the Soviet system was the first to break off" (Kelsen 1921, p. 9; 1965, p. 155). Renner had no such plan for Austria; he merely advocated for "permanent advisory councils" formed from the "vocational organizations" (!), which were to "participate in administration in certain strictly defined cases "In this form, the council idea can be utilized and simultaneously restricted to an acceptable degree."[25] Fierce resistance to these plans naturally came from the Christian Socialists, and a compromise was hard to achieve. Finally, only a programmatic provision was included in the Federal Constitutional Act, which was never implemented.

Kelsen had not been involved in this development,[26] but he attributed great significance to the impending administrative reform, considering that "district administration... is today the main pillar of our entire administrative structure" (Kelsen 1921, p. 8). There can be no doubt that Kelsen was generally open to the idea of councils at that time: In the first edition of his work "The Essence and Value of Democracy", published even before the adoption of the Federal Constitutional Act, Kelsen referred to the council system, where even 'the individual economic enterprise, the factory, the workshop, the regiment become electoral bodies' as the 'most genuine democracy'. However, he explicitly left open the questions of feasibility and appropriateness of this model (Kelsen 1920/2006, p. 13). Now, however, these matters presented themselves with urgency. In an essay from 1921, Kelsen therefore developed various possibilities for how the constitutional mandate could be most effectively implemented. The most sensible solution, in his view, was a democratically elected district council, which would then elect the district governor (*Bezirkshauptmann*), similar to how the provincial parliament elects the provincial governor. However, he also noted that the democratization of district administration differs from that of state administration, particularly because only executive, not legislative, functions exist at the district level; the "district parliaments" would more closely resemble municipal councils than provincial parliaments in their functions (Kelsen 1921, p. 11). This comparison, however, indicates that Kelsen began to move away from the idea of complete administrative democratization: significant difficulties already exist in law enforcement by mayors in the so-called assigned sphere of competence. This demonstrates that law enforcement is better ensured by officials selected based on objective criteria and held personally responsible for their actions than by elected officeholders:

> And even less than a democratically elected district governor would a district council see its highest goal in legality. It would seek to impose the will of its respective party-political majority rather than the will of the law. The country risks dissolving into districts through the democratization of district administration, just as the state dissolved into states through the democratization of state administration (Kelsen 1921, p. 13).

Adolf J. Merkl, who was a disciple of Kelsen and later professor at Vienna University as well, argued in a similar direction, thoroughly examining the pros and cons of an "autocratic" and a "democratic" administrative organization in 1923, concluding that the democratization of administration also meant "the transformation of a previously centralized democracy into a decentralized one." The "struggle for district democracy" was a "struggle against state democracy", and ultimately against provincial democracy (Merkl 1923, pp. 81, 84; cf. Polaschek 1997, p. 86). Such considerations likely led the constitutional legislator to abandon the idea of democratizing district administration.[27] The 1925 Constitutional Amendment[28] definitively set the course in favor of the autocratic administrative model.[29]

Kelsen and Merkl endeavored in their writings to present this administrative model as democratic and to prove that it was in no way inferior to the other model, which was ultimately abandoned, and indeed that it was even preferable. At first glance, it may appear that the democratic organization of the executive sphere simply follows from the democratic organization of the legislative sphere, and that the idea of democracy is served all the better, the further the democratic form of government seizes upon the process of execution. Yet, this is by no means the case", Kelsen (1929/2013, p. 80) explained. Insofar as the executive organs have no discretionary powers and are simply to enforce the (democratically enacted) laws, there is neither necessity nor sense in their democratic creation: "Indeed, the discretionary powers granted to executive bodies are sometimes quite extensive. However, precisely the democratization of legislation leads to a comprehensive legislative activity that restricts these discretionary powers considerably" (Kelsen 1921, p. 12). "Only broad discretionary powers can ensure the beneficial operation of a democratically organized administrative sphere. This means, however, that administrative democracy holds within itself a strong tendency towards decentralization. The will of the parts can be given leeway only at the expense of the will of the whole" (Kelsen 1929/2013, p. 82; cf. Dreier 1991, p. 123). In this way, Kelsen came to justify the situation—one he had sharply criticized in 1920—where, "one stage of law creation... namely the

legislative stage, is democratic, while the next stage—the so-called executive—is organized autocratically" (Kelsen 1920/2006, p. 17). Thus, "the doctrine of hierarchical legal structure now provided the legal conceptual framework and the legal legitimacy for parliamentary democracy" (Öhlinger 1975, p. 32). In fact, in the following decades, the model established in 1925 became so closely associated with its legal-theoretical justification by Kelsen and Merkl (1923; 1927, p. 336ff)[30] that in the Second Republic it was referred to as the "Kelsen-Merkl concept."[31]

There has been no shortage of critics of this administrative model; their objections are both of an administrative and democratic-theoretical nature. From an administrative theory perspective, there is doubt that administration can be adequately determined and organized by laws and directives (Öhlinger 1975, p. 34; Pernthaler 2004, p. 170). Indeed, there are numerous signs that the over 200-year-old paradigm of the "rule of law" is now in decline, along with the hierarchical structure doctrine—not as a legal theory model, but as a legal-technical maxim. The many related issues cannot be explored in depth here.[32] The democratic theoretical objection is that democracy does not necessarily compel centralization and that self-governance by citizens at a lower level, such as municipal, is also democratic and not inferior to a democratic centralized administration (Pernthaler 2004, p. 170). Accusing Kelsen of labeling such models as undemocratic is, however, unjustified. Even in 1925, the year of the constitutional reform, Kelsen saw in a "system of elected collegial bodies..., which descend in a stepwise manner from a central administrative body... to local administrative bodies," the "closest approximation to the democratic ideal." What decided against this system were not democratic theoretical reasons, but "socio-technical reasons": the need for division of labor, which "asserts itself much more strongly in the realm of execution than in that of legislation," and "here leads to forms of indirect will formation, thus also compelling autocratic administrative forms" (Kelsen 1925a, p. 362f; Czerwick 2001, p. 35). Within certain limits, however, the autocratic form of execution is by no means in conflict with the democracy of legislation, and "the demand for democracy in administration" can "only have conditional and limited validity..., precisely in the interest of preserving democracy itself" (Kelsen 1925a, p. 367; Saage 2002, p. 14).

However, it must be admitted that Kelsen believed that the "organizational principle of democracy, by its very nature, is not equally suitable for all stages of state will formation. It is primarily intended for the legislative process"—his remarkable, yet consistent thesis arises in the context of an entirely different matter: the problem of jury trials. In 1929, due to a contemporary issue,[33] Kelsen commented briefly on the topic (Kelsen 1929a)[34] acknowledging its democratic character in principle. However, he noted that it had been established in an era when legislation was largely in the hands of the monarch and had since lost its "good political sense." For once legislation is democratized, the democratization of further stages is "not a continuation of the democratic principle, but rather a threat to it." Thus, Kelsen argued strongly for replacing jury trials with courts with a mixed composition of professional and lay judges, where lay judges would not decide solely on the guilt of the accused, but only in conjunction with professional judges. The professional judges, owing to their official duty, professional interests, and professional honor, "are far more interested in the legality of the verdict" than lay judges. Lay judges, on the other hand, offer no guarantee that "the law, in which the will of the people is expressed, will be applied by the organ tasked with its application and nothing but its application" (Kelsen 1929a).

IV. DEMOCRACY AND THE SEPARATION OF POWERS

From Kelsen's perspective on the relationship between legislation, judiciary, and administration, it is understandable that he also viewed the doctrine of the separation of powers with some criticism, initially even rejecting it vehemently.[35] "Only theoretical shortsightedness or political intention could present the principle of the separation of powers as a democratic one," writes Kelsen in 1920. In reality, it is "a principle that inhibits the complete democratization of the state" (Kelsen 1920/2006, pp. 15-17).

Montesquieu, regarded by Kelsen as the originator of this doctrine, saw the separation of powers as a guarantee of freedom. Yet, Kelsen suspects it was meant to secure "a final advantage for the monarch over

the power of the people concentrated in Parliament" during the transition from absolutism to constitutionalism. While the monarch had to share the legislative process with Parliament—whose significance was vastly overrated at the time—the execution remained with him. Therefore, it is an "irony of history" that the United States "faithfully adopted the dogma of the separation of powers." Kelsen took this as an opportunity to also criticize the presidential democracy system of the United States: "For if a single elected person stands before a voting populace numbering in the millions, then the idea of representing the people loses its last semblance of legitimacy" (Kelsen 1920/2006, p. 16). It is also to be understood as a criticism of the Austrian Federal Constitution Act, which he had a hand in shaping, that he also criticizes a system where "a special head of state exists alongside Parliament and Cabinet" (Kelsen 1920/2006, p. 18).[36]

Kelsen's judgment on the separation of powers in his later works is considerably more moderate: In 1929, he even suggests that "considering the conflict between ideology and reality, the question of whether the separation of powers is a democratic principle cannot be answered definitively" (Kelsen 1929/2013, p. 89). Regarding ideology, Kelsen remains with the views he expressed in 1920. As for practice, he acknowledges that the separation of powers has proven effective in avoiding arbitrariness and the concentration of power; thus, it "can also be seen to produce effects that tend in a democratic direction" (Kelsen 1929/2013, p. 90). Instead of "separation of powers" (*Gewaltentrennung*), one should say "division of powers" (*Gewaltenteilung*), as the goal is not to separate the powers from one another, but to divide them so they can control each other (Kelsen 1931, p. 599)[37]—Kelsen's "reconciliation" with the doctrine of separation or division of powers is, however, only temporary: he had already recognized another, highly dangerous characteristic of this doctrine in the meantime. It is used as an argument that "the judicial power must not intervene in the legislative power," meaning that the judiciary is not allowed to scrutinize the legislative process for its constitutionality" (Kelsen 1923/1924, p. 408). It's as if Kelsen, with this remark made in 1925, had already anticipated his later controversy with Carl Schmitt: the latter, in his 1931 book *The Guardian of the Constitution* (*Der Hüter der Verfassung*), among other things, denied the legitimacy of judicial review of legislation, citing the separation of powers. Kelsen countered with arguments he had long developed (Kelsen 1931, p. 598, cf. Dreier 1999) if the three powers are no longer seen as fundamentally distinct functions, but rather as different stages of legal concretization in line with the doctrine of hierarchical structure, then there is nothing against allowing judicial review of administration or legislation. Thus, Kelsen's view that even legislation is a form of execution—execution of the constitution—also forms the democratic theoretical basis for a state function that Kelsen had a significant role in establishing: constitutional jurisdiction (Öhlinger 1975, p. 39; Lepsius 2007, p. 120; Olechowski 2014).

NOTES

1 This essay is based on Olechowski 2009, large parts of which were translated verbatim into English, but also takes into account literature that has appeared in the meantime, such as Turner and Mazur 2023. References concerning Austrian constitutional history and constitutional law were eliminated or, where they seemed necessary, explained in more detail. I would like to thank Mr. Bartosz J. Buchman for his help with the translation.

2 That's the title of the detailed analyses by Telman 2010, probably an allusion to the famous book "The path of the Law" by Oliver Wendell Holmes Jr.

3 One major exception was the international conference in Chicago 2013, see Telman 2016.

4 During Kelsen's lifetime, at least two attempts were made to translate 'Vom Wesen und Wert der Demokratie', but no version was published; see Bock 2021 and Olechowski 2021a, p. 689. It was not until 2013 that a translation of the 2nd edition was published. The translator was Brian Graf (Kelsen 1929/2013). A translation of the 1st edition—which in large part differs from the 2nd edition—is still a desideratum. For more on the connection between Kelsen's theory of law and democratic theory, see Zalewska (2025).

5 Cf., in great detail, Olechowski 2021a, pp. 271-303.

6 Also cited by Kelsen 1929/2013, p. 29. Cf. Kailitz 2007, p. 284.

7 See also Hofmann and Riescher 1999, p. 98; Saage 2002, p. 11; Lepsius 2007, p. 117.

8 See also Kelsen 1925b: 10f; cf. 1960/1967: 5f. For the relationship between democratic theory and Pure Theory of Law, see especially Dreier 1986, pp. 249ff, 282.

9 The argument of Messner (1966, p. 815) takes a similar direction, although it is even more evident in Messner's work than in Kelsen's that parliamentarianism signifies a turn towards an aristocratic system.

10 See also Saage 2002, p. 14.

11 See especially Kelsen 1965, p. 151, where he literally speaks of "degenerations of democracy, brought about by long legislative periods and the isolation of the representative body due to the principle of free mandate".

12 His criticism was primarily directed against what is often referred to as immunity in the narrower sense, namely that a member of parliament may only be prosecuted for his actions outside parliament with the consent of parliament. They are not so much directed against the so-called indemnity, the irresponsibility of MPs for their behaviour in parliament itself. At the time of writing the aforementioned works, the Austrian Federal Government was elected by the Austrian National Council in a similar way as the German Federal Government is elected by the German Bundestag today. The majority of MPs are therefore always on the side of the government.

13 These teachings were particularly popular in conservative Catholic, but also fascist circles and were given a significant boost in 1931 by Pope Pius XI's encyclical 'Quadragesimo anno'. At the University of Vienna, they were taught primarily by Othmar Spann (1938).

14 Kelsen's criticism of the corporative state is primarily of legal-historical interest, as it occurred before the establishment of the corporative state in Austria in 1934. The experiences of the subsequent years have clearly demonstrated the anti-democratic nature of the corporative state; see more closely Wohnout 1993; Olechowski 2021b, p. 183. Johannes Messner SJ, a leading representative of Catholic social teaching, spoke of a "crux of pluralistic democracy" and called for an "institutionalization of interest groups", which, however, should only have an advisory function in relation to the democratic parliament: Messner 1966, pp. 731ff, 1170f. Cf. also Leser 1995, p. 800f. However, the discussions surrounding the corporative state also had a lasting influence on the system of social partnership in the Second Austrian Republic after 1945: economic policy laws were discussed in detail by representatives of business and labour and were generally only introduced into parliament after mutual agreement. This system was also expressly recognised by an constitutional amendment in 2007, but has lost some of its significance in recent years.

15 Even Messner 1966, p. 733 had to admit that "the corporations ... are by no means the entire 'society'."

16 Thus, Kelsen's theory of democracy can be assigned to the group of so-called competition theories, as it was later developed by Kelsen's friend Joseph Schumpeter (1883-1950). This should not be confused with the model of competitive democracy; for comparison, see Kailitz 2007, pp. 285f, 314f. Kelsen himself engages with Schumpeter in his work *Foundations of Democracy*; for comparison, see especially Kelsen 1956/2006, pp. 253ff, 370f.

17 See also Pernthaler 2004, p. 107, who sees the so-called "electoral justice" realized only in a pure proportional representation system, even though he also highlights the disadvantage of party fragmentation as a consequence of this principle. Also critical is Leser 1995, p. 798.

18 For the following, see also Llanque 2008, p. 374ff.

19 Kelsen's doctrine of the identity of state and law is a core element of the Pure Theory; cf. e.g. Van Ooyen 2009.

20 The term "government authority" (*Regierungsgewalt*) was changed to "administration" (*Verwaltung*) shortly before the adoption of the B-VG: Minutes of the 18th meeting of the parliamentarian Subcomité, 23. Sept. 1920: https://b-vg.acdh.oeaw.ac.at. Otherwise, Kelsen's structure and terminology have remained in effect until today.

21 The extent to which theory and practice are linked here can be recognised by the fact that Turner and Mazur quote no other but US President Woodrow Wilson at length when discussing the position of administration in the democratic state (Turner and Mazur 2023, p. 78). See also Olechowski (2025) on the following.

22 See especially Polaschek 1997, p. 9ff.

23 For details see Schmitz 1991, p. 82ff; also Polaschek 1997, p. 83ff.

24 See for example Lenin 1918/1960, p. 263ff; and Kelsen 1965, p. 145.

25 Cited in Schmitz 1991, p. 57. Cf. also Renner 1946, p. 30, who speaks of "two equally necessary, equally valuable wheels of the machinery of the state."

26 In particular, his constitutional drafts did not contain a corresponding provision: see Schmitz 1981, p. 45.

27 On February 10, 1921, the Federal Government had already submitted a corresponding government bill to the National Council, see Polaschek 1997, p. 84.

28 Amendment to the Federal Constitutional Act from 30 July 1925, *Bundesgesetzblatt für die Republik Österreich* No. 268. This amendment was particularly aimed at cost savings in administration, which was to be achieved, among other things, by eliminating all "duplications" (*Doppelgleisigkeit*); See Olechowski 2021b: 100f.

29 The district representations (*Bezirksvertretungen*) that existed only in Styria were de facto dissolved in 1924 and de jure in 1938; cf. Polaschek 1997, p. 90ff; Olechowski 2021b, p. 161.

30 Merkl 1923; Merkl 1927: 336ff.

31 First apparently in Öhlinger 1975, p. 34. The term is now common, see, for example, Weber 2003, p. 109; Pernthaler 2004, p. 170; but it is notably not used by proponents of the Pure Theory of Law.

32 See in detail Jabloner 2006, p. 410; 2005, p. 184; for the international debate see Ost and van de Kerchove 2002.

33 Particularly as a result of the "Schattendorf Trial"—a murder trial with a political background that led to serious domestic political unrest with many deaths, cf. Olechowski 2021a, p. 458—the jury trials had fallen into disrepute, which is why the government planned to replace them with lay judges: Cf. the daily newspaper *Neue Freie Presse*, 2nd February 1929, p. 1. This actually only occurred in the authoritarian corporate state with the Federal Act of 19. June 1934 *Bundesgesetzblatt* part II, No. 77.

34 In addition to Kelsen, the Vice President of the Regional Criminal Court of Vienna, Dr. Rudolf Schneeweiß, and the lawyer Dr. Richard Preßburger (who was so famous that he was later portrayed in a film by Patrick Swayze) were also asked for statements by the *Neue Freie Presse* (ibid 1f). The former advocated for a "depoliticization of the jury lists," while the latter warned of the dangers of lay judges; no one except Kelsen welcomed the impending abolition of the jury.

35 The "political sense of the theory of hierarchical structure of the legal system" in overcoming the separation of powers in favor of parliamentary legislation.

36 The problem of democratic leader selection cannot be addressed here, see Turner and Mazur 2023, p. 63f.

37 It must be emphasized here that Montesquieu did not advocate for the isolation of powers, but rather the demand for "checks and balances" has always been intertwined with the separation of powers. See Hofmann and Riescher 1999, p. 123.

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From Judgment to Imperative: Hans Kelsen critical of ideologies

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If one wishes to try to extract from this interesting work of Stephen Turner and George Mazur the critical core that moves the authors' arguments, I will say that this core lies in the relationship between validity and effectiveness in the law. It is not by chance that the two great thinkers who act here as fundamental benchmarks are Max Weber and Hans Kelsen, who to the theme of the relationship fact-value, effectiveness-validity, factual judgments-value judgments have devoted much of their writings in the field both of philosophy and sociology of law. To what extent does this issue affect democracy as explained by Kelsen, in other words the idea of democracy and its possibilities for a concrete, practical translation in the world of the social organization? Specifically: what is Hans Kelsen's contribution to this?

For Turner and Mazur "[t]he core idea of the book is simple: democracy is a largely majoritarian procedure of law making and leader selection for a state with a significant administrative and judicial apparatus. Moreover, law and democracy are linked: "democracies produce decisions through legal procedures, and law is the means by which the decisions are put into effect" (p. x). Now, without doubt, democracy for Kelsen is a method for the choice of leaders, but that it is in its essence a procedure for the formation of law is an accidental element: it is in fact only one of the two methods (democracy and autocracy) of choosing leaders, which, in truth, are in this aim equivalent.

Now, the originality of the Kelsenian defence of democracy consists in the fact that it is 'founded' on the critique of ideology, which by its radicality invests the democratic ideology itself. Kelsen avoids, in short, the contrast "good democracy-bad autocracy", precisely because "good-bad" is not a contrast that is part of his conceptual scientific baggage, being the subjective evaluation something proper of ideologies, not of the science.

Thus, Kelsen knows and strongly denounces the gap existing between the democratic *ideal* and the democratic *reality*, between democratic ideology and real democracies. As a scientifical theorist of law and the State, as a jurist and political scientist, he does not consider in his method the democratic ideal based on subjective motives, on psychic emotions, on the distorted or tendentious representation of the real facts in order to cover personal or group interests or simply linked to impulses and instincts deposited deep in the personality; he takes into consideration, on the contrary, only the "transformation" that the democratic ideal must *necessarily* undergo to become a reality, a political and legal order existing in the world of social relations, dominated by the law of difference between those who command and those who are commanded. The scien-

tist 'knows': according to the principle of causality when it comes to natural facts (*Sein*), according to the normative principle (*Sollen*) when it comes to values, duties, norms. The object of the Kelsenian doctrine of democracy is therefore not 'democracy', but a particular democracy, the juridical-formal one, that Turner and Mazur bring back to the Weberian legal-rational State; as Horneffer observed already in the Twenties of the past century, "Kelsen does not describe democracy, but two democracies, at a time when he separates the idea of democracy from its reality" (Horneffer 1926, p. 24). We are faced with two completely different objects of consideration, and yet we need to verify the distance between one (democratic ideology as freedom of the individual from every social coercive order) and the other (the democratic reality as a state, coercive order) where real democracy can move away from the ideology of individual freedom without ceasing to be a democracy. In other words, to investigate which needs of the ideal must necessarily be realized in, and through, the law so that a form of state can still be characterized as democracy. What matters "is to find the real or legal concept of democracy" (Horneffer 1926, p. 25).

Knowledge of the democratic reality, of democracy not as ideal but as method, as a social organization, is also part of normative knowledge, just like law. In this way the opposition between ideal democracy and real democracy can also be brought back to the original methodological opposition of the two «orientations of our visual field» (*Blickrichtungen*) of the natural intellect (Kelsen 1916/2010, p. 551ff): the democratic ideal, that is, the ideological representation of democracy, falls within the framework of naturalistic knowledge, because here it is a matter of explaining—according to the principle of causality proper to natural science—the real, effective, precisely psychic motives, which determine the ideological representation of a materially 'just' democracy, or lead to the derivation of an abstract subjective value from an objective form of valid value, according to an undue and fallacious derivation of an is (subjective value as a psychic fact) from an ought (the valid norm) (Kelsen 1920/2013, p. 175ff).

Democracy as a reality—obviously 'reality' in the sense of the specific existence of democracy as a method, organization, technique, and legal form—is, on the contrary, itself part of normative knowledge, of knowledge-of-ought. If a scientific knowledge of law is possible (as a complex of state norms), it is also possible to have a scientific knowledge of democracy as a form of real government, an instrument, a social technique suitable for the realization of an end, in this case the limitation of the «torment of heteronomy», the guarantee of minorities, and especially the defense of possible freedom in its various forms, especially in that of the freedom of science from power. So (apart from the definition of every state as *Rechtsstaat*) Kelsen, leaning on his pupil and friend Adolf Merkl, is forced to abandon the original static conception of law as presented in the *Hauptprobleme der Staatsrechslehre* to accommodate—albeit in a manner not devoid of contradictory effects on the structure of the legal order as imagined by the method of neo-Kantian-an imprint—a dynamic perspective of the legal order, no longer composed exclusively of rules, but of acts producing norms and norms produced, whereby each level of the legal order appears both as production and product at the same time. This is a necessary step in order to give meaning to Kelsen's legal positivism, but the original normativism—founded on a *Grundnorm* as a constructive hypothesis of the coherence of law as a legal order—contradicts Merkl's realistic vision, attentive to the proper element of the rule of law understood as an administrative state yet founded on the primacy of the law.

This original contradiction leads not by chance the Kelsen critic of ideologies—including democratic ideology—to the realist Kelsen of the posthumous *Allgemeine Theorie der Normen*, not coincidentally based on the primacy of the norm understood, contrary to the original normativism of 1911, as a command-based imperative: *Kein Imperativ ohne Imperator*, no imperative without emperor. From this perspective, which considers the "pure theory of law" a doctrine in evolution also on the basis of the specific personal experiences of its author (especially in the United States), the interpretative position of Turner and Mazur seems to me not to give the sufficient, necessary attention to these processes of transformation and periodization, accepting on the contrary a certain interpretation of Kelsen that accentuates the importance of the 'American Kelsen' (the Kelsen of the *General Theory of Law and State* of 1945 and of the second edition of the *Reine Rechtlehre*, 1960) compared to the Austrian Kelsen of the 1910's and 1920's, in my opinion, the Kelsen truly important in the legal and political science of the Twentieth century (see my Carrino 1984).

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Kelsen, Jellinek, and the Sociology of State

CHRISTOPHER ADAIR-TOTEFF

Hans Kelsen and Georg Jellinek are often regarded by legal scholars as two of the most influential constitutional experts from the last two hundred years.[1] Despite their prominent places in the history of legal philosophy, little attention has been paid to them together. Yet, Jellinek was not only regarded as the most important legal scholar in Germany, he was also Kelsen's professor at Heidelberg. What is even more crucial was that Kelsen later criticized Jellinek's "two-sided theory." Jellinek held that a political object had two different sides: the causal explanatory sociological side and the juristic normative legal side. Kelsen rejected this and argued that in terms of law, there was and only could be one view and that was his legal normative one. Furthermore, Kelsen objected to Jellinek's combining the political with the legal: politics focuses on unity; law deals with rules. Kelsen's critique of Jellinek is the focus of this essay.

In the ten years from 1920 until 1930, Hans Kelsen published more than a hundred writings.[2] Some of these, like *Allgemeine Staatslehre* (1925), became famous and still attract considerable attention.[3] Others, such as *Von Wesen und Wert der Demokratie* (1920/1929) and *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928) have recently become objects of discussions. Of these hundred-plus works, a majority are of little interest to most scholars because they are brief, or they dealt with minor issues or even a combination of the two. There is one work that is neither short nor of limited historical interest; rather, it is a wide-ranging and an extensive examination of a slew of crucial legal theories. This work is *Der soziologische und der juristische Staatsbegriff.* As the title indicates, Kelsen intended to set out the contrast between the sociological concept of the state and the juridical concept of the state. But as the subtitle clarified, it was also a critical investigation of the relationships between state and law (*Kritische Untersuchung des Verhältnisses von Staat und Recht*). Kelsen published the first edition in 1922 and then released a mostly unchanged version in 1928 (Kelsen 1928, p. v). Both editions were published by the Tübingen firm J. C. B. Mohr (Paul Siebeck). The book has four major sections: the first is on the sociological concept of the state; the second is on the juridical concept of the state; the third is on the issue of the identity of state and law; and the fourth is on the notion of the state as substance. Each of these four sections is ripe for detailed examination; the concern of this essay is on section three. Unfortunately, section three itself is almost one hundred pages in length and covers ten different thinkers, including Georg Jellinek, Max Weber, Wilhelm Wundt, Edgar Loening, and Weber's "nemesis"

Rudolf Stammler.[4] This essay focuses on the first of these legal scholars: Georg Jellinek. As Stephen Turner notes in *Making Democratic Theory Democratic,* Jellinek was not only Max Weber's friend and ally, he was also Kelsen's teacher at Heidelberg. There are a number of writings devoted to the connections between Jellinek and Weber, but there are very few that explore Kelsen's critical appraisal of his former professor.[5] Although Jellinek died in 1911, his *Allgemeine Staatslehre* would continue to be the standard legal textbook for almost another twenty years. Because of Jellinek's prominence, Kelsen recognized that he would have to address his former professor's philosophy in considerable detail. Whereas Kelsen spent several pages each on Loening, Wundt, and Stammler, and close to ten on Weber, he devoted almost twenty just to Jellinek. Who was Georg Jellinek and why did Hans Kelsen feel the need to concentrate so much fire on his former professor's legal philosophy?

Georg Jellinek (1851-1911) was not just Weber's friend and colleague and he was not only Kelsen's professor at Heidelberg.[6] Jellinek is regarded as one of the three outstanding thinkers of the theory of the state—along with Carl Friedrich von Gerber and Paul Laband. Jellinek adhered to the "Sein-Sollen" (Being-Ought") distinction and he divided human studies into social-empirical and normative-legal categories. He was recognized as one of the first to investigate the notion of human rights but his reputation rested primarily on his *Allgemeine Staatslehre*.[7] It was first published in 1900, in a second edition in 1905, and a third edition was published in 1914. The fourth edition (1921 and 1922) were reprinted unchanged by Jellinek's son. A fifth edition appeared in 1929 and by that time Walter Jellinek had long been regarded as one of the leading legal scholars. For this fifth edition Walter Jellinek went through the work and added notes and brought the bibliography up to date.

In his authorized biography of Kelsen, R. A. Métall related that Kelsen had studied Jellinek's works with great attention but when he was at Heidelberg, his assessment of Jellinek changed. He attended Jellinek's seminar but did not try to establish any personal contact with his professor and instead devoted himself to his own original work (Métall 1969, pp. 11-12). Métall's account fits with some of Kelsen's own autobiographic writings. In his "Selbstdarstellung" from 1927 there is no mention of Jellinek although he attended the seminar given by Jellinek and Gerhard Anschütz during the winter semester 1907/1908 and the winter semester 1908/1909.[8] In his "Autobiographie" from 1947 there is a brief mention of Jellinek. Kelsen had been granted a generous travel stipendium which he used to spend his time in Heidelberg. He suggested that he had been granted it not because of his published works but probably because he was the only person to apply for it. He wrote that he used it to accomplish two things: to study with Jellinek who was regarded as the greatest authority in the area of "general doctrine of state" ("allgemeine Staatslehre") and to complete his "Habilitationsschrift" (Kelsen 2007, pp. 39-40). Kelsen explained that he had no time to go to lectures but he did attend Jellinek's seminar. However, he added that he was not excited by what he heard and he had even less interest in developing a personal connection. Kelsen occasionally accompanied Jellinek home after the seminar and the exchanges were not exactly positive. He complained that Jellinek was rather vain and he encouraged his students to compliment him. In Kelsen's view, Jellinek was a better scholar than a teacher (Kelsen 2007, p. 40). In his impressive biography of Hans Kelsen, Thomas Olechowski provides a fuller and a more objective picture of Kelsen's professor. Olechowski wrote that in the late 1880s, Jellinek was recognized by many scholars in and outside of Austria as that country's leading "expert on public law" ("Öffentlichrechtler"). Since Jellinek had no real hope to gain a professorship in Austria because of antisemitism, he went to Berlin where he "habilitated" in 1889.[9] After finishing and spending a year at Basel, he moved to Heidelberg. Jens Kersten noted that when Jellinek suddenly died on 11 Jan. 1911 there was a broad national and international "echo" upon hearing the news (Kerstein 2000, p. 30). Olechowski wrote that the seminar that Kelsen attended was famous and he attracted students from all parts of Europe (Olechowski 2018, p. 102). It appears difficult to reconcile the international respect that Jellinek had as scholar and teacher with Kelsen's negative opinion. But is not difficult to assume that Kelsen had a complex relationship to Jellinek: he learned much from him but he was intent on going in own way.[10]

KELSEN'S CRITICISM OF JELLINEK IN DER SOZIOLOGISCHE UND DER JURISTICHE STAATSBEGRIFF

Thomas Olechowski accurately described Kelsen's *Der soziologische und der juristische Staatsbegriff* as a discussion of a series of legal scholars' thinking. However, he devoted a single page to it and mentioned Jellinek in passing (Olechowski 2018, p. 331). This is mentioned only because most commentators on Kelsen tend to ignore it and to minimize Jellinek's role in it.[11] Métall in his biography barely mentions Kelsen's book and it is mostly to note that it was reprinted and translated into Japanese. Jellinek was not even mentioned (Métall 1969, pp. 42-43). In his introduction to the version included in *Hans Kelsen Werke* Stanley L. Paulson devotes four pages to Jellinek; however, he spends much of these four pages on Gottlob Frege, Rudolf Carnap, and neo-Kantianism (Paulson 2022a, pp. 76-80; 2022b, pp. 90-94).

Kelsen's critique of Jellinek is found in the third section entitled "Kritischer Beweis der Identität von Staat und Recht" ("Critical Proof for the Identity of State and Law") and has the first subsection "Der Staat als Voraussetzung des Rechts" ("The State as Presupposition of Law"). The first chapter of this subsection in Kapitel 6 is: "Soziallehre vom Staat und Staatsrechtslehre" ("Social Doctrine of the State and the Doctrine of States Law"). The "§20. Die juristische Zwei-Seiten-Theorie (Jellinek)" (§20. The juridical Two-Sides Theory [Jellinek]) and "§21. Der Staat als 'Verband' (sozialer Staatsbegriff) und als 'Korperschaft' oder Rechtssubjekt (juristischer Staatsbegriff) Identisch." ("§21. The State as 'Group'[social concept of the state] and as 'legislative body' or legal subject (Juridical Concept of the State) [are] identical") jointly cover 18 pages and both together are devoted to criticizing Jellinek's legal philosophy (Kelsen 1922, pp. 114-132; 2022, pp. 212-232).

Kelsen opened his critique of Jellinek not just by referring to Jellinek's most famous book *Allgemeine Staatslehre.* This book was first published in 1900 and then revised in 1905. After Jellinek's death it went through several more editions. Nor did Kelsen begin with *System der subjektiven öffentlichen Rechte.* Jellinek published this work in 1892 and revised it the same year as he did *Allegemeine Staatslehre.* Instead, Kelsen included *Die Lehre von den Staatenverbindungen* which Jellinek published in 1882. It was this work that earned him the right to teach in Austria. Jellinek did not think it was worth revising but was evidently still proud of it.

Kelsen began §20 by indicating that Jellinek offered a judicial conception of the "Two-Sides-Theory" in comparison with the sociological version given by Simmel's former student Theodor Kistiakowski. Kelsen had admitted to be rather critical of Kistiakowski's account because it was sociological in nature rather than legal. He was also critical because Kistiakawoski had relied primarily on neo-Kantian epistemology for distinguishing between the causal and the normative notions of law (Kelsen 1922, pp. 107-110; 2022, pp. 206-208). Kelsen indicated that Jellinek and Kistiakowski shared a similar methodological conception; namely, that "The state is a social construction that has an independent existence separate from law." ("Der Staat ist ein soziales Gebilde, an sich eine vom Recht unabhängige Existenz hat.") (Kelsen 1922, p. 114; 2023, p. 212). If it is viewed as a social doctrine, then its social factor is a "force" ("Macht"). Kelsen cites two passages in *Allgemeine Staatslehre* and one in *Lehre von den Staatenverbindungen.* All three passages indicate that ultimately it is force that guarantees the continued existence of the state (Jellinek 1929, pp. 168, 333; 1882, p. 262). Although Kelsen does not mention it, this is fundamentally Weber's definition of the state as having the sole legitimate possession of physical force. But Kelsen is not interested in the social aspects here; his focus is on Jellinek's legal philosophy. Kelsen praised Jellinek's theory for being a "standard work" and offering the highest scholarly account. But Kelsen insisted that Jellinek's great contribution was not because it was new and groundbreaking; rather, he provided a brilliant formulation of previous explorations. Jellinek had offered an account of the contemporary doctrine of the state as a closed system (Kelsen 1922, p. 114; 2023, p. 213).

Jellinek and others begin from the premise that the state is "*one and the same object*" ("*ein und dasselbe Objekt*"). The state is not one object for sociologists and another for jurists; it is the same but is viewed differently by jurists than by sociologists. Hence, the name "Zwei-Seiten" ("Two-Sides"). The jurist is not

concerned about the sociological factors of the state but only the legal ones. Kelsen quotes Jellinek but not from *Allgemeine Staatslehre* but from the *System der subjektiven öffentlichen Rechte*: *"How have I to think about the state legally? ("Wie habe ich mir den Staat rechtlich zu denken?")* (Kelsen 1922, p. 115; 2022, p. 213; Jellinek 2011, p. 13). Kelsen noted that Jellinek answered his own question by pointing out that one cannot approach the matter as if there is only one single way to do so. He pointed to Jellinek's observation that there are two ways to consider a symphony—from a physiological way and from an aesthetic way. The first case has the sound considered from a natural science point of view. There are only sounds to consider on a scale. Later, Jellinek described this as "theoretical knowing" ("theoretischen Erkennens"). The second case has the sound considered from an artistic point of view, or as he contrasts it with theoretical knowing—"aesthetic feeling" ("ästhetischen Empfindens" (Jellinek 2011, p. 15). That means that different people are likely to respond based upon their musical tastes. The first case can be regarded as "objective", the second case is obviously subjective (Jellinek 2011, pp. 14-15). To put it bluntly, in the first case, there is no "symphony" but only noise; in the second case, there is no "noise", but a beautiful piece of music—a symphony. Kelsen responded by stating that "The identity of the object of knowledge is determined by the identity of the method of knowledge!" ("Die Identität des Erkenntnis–Objektes ist bedingt durch die Identität der Erkenntnis-Methode!") (Kelsen 1922, p. 116; 2022, p. 214). Kelsen suggests that Jellinek is "almost entirely correct" ("beinahe ganz richtig") and quotes Jellinek again: "For the physiological and the juristic observation the symphony does not exist as a constant object in general" ("Für die physiologische und psychologische Betrachtung existiert eine Symphonie als konstantes Objekt überhaupt nicht.") (Jellinek 2011, p. 14). Kelsen suggested a correction: dropping the "constant" but adding that Jellinek's dualism of sociological and juridical are problematic. It is problematic because he constantly insists on his principal dualism of "explicative being—and normative ought observation" ("explikativer Seins—und normativer Sollensbetrachtung") and he constantly warns about a syncretism of both methods (Kelsen 1922, p. 116; 2022, p. 214).

Kelsen maintained that the logical impossibility of this is demonstrated if one considers the "'legal properties'" ("'rechtlichen Eigenschaften'") of something real; that is, something regarded as an object in the sense of a natural thing (Kelsen 1922, p. 116; 2022, p. 214). It is with this paragraph that Kelsen turns his attention away from Jellinek's *System* to the *Allgemeine Staatslehre*. He points out that Jellinek regards the state in two different ways: as a real sociological entity and as something that is "*covered*" ("*bekleidet*") with a juristic "property" ("Eigenschaft"). Kelsen quotes "The juristic knowledge of the state will not grasp on his real essence" ("Die juristische Erkenntnis des Staates will daher nicht sein reales Wesen erfassen"). Kelsen pauses his citing in order to interject the question regarding how it is even possible to think about this sociologically when what is being discussed is really legality. He then returns to Jellinek's sentence: "that is, to find a concept in which all *legal properties of the state* can be considered without contradiction." ("d.h. einen Begriff auffinden, in dem alle *rechtlichen Eigenschaften des Staates* widerspruchlos zu denken sind") (Jellinek 1929, p. 163; Kelsen 1922, p. 117; 2022, p. 215, Kelsen's emphasis).

Kelsen insisted that the attempt to regard the state as having a content that has two different concepts; namely, a social one and a legal one, must naturally lead to "the most difficult contradictions and ("schwersten Widersprüchen und Verrenkungen") (Kelsen 1922, p. 117; 2022, p. 215). He adds that if a "state" is regarded as a "*legal* concept" ("*Rechts*begriff") then it can be understood as an object of a legal concept. Kelsen argued that a natural concept is either a concept of nature in general or a concept of some part of nature. Similarly, a legal concept is either a concept of law in general or is a concept of some part of law. However, Kelsen claimed that Jellinek tends to confuse the two, but more importantly, it makes no sense to speak about the "validity" of a natural entity (Kelsen 1922, p. 117; 2022, p. 215).

Kelsen insisted that it is almost inconceivable how Jellinek has built his system on the dualism of "Sein und Sollen", between the explicative sociology and the normative judicial. Yet, Jellinek appears to overstep that strict division when he insists that "No state is possible without law" ("Kein Staat ist ohne Recht möglich") (Jellinek 1929, p. 163; Kelsen 1922, p. 118; 2022, p. 215). Moreover, Kelsen continued with Jellinek's statement "There the law is *essential* to the state, so is a completed knowledge of the state with-

out knowledge about its legal nature is not possible." ("Da das Recht dem Staate *wesentlich* ist, so ist eine vollendete Erkentniss des Staates ohne Kenntnis seiner rechtlichen Natur nicht möglich.") (Jellinek 1929, p. 162; Kelsen 1922, p. 118; 2022, pp. 215-216). Kelsen complained that this passage makes little sense and he continued his criticism by indicating that Jellinek's claim about law needing to be founded upon "real factual findings" ("reale Tatbeständen"). It is problematic to regard this as a necessary substrate for law because, in Kelsen's view, this conflates the sociological and the natural science concept of law. Kelsen again quotes Jellinek: "The real factual findings (the 'substrate' of the legal concept) are not the legal concepts themselves" ("Allein die realen Tatbestände [die das 'Substrat' der Rechtbegriffe sind] sind nicht die Rechtsbegriffe sind.") to which Kelsen adds "Of course! The real factual findings are also not the sociological concepts themselves!" ("Natürlich! Die realen Tatbestände sind auch nicht die soziologischen Begriffe selbst!"). Kelsen further criticizes Jellinek for making a turn that renders superfluous what he had been saying: "They (the legal concepts) are moreover abstractions" ("Sie [die Rechtbegriffe] sind vielmehr Abstraktionen"). Kelsen turns to his own ideas and insists "The substrates of legal concepts are accordingly not 'real factual findings'; but rather, *legal norms*." ("Die Substrate der Rechtbegriffe sind somit nicht 'reale Tatbestände', sondern *Rechtnormen*"). For Kelsen, the state can be the substrate only as the totality of the legal norms. Thus, the state cannot have a real existence because it is not an object but a composite of norms (Jellinek 1929, p. 162; Kelsen 1922, p. 118; 2022, p. 216).

On the basis of this, Kelsen suggests that one must honestly doubt whether Jellinek really understood the notion of norms, the concept of "Sollen" when he keeps talking about reality, thus confusing the kingdom of ought with the realm of is. What is more problematic is that "Jellinek seeks the specific existence of norms, its *validity*, in its *effect*iveness." ("Jellinek sucht die spezifische Existenz der Normen, ihre *Geltung*, in ihrer *Wirk*samkeit.") (Kelsen 1922, p. 119; 2022, p. 216). Kelsen insisted that this misunderstanding is bad because it confuses the two types of orders; but what makes it so incomprehensible for Kelsen is that Jellinek had insisted that explanatory/ causal science is different from norms so how can there be any overlap? In particular, Kelsen criticizes Jellinek for thinking his norms are something real, meaning that they have cause and effect like real objects do. Yet, Kelsen points out that Jellinek contends that norms belong to a special world, evidently something between the physical world and the realm of nothingness. This is what Jellinek meant when he wrote of "'the world of *legal* norms'" ("'die Welt der *Recht*normen'") and when he insisted that norms are not fictions. Kelsen quotes two sentences from Jellinek's *System*: "The juristic concepts here have no essentialness to an object; the juristic world is a pure world of thought. It is to the world of real occurrences much as the world of aesthetic impressions have to theoretical knowledge. It is, however, a world of abstractions, not [a world] of fictions." ("Die juristischen Begriffe haben daher keine Wesenheiten zum Objekt, die juristische Welt ist eine reine Gedankenwelt, die zu der Welt des Geschehens sich ähnlich verhalt wie die Welt der ästethetischen Empfindung zu der der theoretischen Erkenntnis. Sie is aber eine Welt der Abstraktionen, nicht der Fiktionen.") (Jellinek 2011, p. 17; Kelsen 1922, pp. 120-121; 2022, p. 217). Having stated this, Jellinek appeared to have muddied this by explaining that fictions are total inventions whereas abstractions are based upon real occurrences. Kelsen objected that rather than keeping this a "pure world of thought" Jellinek insisted that abstractions are tied to the physical world as the substrate. Rather than having the two worlds of "Sein" and "Sollen" remain separate of one another, Jellinek merges the "normative" discipline with the explanatory function of natural science. Kelsen concluded §20 with the claim that Jellinek's view of the legal life is one that is neither empirical nor real but can be explained as one that is "certainly unthinkable" ("wohl undenkbar") (Jellinek 2011, pp. 17, 34-35; Kelsen 1922, p. 120; 2022, p. 218).

The focus of §21 is a continuation of Kelsen's critique of Jellinek but here it is on the notion of the state as an "association" ("Verband"). Before Kelsen criticizes that he returns briefly to Jellinek's contention that the state is a presupposition of law and that the state has an existence prior to, and independent of, the law. Jellinek's conception of the state is that it is an object that exists in the real realm of causality and that it can be explained as easily as any other object. In line with this Jellinek contends that the state can be regarded as a sociological entity and that law is based upon an abstraction from that world. Hence, Jellinek contends

that the state is both a sociological structure as well as a realm of norms. Kelsen sums up Jellinek's methodology with the observation that he held that the state could be considered as part of a "causal-scientific social doctrine" ("kausalwissenschaftliche Soziallehre") as well as a form of "legal norms" ("Rechtsnormen"). The state is regard in the first instance as a "*social* concept" ("*sozialen* Begriff") while it is considered as a "*legal* concept" ("*Recht*sbegriff") in the second case (Kelsen 1922, p. 121; 2022, p. 218). In addition, Jellinek contended that the first concept was epistemologically prior to the second concept; hence, the legal concept rested upon the social concept. However, Kelsen insisted that this supposition was problematic because Jellinek consistently maintained that law also belonged to the essence of the state. Kelsen did not quote Jellinek but the likely passage that he had in mind was "As law is essential to the state" ("Da das Recht dem Staate wesentlich ist" (Jellinek 1929, p. 162). Kelsen refers to a second and much later passage, one that is more difficult to locate. It is possible that "It is essential that a state possess a legal order" ("Ist es aber dem Staate wesentlich, eine Rechtsordnung zu besitzen" (Jellinek 1929, p. 477). Kelsen attacks Jellinek's repeated claims about the objective, psychological basis for his legal philosophy and he ridicules his claim that this is an exclusively psychical type (Kelsen 1922, p. 121; 2022, p. 219). Kelsen questions how is it possible for this to be a psychological type and at the same time be an "outer power" and serve as a "relationship of domination" ("Herrschaftsverhältnisse"). Kelsen complained that Jellinek's insistence on order meant "that this unity of order is not *causal*, but is teleological" ("daß diese Ordnungeinheit keine *kausale,* sondern eine teleologische ist.") (Kelsen 1922, p. 122; 2022, p. 219).

Kelsen maintained that in making order into something teleological Jellinek broke with his fundamental methodological principles. What Kelsen meant was that Jellinek dispensed with the opposition between the explanative and the normative that he had so carefully constructed. Rather than insisting that there was a sociological concept to explain the state and law, Jellinek replaced it with a normative and teleological one (Kelsen 1922, pp. 219, 122). Kelsen quotes three passages: one from the *Allgemeine Staatslehre* and two from the *System der subjektiven öffentlichen Rechte.* All three place the notion of an "unity" ("Einheit") in the teleological category (Jellinek 1929, p. 178; 2011, pp. 25-26). Kelsen draws from this the conclusion that "the '*juridical*' concept of the state is a *teleological* unity!" ("der '*juristische*' Staatsbegriff ist eine *teleogische* Einheit!") (Kelsen 1922, p. 122; 2022, p. 220). Given this, it makes little sense to continue to speak of a difference between a sociological and a juridical concept of the state. Instead, it would make more sense to speak of the two concepts more along the lines of two different orders which have two different purposes—like the state and the church. Kelsen insisted that they are two different organizations which regard one and the same human being from different points of view (Kelsen 1922, p. 122; 2022, p. 220).

Kelsen maintained that there is the no real doubt that the order that Jellinek is referring to is nothing more than the "*unity of the state*" ("*Einheit des Staates*") and this is a "*legal* order" (*Recht*sordnung") that provides security because the "law is essential to the state" ("dem Staat sei das Recht wesentlich") (Kelsen 1922, p. 122; 2022, p. 220). Furthermore the "legal order" ("Rechtsordnung") and the "legal purpose" ("Rechtszweck") are identical. But this moves the notion from the "objective" realm of the causal world to the "subjective" realm of ideas and ideals. As much as Jellinek insisted on the distinction between "Sein" and "Sollen", he basically undercut the "psychological will (being)" ("psychologischen Wollen [Sein"]) and that left only the normative "Sollen" (Kelsen 1922, p. 123; 2022, p. 220). Kelsen quotes Jellinek: "also the unity of the state is essentially [a] teleological unity" ("Auch die Einheit des Staates ist wesentlich teleologische Einheit") (Jellinek 1929, p. 179; Kelsen 1922, pp. 123, 220). Although Jellinek goes on to talk in terms of many purposes, Kelsen suggests that it meant something slightly different than what Jellinek seemed to have meant. On the one hand, Jellinek appeared to think of the purpose as subjective when he maintained that the more intensive the purpose, the stronger is the unity. But on the other hand, Jellinek thinks that this strengthens the organization. In Kelsen's opinion, this is not only confusing; it also has limited value for practical purposes. It has little theoretical value because it does not provide the least amount of value for either practical life or for practical law (Kelsen 1922, p. 124; 2022, p. 221). Kelsen explained that the notion that a number of individuals who actually strive for the shared goal can be understood only under the "point of view of *theoretical* knowledge" ("Geschichtspunkt *theoretischer* Erkenntnis") and the no-

tion of the unity can be understood only as a concept in the "*explanatory* social psychology" ("*explikativen* Sozialpsychologie") (Kelsen 1922, p. 124; 2022, p. 222). Kelsen has particularly harsh words for Jellinek's penchant for psychology in part because it thinks in terms of causality so it is like considering how plants grow under certain light conditions. But in this case, it is like trying to determine the "teleological purpose of consciousness" ("teleologischen Zweckbewußtsein"). Worse, Kelsen condemns Jellinek for thinking that this is a matter of studying how legal processes work—as if they are matters of how the world runs. Kelsen accuses Jellinek of having an ambiguous notion of the state: as a social reality and as a mental construct. Kelsen contends this duality is a consequence of Jellinek's "theoretical knowledge unclarity" ("erkenntnis-theoretischen Unklarheit") (Kelsen 1922, p. 125; 2022, p. 222).

Towards the end of this almost four-page paragraph Kelsen offers three quotations from one page from Jellinek's *System der subjektiven öffentlichen Rechte.* Kelsen's point is that there is a contradiction between what Jellinek writes here and what he wrote in the *Allgemeine Staatslehre.* Before turning to Kelsen's criticisms, it is crucial to point out a few problems with Kelsen's citations. In the first one, Kelsen not only begins the quotation with the wrong word but he also mangles another word in this quotation. Kelsen's citation is as follows "Für die vor keiner Konsequenz zurückschreckende" whereas Jellinek's was "Denn für die vor keiner Konsequenz zurückscheuende" (Jellinek 2011, p. 27; Kelsen 1922, p. 125; 2022, p. 222). Although these two changes may appear minor, they are further indications of either Kelsen being careless or his lack of concern about accuracy. The second option gains more credence with Kelsen's second quotation: "wird *die staatliche Einheit nicht vorhanden sein*" and that is because it was Kelsen who placed the emphasis and not Jellinek. The third quotation is a very lengthy fifty word and six commas sentence. Kelsen criticized it not just for its ambiguity but because Jellinek insisted that the state is both something that does not yet exist but is still a "sociological reality" ("soziologische Realität") (Jellinek 2011, p. 27; Kelsen 1922, pp. 125-126; 2022, p. 223). Kelsen pointed out that this is not the only contradiction in Jellinek's legal doctrine; there is also the problem regarding the essence of the state. Either it is a normative juridical concept, meaning that "the state is an unity of order" ("der Staat eine Ordnungseinheit ist") or else it is a sociological concept of "domination" ("Herrschaft"). Kelsen criticizes Jellinek's assertions about dominance: on what grounds does Jellinek's claim that an association's unity is based upon a unity of wills and that is provided by the need for sharing the same goal. In addition, Kelsen claimed that there is a tension in Jellinek's claims. Jellinek suggested that dominance is not prior to the state and that without dominance the state cannot exist. Moreover, Kelsen asks what a "Herrschaftverhältniss" even is. Is it a condition of ruling or is it a ruling relationship—Jellinek failed to clarify. Instead, Kelsen believed that Jellinek was engaged in hypostasiering; especially when he wrote about the "objective component of the state" ("objektive Bestandteile des Staates") (Jellinek 1929, p. 177; Kelsen 1922, p. 126; 2022, p. 224). Kelsen focuses on the tension between the two ideas regarding the state. Previously, Jellinek had insisted that the state was an association in which its members shared the same goal; that is, "order" ("Ordnung"). Now, however, Kelsen points to Jellinek's insistence that the associations do not share the same goal but that the state has authority and domination over its members. Kelsen quotes several passages from the *Allgemeine Staatslehre* but the most important one is "The state has the power of domination" ("Der Staat hat Herrschaftengewalt"). The second quotation is almost as critical as it explains the first: "Domination means the capacity to have one's own will unconditionally overcome another's will" ("Herrschen heißt aber, die Fähigkeit haben, seinen Willen anderen Willen unbedingt" (Jellinek 1929, p. 177; Kelsen 1922, p. 127; 2022, p. 224). Kelsen pays considerable attention to Jellinek's conceptions of the state and its power of domination. The term "conception" is in the plural because Kelsen contends that Jellinek shifts the notion of "Herrschaft" from one conception to another. Kelsen quotes: "The state with the original power of domination the furnished associational unity of established humans." ("Der Staat ist die mit ursprünglicher Herrschermacht ausgerüstete Verbandseinheit seßhafter Menschen.") (Jellinek 1929, p. 177; Kelsen 1922, p. 127; 2022, p. 224). Kelsen argues that previously Jellinek had maintained that the state was a "*unity* of domination-*relations*" ("*Einheit* von Herrschafts*verhältnissen*") whereas it has been altered to the claim that the state is "now suddenly *a ruler*!" ("jetzt plötzlich *ein Herrscher*!"). Kelsen insists that Jellinek must not have been aware of this quantum leap

because if he had, he would have corrected this change. What Jellinek has done has been to change from a conceptual ideal to a "real, will-possessing, powerful entity" ("realen, willensbegabten, machtvollen Wesen") (Kelsen 1922, p. 127; 2022, p. 224). Moreover, Jellinek has altered his conception of the state from a teleological unity to one of sheer power of one's capacity to force another to submit to one's will. Although Kelsen does not say it, what Jellinek has done is to move from the circle of law into the realm of politics. What he does say is that Jellinek has shifted from the claim "no one *should* steal" ("niemand *soll* stehlen") to the unconditional power of the state (Kelsen 1922, p. 128; 2022, p. 225). To put it differently, Jellinek now claims that it is not law that instructs, but it is power that compels. This is no longer the realm of "should" but is the world of "must"—not a place for ideas and ideals but a world of being and force. Kelsen adds that Jellinek's insistence on the "origins" of this power just complicates the issue. He claims that Jellinek's attempts to ground the notion of law/power in its origins is nothing more than to reason that it is based in the state's sovereignty (Kelsen 1922, p. 129; 2022, p. 226). It is odd that Kelsen did not expand upon the notion of sovereignty because it was not only a major topic of discussion during this time but it also was one of his favorite subjects. Regardless, he returned to his critique of Jellinek's "social" concept of the state. He also continued his claim that Jellinek had "personified" the state by making it into the "Herrscher" and he undercut the state's claim to law by concentrating on force. In Kelsen's opinion, this emphasis on the "social" concept of the state diminishes the juridical concept of the state. Kelsen further objected that Jellinek was unable to minimize this problem with the insistence that the state is somehow the picture of law. Kelsen takes particular aim at Jellinek's claim that the state must be regarded as a "*legal subject*" ("*Rechtssubjekt*") and as a "state *person*" ("staats*person*") (Jellinek 1929, p. 183; Kelsen 1922, pp. 129-130; 2022, p. 226). Kelsen admits that Jellinek writes about the state as having rights and duties but he suggests that this talk does not obscure the fact that Jellinek's real concern is not so much law and rights as its authority and power. Kelsen insisted that the "legal person" is nothing other than the expression of personification for the unity of the legal order." ("Rechtsperson—nichts anderes als der personifikative Ausdruck für die Einheit der Rechtsordnung ist" (Kelsen 1922, p. 130; 2022, p. 227). But Kelsen continues to concentrate on Jellinek's social notion of the state. He allows that Jellinek continued to view the object as having the two sides of social and juridical but Kelsen insisted that Jellinek's discussion mostly centered on the former and that the latter was neither that important nor was it really relevant. To support his claim Kelsen again quotes from the *Allgemeine Staatslehre*: "As a legal concept the state is connected to the original power of authority derived from a developed body of an established people." ("Als Rechtsbegriff ist der Staat demnach die mit ursprünglicher Herrschaftsmacht ausgerüstete Körperschaft eines Seßhaften Volkes.") (Jellinek 1929, p. 183; Kelsen 1922, p. 130; 2022, p. 227). Of course, this definition raises a number of problems. Kelsen points to one problem in that Jellinek is promoting a sociological notion with his notion of the state as an association while he is also promoting a legal concept with the emphasis on a legal body. A further problem is again Jellinek's teleology—that the state is constituted to guarantee order. An additional problem is Jellinek's insistence on the unity of wills needed to promote and preserve order. Kelsen points out that despite Jellinek's claim, the sociological and the legal are two totally different ways of looking at two different things: one social and one legal. The first one is psychological and determined by ends and goals; the second is legal and is concerned with rules and laws (Kelsen 1922, p. 130; 2022, p. 227).

Kelsen further objects to Jellinek's preoccupation with the development of the state and how this is somehow based upon a "becoming" ("Werden") of some "'objective' reality" ("'objektive' Realität"). What concerns Kelsen more is Jellinek's attempt to show that the development of the state "*falls outside the legal area*" ("*außerhalb des Rechtsgebiets fällt*") (Jellinek 1929, p. 182; Kelsen 1922, p. 131; 2022, p. 238). Yet, Jellinek also wants to maintain that the state must be something that is independent of "all teleological synthesis of consciousness" ("aller teleologischen Bewußtseinssynthese"). Kelsen argues that all of this is in contradiction to what Jellinek frequently maintained. He points to a sentence in the *Allgemeine Staatslehre* where Jellinek wrote "that the state's order itself is [a] legal order" ("daß die Staatsordnung selbst Rechtsordnung sei"). Kelsen notes that in the *Lehre von den Staatenverbindungen* Jellinek had insisted "The most essential moment in the concept of the state is that it is *order*." ("Das wesentlichste (!) Moment

im Begriffe des Staates ist, daß der *Ordnung* ist"). The exclamation point and the italics are Kelsen's. It is unclear why Kelsen did not quote the rest of Jellinek's sentence: "and an order before the order is a contradiction in itself." ("und eine Ordnung vor der Ordnung ist ein Widerspruch in sich selbst.") (Jellinek 1929, p. 182; 1882, p. 266; Kelsen 1922, p. 131; 2022, p. 228). This is surprising since Kelsen points out that Jellinek contended that the constitution of a state was needed prior to the establishment of the state itself. That is because Jellinek believed that the constitution was the foundation of the state. Kelsen objected to this because this meant that the foundation of the state was not something legal but was something factual. Kelsen continues: "Thus the state as factum and the state's order as factum are to be distinguished. And yet they are again identical." ("Es sind also Staat als Faktum und Staatsordnung als Faktum zu scheiden. Und doch sind wieder beide identisch.") (Kelsen 1922, p. 132; 2022, p. 229).

Kelsen concludes the second section (§21) by criticizing Jellinek's attempt to combine the state with law. He complained in particular of Jellinek's dualism of sociological and juridical concepts to show that the state is fundamentally an "order" ("Ordnung"). This is, according to Kelsen, nothing less than domination ("Herrschen") which is when the ruler sets his will against the will of the other. As much as Jellinek might have wished this to be as innocuous as it sounds, Kelsen clarifies that it is not because what it is, is really "*forcing*" ("*zwingen*"). Although Kelsen did not mention it, Jellinek's concept of "Herrschaft" is not really any different from that of Max Weber. That means that the state is not a system of norms; but rather, the entity that has legitimate possession of force.[12]

CONCLUDING COMMENTS

Kelsen devoted just under twenty pages to his criticism of Jellinek. He cited three of Jellinek's works but one was less relevant. He focused on Jellinek's two major writings: *System des subjektiven öffentlichen Recht* and *Allgemeine Staatslehre*. The first book is 366 pages in length and the second one contained more than 800. From the first book, Kelsen cited from seven pages; from the second, he cited twenty pages. That means that he was quoting or citing from twenty-seven pages out of more than 1150.[13] But Kelsen did more than just let Jellinek occasionally speak, he also altered Jellinek's voice. In two instances, Kelsen eliminated Jellinek's emphasis (Kelsen 2022, p. 224 notes 422, 227, 430). However, in fourteen cases he emphasized words and phrases that Jellinek had not.[14] This may suggest that Kelsen was less concerned with a scholarly critique of his former professor's legal philosophy than he was in providing a polemical attack—an attack that was intended to dislodge the great master from his esteemed position in the pantheon of legal scholars. Kelsen's attacks might not have been very polite, but they were certainly political. That does not render them unworthy of study; if anything, they should draw more interest and more scrutiny. Kelsen criticized Jellinek's *Allgemeine Staatslehre* not only because he found it contained flaws; he attacked it to make way for his own *Allegemeine Staatslehre* that he published three years after *Der soziologische und der juristische Staatsbegriff*. Kelsen's 1922 book did not achieve the fame that some of his later books did, but it is a book worth reading (Adair-Toteff 2023). It is especially worth reading §20 and §21 because these two sections contain the criticism of one of the legendary philosophers of law by another one of the leading legal theorists. It is nothing less than Kelsen and Jellinek on the meaning and purpose of the "sociology of the state."[15]

NOTES

1 The following essay does not address any specific point that Turner makes in *Making Democracy More Democratic;* but it stems from Turner's long-standing interest in Kelsen's legal thinking. It is my contention that one cannot understand Turner's conception of democracy without having some idea of his ideas on Kelsen and Weber. It is in this sense that this essay is a contribution to Turner's *Making Democracy More Democratic.*

2 See Olechowski 2020, pp. 936-939. Métall lists 150 for this period, from number 43 to number 194. See Métall 1969, pp. 126-133.

3 Although it never achieved the prominence nor the notoriety that his later *Reine Rechtslehre* (1934) did.

4 While Kelsen thought that Stammler's philosophy of law was misguided, he did not issue the blistering critiques that Weber did. See Adair-Toteff 2014.

5 These include Bobbio 1987; Treiber 2016; Colliot-Théléne 2016; Anter 2000, and Breuer 2004. There is also some discussion of Weber and Jellinek in Adair-Toteff 2022b. One of the few works which contrasts Kelsen and Jellinek is Donhauser 2016. However, he concentrates primarily on Kelsen's *Pure Theory of Law.* Hans-Joachim Koch takes up Kelsen's criticisms of Jellinek but like Donhauser, he ignores Kelsen's 1922 work. Koch 2000, pp. 377-384. Similarly, Stefan Korioth briefly discussed Jellinek but it was only to provide some context because his focus was on the Smend/Kelsen controversy (Korioth 2005, pp. 320-322).

6 Turner and Mazur 2023, p. xiv. Turner mentions Jellinek in a note in the chapter "The Rule of Law Deflated" in which Turner suggests that Weber borrowed the term "ideal type" from Jellinek. Turner and Mazur 2023, p. 175, note 4. This has been a matter of debate but cannot be addressed here. That chapter also includes a lengthy quotation from an English translation of *Der soziologische und der juristische Staatsbegriff.* Turner and Mazur 2023: 163. The passage is found in Kelsen 1922, p. 187; 2022, pp. 282-283.

7 Keller 1995, pp. 323-324. Not all scholars agree with this, Kersten points out that Jellinek's work on human rights remains influential and he insists that Jellinek's *System der subjektiven öffentlichen Rechte* was Jellinek's first internationally recognized juristic work. There is little doubt that it is also a "classic" and there is no doubt that *System* was Jellinek's favorite book. Kersten 2011, pp. 8, 15, 16, 23.

8 See Kelsen 2007, p. 20, footnote 3 and also 39, note 57.

9 In his "Georg Jellineks System—Eine Einleitung" Jens Kersten discusses Jellinek's reputation in the 1880s and how the Austrian university authorities discriminated against him, finally compelling him to leave Austria for Germany (Kersten 2011, pp. 11-12).

10 See Olechowski 2018, pp. 109-11 and also see Kersten 2000, p. 87. Kersten pointed to Jellinek's international reputation and to the fact that Jellinek's students referred to him with the superlative "Meister." Even Jellinek's scholarly opponents recognized his immense academic fame (Kersten 2000, pp. 24-25).

11 In his sixty page "Editorial Report" devoted to *Der soziologische und der juristiche Staatsbegriff* Rodrigo Cadore noted that by a wide margin Jellinek is the most cited author in the entire work. Yet, he devoted less than a full page to discussing Kelsen's criticism of Jellinek (Cadore 2022, p. 545, note 279).

12 The state as considered from the sociological point of view is a political body and it is defined not by its content but by what it does. What it does is to maintain order because it has the "*monopoly of legitimate physical force*" ("*Monopol legitimter physischer Gewaltsamkeit*") (Weber 1994, pp. 158-159).

13 If the 330 pages of *Die Lehre von den Staatenverbindungen* are included then the total number of pages approaches 1500.

14 Kelsen 2022, pp. 214 n.387, 215 n.391, 216 n.383, 394, 217 n.398, 218 n.401, 402, 219 n.405, 220 n.409, 221 n.411, 414, 222 n.415, 223 n.418, 228 n.436.

15 Kelsen was not content to keep the sociological and the juridical separate; he wanted to prove that the law did not need a theological foundation. Moreover, he wanted to show that a pure theory of law provides "*a doctrine of the state—without a state*" ("eine *Staatslehre—ohne Staat*") (Kelsen 1922, p. 283; 2022, p. 458).

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Response: Debating Weber and Kelsen in the 21st Century: The Relative Autonomy of Democracy, Law, and Administration

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Crises bring about the conditions for rethinking fundamental problems, if only because they expose intellectual conflicts that have been concealed or submerged, or in which older concepts had to be extended in ways that required them to be articulated in new forms. Such periods are better understood in retrospect, and rarely by their participants. They are nevertheless intellectually fruitful ones, where things are said openly, with a more direct but partial understanding, that reveal deeper issues. Whether we are in such a period now is an open question. But it is one in which long stable political arrangements, including divisions between traditional parties and administrative systems with well-defined limits and roles are seemingly breaking down. Particularly relevant for this discussion is the fact that discretionary and emergency powers are being invoked on the basis of expert knowledge rather than deliberation. Bruce Wearne's reflections on the opening pages of the book capture the sense, which we share, that present circumstances do call into question some fundamental aspects of what we think of as democracy, law and legality. These call for, as he takes us to be suggesting, political education, at least the kind of political education that gets past ideologists talking past each other, as he notes.

Max Weber and Hans Kelsen wrote in periods of rapid change. Both had similar responses: they embarked on an intellectual project of purification or de-ideologization. In the conclusion we will make some metaphilosophical comments on this kind of project. The book was itself also an exercise in de-ideologization, an attempt at framing the relevant relationships in a way that the ideological or partial character of certain responses could be made evident. So it is perhaps no surprise that Weber and Kelsen, the authors of their own projects of de-ideologization, should serve as a starting point for and also provide a contrast to what passes today for democratic theory, as well as for current defenses of the administrative state and accounts of the rule of law. The comments collected here are testimony to the importance and complexity of the issues, and also to their character as fundamental theoretical questions about political life and the law.

THE PROBLEM OF ADMINISTRATION

Recent major works on administration and the executive have appeared which recognize something that has been largely ignored in the decades of discussion concentrating on deliberative democracy and representation: the fact that governing is not only different but increasingly separated from electoral, deliberative, and legislative politics. Both Pierre Rosanvallon (2006, 2018) and James Heath (2020) have produced major works on the topic of governance, its normative principles, and the merits and demerits of bureaucratic governance and the controls on it. Within US constitutional law, Philip Hamburger has asked the question, is *Administrative Law Unlawful?* (2014). The claims made by Carl Schmitt to the effect that the bureaucratic state rested on its own legitimacy apart from parliaments and the legal procedures that make up the rest of the constitution (Schmitt 2008) has in this way been revived. The idea of output legitimacy (Scharpf 1999), applied especially to institutions like the EU which are largely insulated from intervention by popular movements, has become a standard surrogate for deliberative democracy, and fear of "populism" and a moral panic over the declining trust in institutions has become a staple of academic thinking. If anything has made these issues apparent, it was government action against Covid-19, which involved, as it now appears, little evidence-based deliberation and less democracy.

This body of work and contestation raises many interesting issues. But abstracting from it also allows for a reconsideration of fundamentals that is removed from present opinions. A disadvantage of abstraction is that it can create the illusion of understanding where in fact the devil is in the details. And richness is lost: thus Agostino Carrino is correct to point to the earlier and less abstract writings of Kelsen on democracy in the 1920's, and of Hubert Treiber more recently to point to the German legal context (2020). But these writings of Kelsen which, as Thomas Olechowski points out, equated democracy with parliamentarianism. They also assume things, for example, about parties, which may no longer be applicable. This is an issue taken up elsewhere: the Frankfurt School legal thinker Otto Kirchheimer complained bitterly about the American party system, and valorized the solidaristic *Weltanschauung* parties of Europe as disalienating (Turner 2011). And some of the figures in the history of legal theory who may have been salient for Weber and Kelsen from an exegetical or historical point of view may no longer have much relevance, or may not translate well into different legal and philosophical traditions. Treiber notes the role of co-operation in the German bureaucratic system, something discussed by us elsewhere in relation to expertise (Turner 2004a, 2014) under the heading of stakeholder involvement. But as Sara Lagi points out, the forms of the administrative state's rule vary enormously, and it can be added that administrative traditions, the class character, their internal cultures, the incentives internal to the organizations, and much else also varies. This makes abstraction both risky and necessary.

The loss of applicability in new circumstances of a conceptual understanding designed to account for a given historical practice is a central motivation for theorizing (Turner 2004b). Doubtless this was a large part of the motivation for Kelsen's revision of his earlier work on democracy in his papers from the 1920s, later published in *Ethics* (1955). He made it more general and abstract. *Making Democratic Theory Democratic* is also an attempt to go to a higher level of abstraction. It reflects Weber and Kelsen in a key way: they were part of what we have elsewhere called the project of de-ideologization (Turner and Mazur 2014). But to do this it was also useful, and necessary, to step back historically to the figures of Weber and Kelsen and, in both cases based on a long historical record, their attempts at abstraction. But there is also a need to go beyond them, which will be explained shortly. The book stayed at this abstract level, and relied on their texts and their achievements in this larger project, without dealing with more narrow philosophical and exegetical questions of a kind we have dealt with elsewhere. It also presented cases and explications of relevant concepts. But it did not attempt to engage in detailed histories, except where the history could serve as illustrations of more general issues, or were clues to the origins of present-day ideological tropes. There are, of course, costs to this strategy, which the comments reflect. Their additions, such as Christopher Adair-Toteff's discussion of Jellinek, are valuable.

The book nevertheless had a different aim: of seeing the various procedures and mechanisms that have developed—particularly in law, administration, and in democratic control of law and administration—in terms of this higher-level interpretation. It was framed in the Preface and Introduction to the chapters in terms of principal-agent theory, with an emphasis on what Kelsen called metamorphosis. The term applies to the change by which democratic "will" by its expression through the legal procedure of voting turns into legal representation, which through legislative procedures produces law. Law is interpreted by judges and lawyers and transformed in the process. And there is another, major, transformation into administrative rules, and another into actual administrative practice with its inevitable discretionary power and possible abuse of this power. At each point of metamorphosis there is a human element: a potential conflict between each "principal" and the agent carrying out its aims. The point of principal-agent theory is to identify and recognize the significance of the recursive processes by which the principals rein in and surveille the agent, and also the ways in which the agent sometimes evades this control. This is a pervasive process: agents invent new ways to evade, or are presented with them by new circumstances, and principals invent new ways to control and surveille. The topic of these relations poses its own challenge to "democratic theory": it raises the basic question of "who rules?" and of where governance occurs.

The principal-agent model treats law and administration, for democracies at least, as instruments, but instruments that have, so to speak, minds and discretionary powers of their own. They harbor people or groups with their own motivations. They create the possibility of failure, transform the goals they are used for, and need to be subject to controls, controls which are themselves instruments with the same kinds of problematic properties. Moreover, among these controls are self-binding ones that are part of law itself, in the form of constitutions, systems of representation, requirements for supermajorities, restrictions on judges and administrators, requirements of transparency, and on and on. And there are interests that lead in the same self-limiting direction: rulers, judges, and administrators can avoid trouble and resistance by not pushing their powers too far. R. von Ihering, about whom more will be said, wrote about the auto-limitation of force as a key feature of legal evolution (cf. Stone 1950, pp. 712-3). In the law of the United States there are two particularly problematic examples of this that are part of judicial doctrine rather than law: rules governing legal "standing" and tests of causality which limit the capacity of people to sue the government for violating its own laws unless there is a provable personal injury, and "qualified immunity," which protects state officials who violate the law but for which there is no direct precedent for enforcement. These excuse the courts from acting and empower administrators and law enforcement officers with enormous discretion.

This way of thinking is central to the book: what it problematized was uses of discretion and the mechanisms for protecting against what might be taken as abuses and the inevitable flaws of translation, or metamorphosis as Kelsen calls it, from the open political process to law, administration, and administrative actions. Why is this such an important theoretical issue? It is certainly neglected in standard democratic theory and in civics education, although there is an important literature on implementation (Pressman and Wildavsky 1984). The facts involved in administration are arcane, and specific to situations and administrative traditions, which vary significantly between governments. Moreover, the reality of administrative secrecy and the obscurity of bureaucratic practices and decision-making makes generalization difficult. Case studies show the complexities, the errors that are obvious in retrospect, the personal interests and quirks that appear with discretionary acts, biases, and so forth, without providing much basis for generalization. And of course the means of evasion and control evolve in unpredictable ways that do not reflect internal political changes but changes in the environment, in technology, and culture, incentives, political judicial and bureaucratic personalities, and so forth.

This set of relationships generates ideologies. Kelsen made this point about the English doctrine of judicial independence: it was presented as a general principle, but in fact it was the case that the judges were appointed by the monarch and thus were not truly independent. Examples like this abound in the relations between democracy, law, and administration. James Heath's recent book in praise of the administrative state praises the morality of the bureaucracy and their normative commitment to neutrality through

their commitment to Pareto optimality. As an ideology, this serves its purposes: it reassures the public and provides bureaucrats with a convenient vocabulary to justify their discretionary acts. In an earlier generation Dwight Waldo (1948/1984) and Carl Friedrich (1937) gave analogous ideological justifications, not surprisingly in different terms than the one elaborated by Heath (see also Turner 2024, forthcoming 2026). Carl Friedrich preached "responsible bureaucracy" and insisted on the superior rationality and morality of bureaucrats (Friedrich and Cole 1932); Waldo portrayed them as governed by a democratic morality (1948/1984, p. 160), meaning something different than democracy itself, and he also cites a raft of other thinkers insisting on a basis for their morality in the higher law, meritocracy, efficiency and so on. He quotes the reformer Charles Bonaparte as saying:

> All men who have sufficiently reflected and are sufficiently informed to entertain an intelligent opinion must and do think alike on the subject; …no one who has any claim on public attention really doubts that the principle of civil service reform is just and benevolent (Quoted in Waldo (1948/1984, p. 161)

Typically, these ideologies are constructed to finesse the question of whether administration and democracy are at odds. And they are generated by, and are denials of, the problems of the principal-agent relations discussed in the theoretical preface.

Friedrich was embarrassed to have to admit that the supremely moral and rational German bureaucrats he praised did not, as he had confidently predicted, resist and foil National Socialism. Every one of the ideologies generated by this set of relations, such as the idea of the rule of law, judicial independence, superior rationality and morality, fidelity to informed opinion, and so forth of bureaucrats, and so on, has analogous embarrassments. As Kelsen would have pointed out, the agents in these cases were actual human beings, not mechanical devices embodying the ideology, or an abstract "state." What principal-agent thinking does here is to highlight the pervasive process of evading, controlling, assuring, correcting, and failing to correct the failures of execution that inevitably arise through the complex processes of governance, "implementation," the substitution of law for justice, in the face of the conflicting interests and beliefs of everyone involved, but especially those of principals and their agents.

But there is a larger target here as well: democratic theory. Much ink has been spilled over the idea of democratic deliberation, the conditions for genuine democracy, whether a given constitutional order is sufficiently democratic, metrics for evaluating democracy, and so forth. The idea behind this is that there is a theoretical object here, democracy, that can be separated from the preferences, wishes, and desires of actual persons living in actual practical situations, and further that there is an important role for the state in bringing about changes in these preferences in the direction of genuine democracy or democratic deliberation as conceived by the theorist. Challenges to these ideas, such as the challenge of accommodating the intrinsically inegalitarian fact of expert knowledge into the presumably egalitarian process of deliberation are routinely ignored, or ideologized—for example into the idea of the purity of expert opinion or the elitist notion that deliberation should be done by the best deliberators with the people as an audience to be transformed by them. This topic that has been dealt with elsewhere, at length (Turner 2003), but is increasing in importance, as indicated by the appearance or reappearance of the idea of epistocracy. But it was not the topic of this book, which is the problematic relation between democracy, law, and administration.

Kelsen did not think that courts alone could save the rule of law, but that the support of the people was also needed. We can translate this into the lesson that the kinds of measures which principals impose on their agents can always be evaded, that trust in the agents can temporarily be re-established, but that it is always in question, because the agents—representatives, the executive, courts, and administrators—always transform the aims of the principals because their actions take a different form, and because this difference produces a space for discretionary power. But so does the ambiguity of the measures, such as a piece of legislation. Thus there is always a problem of accountability and also a potential gap that arises between the people to whom accountability is owed and the user of discretionary power.

APPLICATIONS

This is a barebones summary of the argument of the book. But the various chapters deal with other related topics. The commentaries here touch on and elaborate its theme in various ways. Robert Shuett's contribution focuses on an exemplary case of the core issue of the book, which also shows the value of the principal-agent framing: intelligence agencies. They are given exceptional discretion, can operate secretly and with the most muted kind of accountability, but are essential to the preservation of "democracy" however it is understood, because they have the agential role of protecting the state and the people from adversaries. But they go on to take advantage of their discretion and secrecy. They are the metamorphosed instrument of democracy. But the notions of democracy, responsibility, abuse of power, and much else is metamorphosed with it. Who are they "responsible" to: the transient and ill-informed preferences of the people who occasionally vote, an idealized version of these voters or citizens, humanity generally, the alliances in which they have ongoing relations of trust, the future persons who will be affected by their actions, or the knowledge-limited incentives and constraints of their place in the bureaucracy and its hierarchy, or to the organizational culture of the agency in question?

It is worth noting that Carl Friedrich, an ideologist of bureaucracy, found it necessary to defend this kind of power on the grounds that bureaucrats were not elites with different values than their subjects, but merely more talented users of the same common sense (Friedrich 1942/1950; Turner 2024). This points to the core problem for democracy and the status of agent: there is always a question of whether they represent the principal and are thus merely instruments. These are issues that democratic theory brackets or idealizes out of existence but are central to the phenomenon of governance itself, and especially in the case of intelligence services.

Mikayla Novak's contribution, on Don Lavoie, focuses on the phenomenon of non-comprehensive economic planning. One can add that this is a far more pervasive phenomenon than it appears. There is a current controversy in the US over state licensing requirements for occupations, which vary enormously, and in some states include such categories as "Interior Designers" and "Hair Braiders." These requirements, and a great many others that are not as absurd, are typically burdened with problems of enforcement and the meaning of the regulations is left to the regulators, which in turn raises questions of discrimination and arbitrariness. The rule is that the more intrusive the state is into new domains, the greater the degree of discretion and arbitrariness, not to mention the likelihood of corruption. But it is difficult in many cases to put these kinds of regulatory interventions under democratic control or to make them subject to accountability and transparency because they are concealed under other headings with other ostensible motivations. It is clear, for example, that drug regulation in the US has "economic planning" effects and that the effects are very large. But they are nominally about safety, just as the regulation concerning hair braiding is.[1] The issue here is not over intervention itself, or its democratic basis: it is over the administration and possibility of accountability for administration, and the fact that economically interested stakeholders dominate the non-transparent processes that are able to harness state power for their benefit.

Proceduralism, as Lagi's comments also suggest, is a weak reed on which to rest protections against abuse. It metamorphoses into law, to courts which interpret and apply the law, then to administrative procedures, then into tacit practices or agencies governed by internal and hidden incentives, then to individual judgements and actions on cases of regulation that provide vast opportunities for results that are non-neutral, arbitrary, or reflective of interests or hidden ideological commitments and also non-democratic, in any sense of the term.

Treiber comments on the differences between German and American modes of public administration, a large topic that cannot be taken up here in any detail. But in fact there are many cases of something like co-operative solutions in American administrative law, especially labor law, employment law, and in the history of reform. If the American model appears on the surface to be more legalistic and the German model more co-operative, this reflects many other differences—in culture, in organizational culture, in geopolitical circumstance, in cultural patterns of deference to the state and collectivism, in the role of the

state in the economy, and so forth. His references to co-operation as a mode of governance reflect the limitations of procedural solutions, and "co-operation" or stakeholder compromise focused on particular interventions and decisions may seem like a preferable alternative to a proceduralist, legalistic, method. But the same principal-agent model applies, just with different mechanisms, and the same issues appear, typically in even more concealed and less accountable forms, in these solutions, which are sometimes, as evidenced by the Hamburg cholera epidemic (discussed in Turner 2004a), catastrophic.

It is difficult to see the current moral panic among elites over trust, conspiracy theories, mal-, mis-, and dis-information, and the response, of secret monitoring and censorship of social media as unconnected to the abuses of discretion, secrecy, and deception that have been evident to ordinary citizens over policies they see as having failed. We have been here before: the propaganda efforts of all involved nations in the First World War created a loss of trust that persisted after the war was over. But solutions, such as Woodrow Wilson's plea for open covenants, openly arrived at, are impossible, by definition, to enforce: secrets are secret from the enforcers. And one only needs to call a secret treaty something different, such as a gentlemen's agreement, to avoid violating the rule against secret treaties. The list of techniques of evasion of this sort is astonishing (Donaldson 2017). Attempts to abolish the practice in the US in the 1950s with the Bricker Amendment (Grant 1985) failed. But one could easily find analogues to the pattern of evasion in every domain of administration, especially those that purport to rely on expert knowledge, and in every administrative system.

One concern, which appears implicitly in Agostino Carrino's comment, and more explicitly in Lagi's and Olechowski's concerns, is the machinery of representation, parties, and voting, notably proportional representation. This was not addressed directly in the book, but a few comments are appropriate. Systems of representation, and rules for voting, are themselves the subject of democratic legal processes of revision and acceptance in a dynamic legal order. They in turn reflect the culture and situations in which they are adopted and revised. A simple example in current US voting law can make the point: there is a voting rights act which assures that districts are not designed to prevent a race—implicitly Blacks—from electing representatives reflecting their identity. This has been interpreted, however, to mean other minorities, implicitly Hispanics, can be incorporated into the same district to produce coalitions.

What would a Kelsenian response to this be? First, that the idea of using identity politics to produce what is called a "majority- minority," or non-white majority, that functions as a coalition is a political ideology and aim. Second, there are indeed legal devices for dealing with minorities and fundamental cultural and political conflicts. In his Harvard Tricentennial lectures of 1936 Kelsen explained federalism in these terms (Kelsen 1942). To be sure, dividing political units is not a solution to the problem of minorities as such, but it changes the problem: it creates new minorities within the new units, and thus new political possibilities. When the US Supreme Court reversed Roe v. Wade, it returned the problem to the states, in which the same conflicts arose, but could be resolved in different ways in each state. "Democracy" requires subjecting such questions to democratic procedures, governed by law. There is no magical match between these procedures, constructed and decided for in particular circumstances and "genuine democracy": these are political questions, which have to be resolved by turning answers into laws and judicial and administrative actions.

The same reasoning applies to such topics as proportional representation. The Frankfurt School legal thinker Otto Kirchheimer was dismissive of the American two-party system, which he regarded as producing parties which were mere interest coalitions with no inner spirit, and therefore alienating, unlike the solidaristic *Weltanschauung* parties of central Europe. As discussed in Chapter 5, the diversity of American religious groups produced a culture of a certain kind of tolerance, and a political system which had the effect of encouraging shifting coalitions among groups, whose memberships were changeable, based on interests and a more or less shared idea of fair play rather than solidaristic feeling. This was a gift of history. But as with proportional representation, the party system that developed was a political choice which reflected a culture and worked because of that culture. This was a kind of reality Kelsen was attuned to (Kelsen 1973, pp. 95-113). One of the aims of our book, as the title implied, was to remove such questions from the cat-

egory of "the definition of genuine democracy." But that does not make them disappear: they remain as problems of democracy of the kind that a dynamic aspect of a legal order can address.

It may be noted that while Weber and Kelsen both valued freedom, they interpreted the concept in different ways. As his assistant Melchior Palyi wrote of his mentors Weber and Lujo Brentano,

> As true Liberals, they stood in matters of labor policy for trade unionism, the eight-hour day, and for factory legislation, as far as compatible with domestic free enterprise and international free trade. They were opposed to dogmatic laissez-faire—which meant paternalism in labor relations—as well as to paternalism in government (1949, p. 15).

But for Weber, there were few people free in the sense of not being subject to the suffocating demands of employment in large organizations. Political freedom, on the other hand, consisted in the ability to participate in the selection of leaders who could exercise some power over the large organization of state bureaucracy. This was a political value, based on the experience of a certain culture: what Joseph Schumpeter described as the bureaucratic rule of the impecunious sons of Prussian nobles. Their culture was distinctive. But Weber's response was similarly rooted in culture. It is no accident that he described the leader in terms of the saying of Martin Luther that "here I stand and can do no other." To go beyond Weber and Kelsen requires us to acknowledge these differences, and to see that freedom is a culturally entangled concept. This kind of cultural dependence or entanglement with political traditions holds throughout, as well as for bureaucratic and legal traditions.[2]

THE PROJECT OF DE-MYSTIFICATION

To fit the comments and our response into a more or less coherent whole, it may be useful to place them in a larger intellectual context, an arc, in the manner of David Dyzenhaus's *The Long Arc of Legality: Hobbes, Kelsen, Hart* (2022). The general direction of the arc is toward disenchantment, de-ideologization, and demystification. The methods employed in this process are purification, Occam's razor, reductivism, and so forth. These methods are contested at the moment they are applied, as they are today in contemporary philosophy, where defenders of "normativism" against "naturalism" insist on the limits to naturalistic explanation in the moral realm, and call for re-enchantment to avoid the reduction of the normative to the natural. What follows here is a necessarily superficial account, in the manner of the history given in Weber's *Wissenschaft als Beruf*, and partly following it. The arc we are considering covers the bulk of the Western intellectual tradition, both in the form of progressing with it, in groping along it, and in the form of resisting it. And the forms of resistance often invoked powers and forces that themselves needed to be disenchanted and discarded. It could be written in many ways, such as the way Nietzsche wrote it, which disenchanted the Christian tradition but led to the enchanted figure of the *Ubermensch*, or as Hegel's historicization of thought which led to the mystery of the absolute idea. But there is a strand that goes directly to the problems of law and the state, which is the strand that will concern us. One set of links in this strand of demythologizing was the subject of chapter 8, in which Rudolf Ihering plays a large role, which deserves some explanation, as it puzzles Treiber.

De-ideologizing notions like the rule of law, democracy, and state, and removing the language and ideological heritage of monarchism and natural law from constitutional thinking are projects with a long history, and large and complex literature. But this project is part of the larger project of disenchantment and demystification that concerned both Kelsen and Weber, and many others as well. Kelsen's *Society and Nature* (1946) located a major form of it in the rise of the dualism of nature and society among the ancient Greeks, and comments that

> There were periods in the history of human thought where men did not think causally—that means, that man connected the facts perceived by his senses not according to the principle of causality but according to the same concepts that regulated his conduct to other men (1946, p.vii).

These were prominently notions of retribution, and a mental world in which objects were alive (1946, p. 31). Causal thinking grew out of "the freeing of the interpretation of nature from the principle of retribution" (Kelsen 1947, p. 246). Aristotle's attempt to distinguish convention and nature in the Nicomachean Ethics is a key instance of dualization:

> Of political justice part is natural, part legal—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent, e.g., that a prisoner's ransom shall be a mina, or that a goat and not two sheep shall be sacrificed, and gain all the laws that are passed for particular cases, e.g. that sacrifice shall be made in honour of Brasidas, and the provisions of decrees. Now some think that all justice is of this sort, because that which is by nature is unchangeable and has everywhere the same force (as fire burns both here and in Persia), while they see change in the things recognized as just. This, however, is not true in this unqualified way, but is true in a sense; or rather, with the gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable; but still some is by nature, some not by nature (Aristotle 1925/1954, Nicomachean Ethics Book 5, Chap. 7, p. 124 [1134b]).

One form of mystification was natural law: the demystifying solution was to apply a dualism between positive law and natural "law." But the teleological concept became a new mystification.

The early modern philosophers, such as Descartes, overthrew the teleological view of the cosmos by applying a dualism of cause and teleology and then discarding teleology. The predictive and regular part was natural law; the teleological part was a matter of faith. Farther along the arc of demystification we find Kant: he was an enlightenment de-mystifier himself. In a famous passage, Kant divided these things in an epistemic way. Teleology was not in the things themselves, but was something we imposed on them in the course of interpreting them. Kant's contribution in ethics was to separate morality from religion. The reasoning involved the assertion of a dualism where there had previously been a unity, where morality was taken to be obedience to God and faith and morality had been one. The moral law, for Kant, could be separated from religion, universalized, and thus de-mystified: it is not merely a formula, but it is part of reason itself.

Ihering had a central role in the next stage of this demystifying story. Ihering rejects Kant on the grounds that to act on the moral law requires more motivation than the supposed authority of the moral law, which by itself motivates nothing. It needs an interest to motivate action. For Ihering, normativity does not exist as a force: that is a mystification to be rejected, a concept that needs demystification. What motivates us are interests, which are also purposes. Utilitarianism provides a theory of interests that mimics teleology, but with a worldly teleology. But the motivating story of utilitarianism also does not work. We are motivated by many purposes, and some of them are worldly and some are not. So it also is a mystification, if we treat it as an explanatory theory. Otherwise it is just another expression of a purpose.

Treiber's criticism requires some discussion. He is committed to the idea that *The Spirit of Roman Law* (*Geist des römischen Rechts* 1852–1865) was Ihering's *magnum opus*, appealing to a general summary discussion by Joachim R**ü**ckert of his early work on *The Spirit of the Roman Law* which Rückert takes to be especially influential. Treiber takes this to represent Ihering's deepest intentions, and claims that our account fails to match up with them. In fact, as Stone explained, Ihering not only changed his approach to the law, "he never finished his Geist because of this change of approach" (1950, p. 300n6). Strangely, Treiber ignores Ihering's later and more influential work, which rejected his earlier affection for legal conceptualism, as well as the standard scholarship on the subject (e.g., Stone 1950, pp. 299-316). As Stone explains "Law in

Ihering's conception, then, was the sphere in which the factors of power and ethical conviction in the interplay of conflicting interests were adjusted" (1950, p. 666). The relevance to Weber is obvious. Treiber uses an equivocal quotation from Gerhard Dilcher and Susanne Lepsius to the effect that the relationship between Ihering and Weber has not been clarified to suggest that the topic of Ihering and Weber is a personal peculiarity of Turner's. But it is not. Many others either discuss the relationship, for example Coutu (2018), or call for more study of it, such as Wilhelm Hennis (1987, p. 53).

This is an important point of disagreement. Chapter 8 in the book quotes extensively from Ihering, Weber's contemporary, friend, and ally Gustav Radbruch, and important major commentators in support of the importance of Ihering: there is no need to rehash the evidence here. In any case it is beside the point. The paper and book in question (Turner 1991; Turner and Factor 1994) are about a topic Treiber ignores: Weber's basic theory of action, interests, and ideas, which is what he builds his account of social regularities on, ultimately including the normative regularity of law. Ihering's *Zweck im Recht* starts from a teleological conception of human action from which he derives a teleological account of law; Weber replaces it with a non-teleological account of action, from which he derives a non-teleological account of law as regularity. These are parallel and conflicting projects. But they have something important in common. Ihering's was a demystifying one, a kind of realism against conceptualism; Weber was a further demystification which eliminated the mystification of teleology. This is the "intention" normally attributed to Ihering.

Treiber's assertions do require a methodological comment. In the history of ideas and especially the history of concepts, there are many ways of establishing the kinds of relationships in question: the similarity of ideas, terms, and themes; direct citations; the logical dependence of a concept on a previous concept; context; climate of opinion; the general regard in which a major thinker is held which allows the interpreter to assume some intellectual acquaintance; relations of teachers and students, including lectures on a person; the diffuse climate of opinion shared by the people, common knowledge; and so on. The relation of Ihering to Weber checks most if not all of these boxes. The fact that we lack proof in the form of page citations that Weber read the passages of Ihering's book that he did not directly reference is not evidence that he did not, nor is it ground for denying the relationships, and differences, between their ideas as historical facts. As Adair-Toteff notes, we run into similar difficulties in the relation of Kelsen to Jellinek: many of the boxes are checked, but not all of them. And Treiber himself does not follow the rule of only using direct citations to the exact page of the relevant texts, referring to indirect "clues" (Treiber 2020, p. 19).

In any case, Ihering was, for the German legal tradition, similar to what Herbert Spencer was for the Anglosphere. His thinking was a point of reference and background even if not acknowledged—and for much the same reason, namely that they developed a coherent account of the evolution of society and its institutions that undermined all atemporal absolutisms. The range of his influence as an interlocutor was astonishing, including Nietzsche, Durkheim, Pound, Lon Fuller, and Paul Vinogradoff. William Grossman, in an essay on Roscoe Pound, comments that

> The title of Ihering's best known work, *Der Zweck im Recht* (1833, 1877), indicates the jurisprudential revolution that he represents and which he, more than any other single man, brought about. Hitherto, nineteenth century philosophy of law had inquired primarily into the nature of law. Ihering sought also the end or ends of law (Grossman 1935, p. 606)

One could go on at length in this vein. It would be a real mystery if Weber had not engaged with Ihering, or with this central work, which closely paralleled his own account of action and regularities. But he did.

The same kind of demystifying logic used by these thinkers applies to the metaphysical theory of the state, to sovereignty, and so forth. Weber demystified the state by characterizing it in terms of means: holding a monopoly of legitimate violence made something a state rather than a mere organization. The state as Weber defined it was not a metaphysical entity but an arrangement between people. Kelsen repeated this: "The modern state is the most perfect type of social order establishing a community monopoly of force" (1944, p. 4). This is a matter of dispute. Weber rejected the "reality" of the state as a sociological, that is to

say explanatory, concept, but conceded its use as a matter of conveniently representing a set of individual activities. He rejected the will of the people as a fiction. Kelsen's account of the identity of state and law was itself a demystification which he seems to think went ever farther than Weber by eliminating any residual notion of the state as something distinct from law: this was his identity theory of state and law. Weber's was a demystification in the domain of explanation; Kelsen's in the domain of norms.

The kind of analysis we gave in the book of democracy, state, law, and administration was an extension of this project of demystification. The terms are abstractions, but they are abstractions from the activities of people, who have interests, roles that they are constantly defining and redefining in particular relationships which are in constant dynamic flux, and objects, like law books, jails, and police batons as well as maps and borders. These activities are subject to ideological interpretation: mystification, in terms of such concepts as representation. Making sense of these relationships and the ideologies they generated was the aim of the book. The method was similar to what Kelsen did in his account of representation (1955). We interpreted the relations between democracy, law and administration as principal-agent relations. Treating these intrinsically problematic relations as the core and motivator of this vast set of ideologized concepts enabled us to do a kind of *Ideologiekritik* analogous to Weber's and Kelsen's. We introduced a dualism, separating the ideological construction of these relationships from their principal-agent core. Weber was careful not to absolutize his substantive concepts, which he understood as ideal-types. He did not want to introduce a new mystery. Neither do we.

NOTES

1 And just as subject to abuse. A recent case actually concerned a hair braiding salon that was denied a permit to open by a municipality because it would provide too much competition for existing salons. Needless to say this was not a licit reason for denial, as the courts affirmed. https://ij.org/press-release/city-of-south-fulton-sued-for-anti-competitive-action-blocking-business-application-city-claims-new-business-would-provide-too-much-competition-with-existing-shops/, But economically consequential abuses of this kind are endemic to permitting processes, which often involve personal relations and antagonisms, not to mention extralegal policy preferences of bureaucrats.

2 The varying bureaucratic traditions of Europe are astonishingly stable and resilient. The case of expertise was discussed at length in (Turner 2004a, 2008), which fits with Treiber's idea of a co-operative German model.

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Review

Sexual Freedom and Its Impact on Economic Growth and Prosperity, by Feler Bose

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Feler Bose's important new book addresses the impact of sexual freedom on economic progress and overall social viability. Adopting a primarily Christian perspective, he evaluates Joseph D. Unwin's (1934) thesis that expanded sexual freedom leads inevitably to social decadence. According to Unwin, abstinence, fidelity, and restraint foster or are at least positively correlated with family security, social order, economic growth, and cultural progress. Unwin's perspective is diametrically opposed to the currently pervasive views that either all kinds of freedom, economic, sexual, and social, are synergistic, complementary, and positively correlated, or the more extreme view that sexual freedom is desirable but economic freedom is not.

The principal impetus for Bose's inquiry was his observation that among the 50 states, those with the most apparently progressive sexual legislation and social policy tended also to be the least free economically. It might be argued that where a left-progressive philosophy dominates policy will favor increasing non-economic rights but restrict economic freedoms that may aggravate social inequality. Conversely right-conservative views generally favor expanding economic rights but restricting sexual freedom. Taboos against discussing sexuality facilitated quacks and charlatans including Alfred Kinsey and Margaret Mead, who had a disproportionate and undeserved influence on the scientific consensus, such as it was, and on subsequent legal and policy reform.

The book's analysis is especially well grounded in the relevant literature and profusely illustrated with historical and biblical examples. It is especially noteworthy that Bose is reopening a conversation which has not really advanced since the 1930s. This area of discussion has profound implications for the future direction and success of our civilization. Bose's perspective is informed by traditional Judeo-Christian theology and ethical norms which emphasize temperance, family security, child-rearing, monogamy, marital fidelity, etc. Although it is not central to his thesis, Bose distinguishes between social norms enforced by state coercion and informal enforcement through social ostracism. Second-wave feminist critiques of conventional marriage held that monogamy was exploitative, unfulfilling, demeaning, and contributed to adultery (de Beauvoir 1949, pp. 466, 518-521; Friedan 1963, ch. 11; Greer 1970). Some second-wave feminists proceeded from explicitly Marxist premises, condemning capitalism as inherently patriarchal and implicitly looking to central economic planning as the key to growth prosperity. In *The Feminine Mystique*, Betty Freidan (1963) argued that American women increasingly found traditional marriage unfulfilling, and had to either

Feler Bose
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supplement it with a career, or substitute the career for marriage. She prefigured a demographic shift where women entered the U.S. labor force in large numbers between 1965 and 1980.

Unwin viewed sexual and economic freedom as substitutes—concluding from historical observation that more of one means less of the other. Bose notes that Unwin and allied researchers were unable to articulate why this should be the case and adopts as his task here one of framing a compelling explanation. This book would make an outstanding text for an undergraduate course offering an alternative or complement to the ever-popular liberal studies courses in human sexuality typically offered by psychology departments. It would also be a useful supplementary text for courses in law and economics, development economics, etc.

Chapter 1, Sexual Freedom and Economic Freedom, reviews how various philosophers analyzed the relationship between sexual freedom, often characterized as permissiveness or libertinism, and economic prosperity. Economic freedom, such as is measured by the Fraser Institute's Economic Freedom of the World index or the Heritage Foundation's Index of Economic Freedom, is strongly correlated with economic growth and performance. Economic freedom is characterized by secure property rights, low taxes, low barriers to engaging in commerce and starting new businesses, etc.

For comparison, how should sexual freedom be measured? Bose constructs an index of sexual freedom based on the ideal of Pauline absolute monogamy as described in Genesis 2:24. Sexual freedom increases as pre-marital and extra-marital sex are first decriminalized and eventually become socially accepted, along with divorce, contraception, polygamy, homosexuality, same-sex marriage, abortion, etc. Sexual freedom operates on a continuum extending to allowing even more extreme permissiveness, including practices that generally remain illegal such as incest, pedophilia, bestiality, etc. A potential shortcoming of Bose's index is that there is no metric for reciprocity among male-female sexual freedom—institutions that subordinate women could still score relatively high. Nevertheless, his choice of a single monotonic score helps operationalize the comparison with the similarly monotonic economic freedom indices.

Adam Smith (1776, I ch. VIII "Of the Wages of Labour;" IV ch. III pt. II "Of the Unreasonableness of those extraordinary Restraints, upon other Principles;" V ch. I pt. III Art. III "Of the Expense of the Institutions for the Instruction of People of all Ages") viewed society as divided into an affluent leisure class, the so-called "people of fashion," and the laboring class. Smith's people of fashion faced fewer incentives to control their appetites, though to the extent they behaved responsibly and augmented their family's generational wealth and status, they would be admired. However, idle hands are the devil's playthings, and the leisure class's wealth enabled some prominent members to indulge in scandalous extra-marital affairs or have relations with servants and prostitutes, generally without requiring them to provide for their illegitimate children. In contrast, the working class had less time to stray, and less discretionary income to waste on vices like prostitution, drink, or gambling. Such scandalous activities were likely to prove ruinous for the more resource-constrained working class, whom Smith observed generally displayed more circumspect behavior than their supposed betters, because the cost was relatively high.

Smith noted further that if the working class were to widely emulate the looser moral standards of the leisure class, that could prove ruinous for society. One thing that keeps this from happening is that even among people of fashion, profligacy was never much admired, whether sexual or material. Smith's view was that the more numerous working class, with their stricter moral standards enforced by relative poverty, was the key to a nation's social and economic progress. Only later would this be seen as pursuing a hypocritical Victorian respectability. The concern for uplifting and preserving the morals of the masses in the U.S. inspired the temperance movement which culminated in Prohibition, though the motivation was primarily to improve assimilation of predominantly Roman Catholic immigrants.

Freud (1920) held that mental health required individuals to overcome neurotic fixations such as the Oedipus and Electra complexes and that civilization itself was merely a product of sexual repression that might be inherently unhealthy and unsustainable (Freud 1901, 1927). Freud's interpretive approach was informed by his patients' therapeutic histories, but his analysis of literary, historical, and biblical sources is both problematic and questionable. For example, in *Moses and Monotheism* (Freud 1939, pp. 56-81), he arbitrarily posits two distinct individuals, an Egyptian priest of Aton and a Midianite prophet, whom he

conflated with the biblical Moses. Freud's main support for his idiosyncratic account was consistency with his psychoanalytic theories, not any external or historical evidence. Unwin would not be the last scholar to criticize Freud, notably being joined by Simone de Beauvoir (1949, p. 59) in *The Second Sex* and Betty Friedan (1963, ch. 5) in *The Feminine Mystique*, both of which became foundational texts for second-wave feminism.

Unwin's scholarship arose from his attempt to confirm the sexual repression thesis Freud developed in the *Psychopathology of Everyday Life* and *Totem and Taboo* (Freud 1901, 1927). However, in looking for such confirmation Unwin observed a strong and persistent correlation between social progress and strict marital fidelity. Societies seem to flourish only when they successfully enforce a strict sexuality that protects the family and supports child rearing. Strict sexual morality leads to cultural advancement as it reinforces individual fidelity and work ethic, and discourages hedonistic practices like promiscuity, gambling, immoderate consumption, alcoholism, drug use, etc. Societies with strict sexual codes possess the energy to explore and expand through international trade and navigation and even impose their morals on less disciplined societies (Unwin 1935, p. 20). He concluded that a society could achieve rapid cultural progress and economic growth, or sexual liberation, but not both (Unwin 1934, p. 412).

Unwin observed that historically societies imposed strict limitations on sex chiefly by restricting the freedom of women and children, often by limiting their ability to own property, and making married women legally dependent on their husbands. Liberalizing sexual conduct weakens the protection these restrictive legal institutions provide the family and the extent they channeled male energy toward spousal and family support. Female emancipation expanded women's sexual opportunities, and perhaps because men do not bear children, Unwin argued that it was more important to restrict female sexual opportunities than male ones (Unwin 1934, p. 323). Some will find this review of outmoded nineteenth-century marriage and property law distressing, but this is the legal environment which ultimately gave birth to today's culture and institutions. The sexual revolution of the 1960s saw divorce law liberalized, contraception and abortion become more common, widespread acceptance of sex outside of marriage, etc. (Bose 2021a). Interestingly, in her discussion of Engels' (1884) argument that private property inherently disadvantages women, de Beauvoir (1949, pp. 64-65) held that it does not—she found that socialism did not deliver on its promise to liberate either sex (de Beauvoir 1949, p. 760).

Curiously Unwin found that the spread of Christianity often weakened the stricter sexual morality of pre-Christian societies by eliminating draconian ostracism against sexual transgressors. Recall that the Old Testament penalty for adultery was death by stoning (Leviticus 20: 10-12 & Deuteronomy 22: 22-24). Pagan societies typically punished adultery with death, banishment, and less commonly, heavy fines. Once these societies converted to Christianity, violators could repent and be forgiven, a comparatively lenient practice seldom seen earlier. Thus pre-existing institutions to discourage infidelity, though often inhumane by modern standards, were generally weakened under Christianity.

Unwin saw a cyclical progression where strict sexual morality strengthens family institutions and allows for cultural and economic progress but ultimately leads to a liberalization of sexual restrictions. Greater sexual opportunities distract society from creation, discovery, economic progress, etc. The cycle repeats if society can reinstate the former strict sexual morality. In Unwin's thesis a society that combines sexual and economic freedom is inherently unstable. In Unwin and Bose's views, marriage should be for life, and until recently this was the view of the Roman Catholic and mainline Protestant Churches. Bose deplores the accommodation of lax modern mores as a step backward—impairing cultural and economic progress by further weakening the already beleaguered family unit.

Harvard sociologist Pitirim Sorokin (1961) extended Unwin's thesis by cataloging historical representations of nudity in European art, finding that it increased steadily from the fourteenth to the twentieth century. However, he also observed a relative decline in erotic representation over the nineteenth century—apparently the Victorian age was as comparatively prudish as its reputation suggests. Sorokin only examined the twentieth century up to 1920, after which the vogue for non-representational modern art might have shifted the depiction of nudes from fine to popular art. Sorokin assumed nudity would become

more common as society degenerates but his work lacks some context—nudity pervaded ancient Greek and Roman art, perhaps best represented by the nude central figure of Apollo in the west pediment of the Temple of Zeus at Olympus. Nudity was reintroduced in western art through the Renaissance's celebration of classical art and architecture, largely with Church sponsorship, though seldom without controversy.

Sorokin cites as further evidence the large number of English baronetcies that had gone extinct, demonstrating the extent to which "people of fashion" apparently paid the price when they drank too deeply of the sexual freedom their wealth could support (Sorokin 1961, p. 70). It is curious however that Sorokin only found support for his thesis among the lowest rank of hereditary nobility—baronets fall into an ambiguous space of minor nobility who are not peers though their titles are inherited. The rank was only created in 1611 by the Stuart kings to raise money to colonize Northern Ireland and Nova Scotia.

The Church's principal contribution to strengthening sexual morality was Pauline absolute monogamy, which Unwin dates to the Reformation. It may seem odd that this institution can be ascribed to St. Paul but remained latent until 1517, but in fact the Catholic Church had been opportunistically accommodating of divorce and annulment and the sexual conduct of several Renaissance Popes such as Alexander VI (born c. 1431/ reigned 1492-1503) was so infamous it contributed to the Reformation.

Chapter 2, Micro and Macro Episodes in the History of Sexual Freedom and its Impact, presents and discusses two historical episodes of sexual revolution, particularly focusing on how they impacted economic performance and well-being. First Bose looks at the celebrated voyage of H.M.S. Bounty and its aftermath. Following the deprivations of the hazardous ten-month journey to Tahiti, Captain Bligh allowed his crew to fraternize with Tahitian natives for the five months they needed to prepare their cargo of breadfruit for transport to the Caribbean. In retrospect this seems to have been a mistake. The contrast between the easy life on Tahiti with the rigors of enforced celibacy on the return trip led to mutiny. The mutineers fled to Pitcarin Island but far from establishing a utopian paradise, their new society degenerated to chaos and murder. Bose does not dwell on the subsequent history of child sexual abuse among the mutineers' descendants (Marks 2009).

On a larger scale Bose looks next at the sexual revolution engineered under Communism after the Russian Revolution. Lenin implemented a program of sexual liberation to supplant the bourgeois sexual mores of the Tsarist regime and the Orthodox Church. Communism removed distinctions between legitimate and illegitimate children, made marriage an exclusively civil institution, and liberalized divorce. Western intellectuals argued for socialized childcare to liberate parents of both sexes (de Beauvoir 1949, p. 568). Because child rearing had been theoretically socialized under Communism, many parents stopped providing for their offspring. The Communist regime also legalized abortion and homosexuality, seeing serial marriage flourish along with prostitution. By the 1930s Stalin recognized the failure of sexual liberation and reinstituted traditional sexual and marriage legislation, though as Bose notes, abortion and divorce rates remained high for decades—once strict sexual morality is abandoned, it is difficult to reestablish.

Chapter 3, History of Sexual Revolution in the U.S.: the Impact of Alfred Kinsey, looks at the Kinsey Institute's contribution to understanding—or misunderstanding—sexuality and how their scholarship contributed to policy and behavioral change. Unfortunately, Kinsey's findings were almost entirely spurious, being based on biased samples disproportionately emphasizing convicts, mental patients, and prostitutes (Kinsey et al 1948, 1953). Biased sampling may have been driven by the limited availability of willing subjects, participants' desire to please or impress investigators, or subjects' proclivities to brag about their sexual experiences, but it seems difficult to avoid the conclusion that Kinsey's personal eccentricities also contributed.

Kinsey reported that 95 percent of American men engaged in sexual activity that then constituted criminal offenses, and that fathers in particular were far more promiscuous than their traditional role would suggest. Widespread acceptance of this finding led to calls to liberalize penal codes to normalize behavior that according to Kinsey was already common and though shocking, seemed demonstrably benign. Over the sexual revolution, the burden of child rearing increasingly shifted from fathers to single mothers,

grandparents, unrelated boyfriends, and the state. Kinsey seemed to want to normalize aberrant practices, even reporting that women are not generally harmed by sexual assault (Kinsey 1953, p. 122) and that sex between children and adults should be viewed as normal (Kinsey 1953, p. 117). The Kinsey Institute facilitated numerous sexual assaults on child subjects to produce a sufficient volume of case studies (Reisman 2012). Kinsey Institute studies claimed to include data from 18,000 individuals, but 75% were excluded apparently because they were not sufficiently salacious.

Bose relates the impact the Kinsey reports had on the American Law Institute's 1950-1962 Model Penal Code project, which was largely enacted throughout the U.S. by 1970. Like the Uniform Commercial Code, the Model Penal Code attempts to codify and rationalize established common and statue law principles in a format to assist state legislatures in revising their criminal law. Since the Kinsey reports were so methodologically flawed, they should not have had the influence on policy they did, and many of the legal reforms they inspired have clearly turned out to be ill-considered.

Chapter 4, Assessing Sexual Freedom across the 50 States: 1960 to 2010, coauthored with Ari Kornelis, calls for and introduces a Sexual Freedom Index as a counterpart to the Fraser Institute's Economic Freedom of the World (Gwartney et al 2024) and the Heritage Foundation's (2024) Index of Economic Freedom. Bose analyzes two components in his index: exclusive protection of traditional, same-sex marriage, i.e., Pauline absolute monogamy, and penalties against sex outside of marriage. From this baseline, the stronger the two components, the lower is Bose's Sexual Freedom Index, which he constructs annually for each state from 1960-2010 and uses to compare individual states and track national trends.

Sexual freedom in the U.S. increased dramatically from 1970-1980 with the sexual revolution and held steady until 2010. Unfortunately the period examined does not include the widespread legalization of same-sex marriage due to the Obergefell decision in 2015 or the 2022 Dobbs decision which overturned Roe v. Wade. Given that so much has changed so rapidly since 2010, it would be interesting to see an updated index, though nothing in Bose's argument depends on what has transpired during the last two decades.

Chapter 5, The Paths to Prosperity: Contemporary Theories on Global Wealth Accumulation, outlines current economic thinking on the sources of economic growth. It then relates these various factors and metrics to Unwin's sexual freedom thesis and evaluates how sexual and economic freedoms intersect in different societies, and what that implies for a society's success. Bose focuses on Douglas North's analysis of institutions whereby good cultural institutions facilitate economic growth by enhancing the predictability of commercial interactions. When agents can form dependable expectations about the behavior of potential exchange partners, transaction costs fall and it becomes easier to engage in trade.

Although the market forces of profit and loss remove inefficient firms and entrepreneurs, inefficient institutions are not subject to market discipline and can impose high costs on society for a protracted period precisely because they operate outside of narrow economic criteria (North 1981). Furthermore, effective institutional checks on state authority are necessary to ensure a predictable, slowly-evolving legal-regulatory environment which supports market decision-making and entrepreneurial planning (Rizzo 1985, La Porta et al 1998). Bose draws a number of reasons from the literature to explain why the industrial revolution spread from Europe after originating there, including climate and demographic factors, the displacement of the feudal nobility by a more productive and entrepreneurial merchant class, the expansion of literacy promoted by the Reformation, etc.

Chapter 6, Time Preference and Economic and Sexual Freedom, develops Bose's interpretation relating sexual restraint to lower time preference, and notes further that lower time preference leads to longer planning horizons, greater saving, greater investment, and faster economic growth. Bose's discussion of time preference, which can be characterized as patience or willingness to delay gratification, is nuanced and informed by recent findings in behavioral economics that time preference varies over time for each individual, and that it is generally higher for small and immediate rewards, or in other words agents may employ hyperbolic discounting (Frederick et al 2002, pp. 360-361).

Religion often promotes a widespread belief in an afterlife which helps lower time preference and lengthens planning horizons across a society, contributing to saving, investment, and faster economic

growth. Western society created institutions like joint-stock companies which emulated the indefinite life span of religious corporations. Sexual restraint is closely linked to low time preference—people with high time preference and short planning horizons are impatient for immediate gratification and also less sexually restrained.

Homosexuality receives special criticism as a high-time-preference behavior because it does not produce offspring, but this view ignores potential benefits suggested by evolutionary biologists—it may act as a safety valve triggered by high population density or severe food shortages, which then lowers fertility and population growth. Homosexuals may also contribute to raising close relatives and propagating their family's genetic lineage (Wilson 1979, p. 275). Homosexuality may also be a byproduct of higher female fertility in the same family—the human hypergyny hypothesis (Barthes, Godelle, and Raymond 2013). However, these proposed reasons for homosexuality are all speculative.

Bose also notes that societies where the median voter has higher time preference will tend to favor public policy that institutionalizes, or at least tolerates, sexual permissiveness and promiscuity. Legislation can lower time preference by providing more secure and predictable property rights, and people who observe social norms that reward and emphasize sober and restrained sexual conduct will tend to adopt similar norms. Similarly, a society force-fed an unrelenting stream of pornography will likely see licentiousness as relatively normal. Nevertheless, everyone knows enough to admire Samuel Richardson's (1748) Clarissa Harlowe for her integrity and virtue and instinctively recognize the physically attractive and charming Captain Lovelace for the despicable villain he is. Literary Darwinism (Carroll 2004; Gottschall and Carroll 2005) points to the evolutionary benefit of relating narrative scenarios and morally evaluating the choices made by fictional characters. Literature opens us up to a world of fictional experience and personalities we may never witness firsthand without exposing us to the attendant risk of the real world, but modern literature increasingly focuses on problematic sexual encounters—e.g., Flaubert (*Madame Bovary*,) Tolstoy (*Anna Karenina*,) D. H. Lawrence (*Sons and Lovers*, *Women in Love*, and *Lady Chatterley's Lover*,) Proust (*À la recherche du temps perdu*,) Henry Miller (*Tropic of Capricorn*,) Nabokov (*Lolita*,) etc.

Bose and Van Duyn (2020) have suggested that left and right parties differ chiefly in their appeal to groups with different time preferences. Right-conservative parties emphasize economic over sexual freedom and appeal to lower time preference constituencies while left-progressive parties emphasize sexual over economic freedom and appeal to less patient voters with higher time preference. In other words, the attempt by different factions to appeal to and capture segments of society with different time preferences helps explain why in the U.S. the Democratic party spends so much time and effort channeling the Comintern, while the Republican party before Trump divided its efforts roughly equally between channeling Adam Smith—rather poorly—and the Spanish Inquisition. High time preference societies neglect future generations—and what other explanation can there be for the U.S. amassing a $30 trillion national debt with virtually nothing to show for it? Although the Republican party purportedly appeals to lower time-preference median voters, paradoxically Bill Clinton has been the most fiscally conservative president since Grover Cleveland—both Democrats!

Chapter 7, Long-Term Thinking in the Bible and its Impact on Economic Growth and Prosperity, focuses on St. Paul's requirement of strict male monogamy. If male monogamy contributes to economic growth, that would go a long way to explaining Christianity supplanting paganism across the Roman Empire, and the later growth of Christianity facilitated by the relative prosperity of the societies that embraced it. This chapter presents nine biblical examples as case studies to illustrate the longer planning horizon resulting from distinctively Christian principles as the Protestant work ethic (Weber 1905), social ethic (Arruñada 2010), bourgeois sensibility (McCloskey and Carden 2020), Pauline absolute monogamy (Unwin 1934, 1935), and the European marriage pattern (Hajnal 1935).

Bose's first three cases are drawn from Genesis. In the first, Adam and Eve commit the sin of impatience or high time preference by not waiting for permission to eat from the tree of knowledge, being punished with expulsion from Eden. The second case illustrates how Abraham wrestles with relative patience and impatience. When God promises him land in Canaan, he displays patience and low time preference

by bringing settlers from Ur and instructing them in religion. However, because Abraham and Sarah were impatient for the son God promised, they turned to Sarah's servant Hagar who bore Ishmael as a surrogate mother. Sarah bore Isaac only later. The third case contrasts the time preferences of Isaac's twin sons Esau and Jacob. Jacob had low time preference and planned patiently for the future. Esau was the older of the two twins and should have inherited Isaac's property but was disinherited when he impatiently traded his birthright for the immediate gratification of Isaac's food.

Case four jumps ahead from Genesis and contrasts Pauline absolute monogamy with the Roman marriage customs it largely supplanted. St. Paul's teachings on monogamy are presented in I Thessalonians, I Corinthians, and I Timothy and contrasted strongly with prevailing Roman customs, which permitted no-fault divorce instigated by either party for any reason. Except in Sparta, Greek and Roman law made women subservient (de Beauvoir 1949, pp. 96-103). Roman women were expected to remain chaste and faithful, but men were permitted a double standard, though liberal divorce laws may have helped restrain them. St. Paul insisted Christian men should strive for fidelity equal to women, and to the extent this was observed, Christian marriage supported stronger family life and better preserved intergenerational wealth. Even where the spirit was willing but the flesh was weak and Christian husbands did not successfully achieve this ideal of fidelity within marriage, it still provided social advantages and marked Christian men as more desirable spouses.

Bose notes that holding men and women to the same standards of marital fidelity was not just profoundly fair, it allowed for better marital harmony and synchronized time preferences within the family. Roman marriage enforced low time preference behavior on women but allowed men greater freedom and higher time preference. Roman men might opt to be faithful, which the most virtuous were, but as a group they were more free to stray, and presumably strayed farther and more often than Christian men. As a result Christian marriage likely produced fewer illegitimate children. Simone de Beauvoir largely ignored the higher place and equality of women in Christian, as opposed to Roman, marriage in *The Second Sex* (1949, pp. 104-106).

Case five looks at attitudes toward sexual abuse of children, which was widely tolerated in Roman society. Christian teaching remains unambiguous in condemning relations between adults and children. Apart from the moral virtue of protecting the weak and defenseless, protecting children from abuse is a forward-looking behavior emblematic of low-time-preference and a long planning horizon.

Case six examines St. Paul's teachings on self-control. In his Letter to Titus, St. Paul exhorts five groups in the Christian community to be forward-looking, patiently plan for the future, and restrain their passions—clearly emphasizing sexual passions, however he encourages Christians to restrain any appetites that are either selfish or short-sighted. Even slaves were encouraged to be responsible to the extent they were permitted autonomy. Although St. Paul offered no blanket condemnation of slavery as an institution, he encouraged slaveowners to treat their slaves humanely beyond the minimum required by Roman law. Roman law allowed owners to execute slaves without penalty and owners occasionally did this to instill discipline throughout the household or as a particularly barbaric display of conspicuous consumption, though manumission was recognized as more praiseworthy.

Case seven examines tithing to support the Christian community. Socializing a portion of individual wealth created a fund for future use when some members of the community might need it more urgently. Case eight examines Christian millennialism. People who believe the end of the world is imminent have high time preference and a short planning horizon. Thus postmillennial Christians, including Roman Catholics and mainline Protestants, have longer time horizons and lower time preference than premillennial Christians. Case nine looks at Christian teachings on wealth redistribution. Bose argues that state-enforced redistribution raises time preferences and contributes to keeping the poor impoverished by discouraging them from investing in wealth accumulation.

Until the Reformation, Catholicism did not encourage either literacy or bible study among the common people. Even St. Jerome's Latin translation of the bible was only accessible to an educated elite. This changed as the Protestant churches produced vernacular translations and encouraged widespread litera-

cy. The Reformation instilled the norms of lower time preference to a broader audience. Although Islam has been the world's fastest growing religion for some time now, the Islamic world was unable to match Christendom's sustained economic progress in part because it allowed limited polygamy and placed less emphasis on male fidelity. Hayek's theory of cultural group selection (Hayek 1967, 1973, 1978; Steele 1987; Stone 2010) suggests that Catholicism successfully imitated the cultural reforms of the Reformation starting with the Counter-Reformation and culminating in the Vatican II reforms. The internecine conflict between European states that characterized the Counter-Reformation led ultimately to a productive international order based on religious toleration formalized in the 1598 Edict of Nantes. Bose closes the chapter by contrasting Unwin's emphasis on female sexual restraint as the key to building civilization with St. Paul's contrasting emphasis on male restraint.

Chapter 8, Sexual Freedom, Guilt, Confession, and Its Impact on Economic Growth and Prosperity, addresses how Christian teachings on guilt, repentance, and forgiveness contributed further to economic progress. Bose points out how secular intellectuals seek to normalize or celebrate vices they either practice themselves or observe to be widespread in society. The self-flagellation that in former times mortified the repentant flesh has given way to moral grandstanding that promotes restrictive government policies—the burdens of which are always to be borne by others—and ever exorbitant taxation. Both measures are especially attractive to the extent the cost can be shifted to third parties and other innocent bystanders, especially when these policies can be exploited to penalize purported Marxian class enemies.

Much like the Kinsey reports, Margaret Mead's (1928) flawed study of Samoan sexual practices contributed to a perception of normalized promiscuity, especially in this case of child promiscuity. In fact nothing in Samoan society or sexual practices justified Mead's conclusions, which derived from a combination of gullibility and projection. Bose turns next to John Maynard Keynes' celebrated disparagement of saving. Saving provides funds for investment and economic growth and results from responsible low-time preference behavior. In keeping with his own questionable sexual appetites, Keynes deplored low time preference savers and advocated for a socialized investment fund directed by a central planning authority of self-anointed bureaucrats and intellectuals like himself. This would have seemed superficially more scientific than market competition but offers a very poor approach to applying limited resources to satisfy diverse wants and preferences.

Kinsey's flawed research has already been discussed. Bose also looks at Freud's (1901) apparent obsession with ascribing mental illness to unrecognized or perhaps unfulfilled childhood sexuality. Scant evidence ever came to light to support Freud's theories—once applauded as revolutionary, they have become little more than bizarre and extravagant intellectual curiosities. Finally, John Money presented confused ideas that attempt to broaden gender ambiguity from a small number of very real but very limited special cases to a widespread and essential feature of human identity (Money and Tucker 1975; Money 1988). Bose suggests guilt drives people to rationalize and justify their own nonconformity or transgressions in an attempt to normalize their deviations from recognized norms.

In Chapter 9, the Afterword, Bose concludes by positing that rather than being complements, sexual and economic freedom are substitutes. People with low time preference choose economic freedom and the higher economic growth it makes possible. People with high time preference choose sexual freedom and indulgence at the expense of economic growth. The change in laws driven by the fraudulent Kinsey reports reflect the preferences of self-anointed elites rather than the median voter.

The Appendix coauthored with Brian Baugus of Regent University analyzes abortion access in terms of time preference. They suggest that the principal beneficiaries of abortion access have been, not the mothers who have abortions, but the fathers who are freed from any need to support either the mothers or children. This conclusion is especially noteworthy because it goes counter to most arguments in favor of abortion rights, that they are necessary to benefit the women.

Bose presents a masterful command of the relevant literature and draws on his own extensive empirical research (Bose 2013, 2015, 2021a, 2021b; Bose and Jacob 2018). However, the value of this book is not limited to its efforts to address current controversies, which are probably interminable. He goes beyond that

by reopening a nearly forgotten conversation that is as relevant today as it was when Unwin addressed it in the 1930s. Any consensus on sexual freedom may remain elusive, particularly in terms of what is permissible, what is optimal, etc., but the discussion needs to be addressed seriously for society to move forward. This book will always be an essential part of that conversation.

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Review

Sociology and Classical Liberalism in Dialogue: Freedom is Something We do Together. Fabios Rojas and Charlotta Stern, eds.

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Fabios Rojas and Charlotta Stern, eds. *Sociology and Classical Liberalism in Dialogue: Freedom is Something We do Together.* Lanham: Lexington Books, 2024. xxvi+200 pages

Social science provides positive analysis of how the world works while ideologies provide a normative framework for how we should shape our world. A naive student might expect participants in ideological projects to draw on findings of each of the social science disciplines to form a coherent view of the world. Conversely, they might expect each of the social science disciplines to maintain a skeptical view of ideological projects. In reality, we often see varying degrees of elective affinity between social science disciplines—economics, political science, sociology—and ideological projects—progressive, conservative, classical liberal.

A new edited volume from Fabio Rojas and Charlotta Stern assembles a motley crew of social scientists from several disciplines to start a dialogue between the two that have shown the least degree of elective affinity—sociology and classical liberalism. The book is structured as nine substantive chapters focused on specific topics sandwiched between two big picture chapters providing extensive background on the history of the dialogue (or lack thereof) and lessons for the future.

Rojas and Stern's introductory chapter is the most illuminating of the volume. They spend little time documenting the chasm between sociology and classical liberalism because it is one of the most self-evident claims one can come across as an academic social scientist. They note vibrant communities of classical liberals thrive within economics, political science, and philosophy but most would struggle to name more and a handful of (living) classical liberals within sociology. Members of the American Sociological Association can find homes in subfield sections on Marxist sociology, critical sociology, and public sociology but they would be hard-pressed to find any section that explicitly or implicitly values classical liberal ideas. "Sociology," they argue, "is poorer because a whole tradition of ideas is left out of consideration."

The present day absence of any classical liberal tradition in sociology, they show, is not the result of any intrinsic tension between the two. Pointing a viable classical liberal lineage in sociology that never took hold in a durable way, they trace the rise and fall of Herbert Spencer and William Graham Sumner—both of whom could have carried on the tradition in sociology if not for being unfairly smeared with the infamous "social Darwinist" label by American public intellectual, Richard Hofstadter.

This leads us to the question of where a new dialogue might be renewed today. They begin with an emphasis on making the "freedom-coercion axis" the primary object of empirical research. Just as many sociologists are motivated by a normative desire to learn more about the cultural and

institutional sources of inequality or poverty, classical liberals can and should use the same tools to learn more about the cultural and institutional sources of freedom or liberalism. This is a straightforward and promising line of research. Their other suggestions include a greater use of several canonical concepts in sociology (the stock of facts; symbolic boundaries; ritual change processes) that, while being generally useful concepts, leave the reader less clear on why we should look to these concepts in particular over countless other canonical concepts that could help us study the freedom-coercion axis.

Two themes emerge from the substantive chapters, which cover such disparate topics as poverty reduction (Iceland and Silver), criminal justice (David), healthcare (Hall), campus culture (Redstone), and more. The first, embodied by the Iceland and Silver chapter on poverty and the Rojas chapter on civil rights progress, takes aim at the strident claims of what we might characterize as the "scholar-activist" strain in sociology. Contrary to the claims of these perpetually pessimistic scholars, they find strong empirical evidence that liberal institutions and societies lead to better, more inclusive outcomes over time. The second theme, embodied by the other chapters, is showcasing examples of how sociology concepts can be helpful to classical liberals (Hall) and how classical liberal concepts can be useful to sociologists (Novak).

Both of these themes are important for thinking about the push and pull of sociology. Many classical liberals are pushed away from sociology by the extreme and unfounded ideological claims of its loudest self-appointed representatives. Others are simply unaware of the useful tools that might otherwise pull them toward sociology. All too often, they stay separate as a result.

Creating space for young classical liberals to feel welcome in sociology and find it useful is a good first step. Measured in this manner, *Sociology and Classical Liberalism in Dialogue* is a worthwhile read for sociology-curious classical liberals.

Review

Regrounding the Literary Humanities

Libertarian Literary and Media Criticism: Essays in Memory of Paul A. Cantor, Jo Ann Cavallo, ed.

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Libertarian Literary and Media Criticism: Essays in Memory of Paul A. Cantor, edited by Jo Ann Cavallo, Palgrave-Macmillan, 2025

Titling this remarkable and quixotic collection of essays must have been difficult. "Capitalist Literary and Media Criticism" might have been technically more accurate, since the book really doesn't touch the major issues of governance and political economy in the dyed-in-the-wool libertarian tradition, but rather tends to defend classical versions of the liberal republic and legal government by consent. And "Capitalist" is a term of execration for not only progressives but many liberals, so using it in the title might well brand the book as yet another academic attack on the free market system. "Liberal Literary..." might be similarly true, but misleading. Maybe "Free Market Literary and Media Criticism" would have been less hackle-raising—but perhaps the book should be raising some hackles.

The book is most deeply about markets in literature and media, and the essential role of economic exchange as the flesh and blood of our greatest (and most popular) fictions. It is quixotic, but not in the now-shopworn protest tradition. It is quixotic in its commonsense, good humor, and adherence to sound economic principles common to economists across the ideological spectrum. It well represents the insight and fairmindedness of its dedicatee Paul Cantor, who has a rousing essay at the end, one of his last pieces of writing. Its lack of the hostile jargon and apocalyptic political atmosphere common to the Modern Language Association and its peers in the Humanities is very refreshing.

What it does is essentially to take the strategy of the postmodern turn—to analyse all literature and art in Marxian terms of economic injustice and oppression, and replace the Marxian narrative with the one that actually works, that is, the regulated free-market system that has in the last few decades rescued from poverty more than half the world. Many of the great stories take on renewed life—Shakespeare's plays, especially, but also Jonson's *Alchemist,* Tolstoy's *War and Peace*, *Pinocchio*, H. G. Wells' *War of the Worlds* (which gets a rather sinister undertone of the Technostate), and even, with astonishing effrontery, Hesse's *Siddhartha*. Likewise, pop culture gets rousing re-readings (entirely in Cantor's own genial tone of full enjoyment and gentle debunking of contemporary attitudes). Scrooge McDuck finally gets a historiography and and a serious critique, showing his evolution in relation to the economic understandings of postwar America. The financial crisis spawned several important movies, all deeply warped by the struggle between different narratives, Marxian, mainline economic, and morally traditional. An essay compares them. *Yellowstone* gets a deeply insightful analysis in

the terms of Austrian economics. Science fiction remains a relatively wild intellectual frontier and there is a strong essay looking at contemporary screen versions of future economic systems. And there is a very amusing piece proposing a theory of comedy that goes beyond Bergson's to the idea of surprise pricing.

Cantor's own essay tackles the two most cheerfully capitalist regular series on TV: *Undercover Boss* and *Shark Tank*, and comes to some very surprising conclusions. Cantor has few illusions about *Undercover Boss*'s benevolence, regarding its often heart-rending endings the way Oscar Wilde regarded Dickens' more sentimental moments: it would take a heart of stone not to laugh at the death of Little Nell. But Cantor is very forgiving of its good intentions.

This collection comes at a very important time. It is clear that the Critical Theory movement in the academy, with its full-throated disparagement of the central values of the Humanities—beauty, truth, and goodness and their replacement by social-science narratives of power and economic oppression, is in a state of crisis. It is so both practically, in the draining away of its student base (if your child loves art and literature, don't wreck it by sending her or him to a top university), and by the massive contradictions involved in its race to the bottom for the most disabling explanation of civilization.

Currently there is yet another challenge to the traditions of the humanistic academy: Critical Theory's antinomian and scornful rejection of the status quo has now been joined enthusiastically by a current administration, vocal in its support of the economic underdog, and bent on an even more massive destruction of the humanities. The "new broom" of the current administration is if anything even more hostile to the free market and the mutual creating of value by exchange than the most woke neomarxist. Perhaps they may even join forces, as they are motivated by the same spirit, and both derive from the profound postmodern undermining of the spirit of truth, the same belief in the social construction of reality.

All is not lost. Several fine books on language, the English, Greek, Roman, Indian, Chinese and Japanese classics have been appearing in the chinks or margins of the academy, pretty much devoid of Critical Theoryspeak. Though real scholarship within the academy may be retreating, public interest in it, especially on the internet, is reviving. *Libertarian Literary and Media Criticism* may be the seed of a more liberal and humane movement in literary and humanistic studies. Jo Ann Cavallo deserves our gratitude for gathering together such a band of interesting misfits.

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SIEO refers to the assimilated *Studies in Emergent Order*

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AIMS AND SCOPE

COSMOS + TAXIS takes its name and inspiration from the Greek terms that F. A. Hayek invoked to connote the distinction between *spontaneous orders* and *consciously planned* orders.

COSMOS + TAXIS is a joint initiative run under the auspices of the Department of Economics, Philosophy and Political Science at The University of British Columbia Okanagan and the Political Science Department at Simon Fraser University.

COSMOS + TAXIS offers a forum to those concerned that the central presuppositions of the liberal tradition have been severely corroded, neglected, or misappropriated by overly rationalistic and constructivist approaches. The hardest-won achievements of the liberal tradition has been the wrestling of epistemic independence from overwhelming concentrations of power, monopolies and capricious zealotries. The very precondition of knowledge is the exploitation of the *epistemic* virtues accorded by society's *situated* and *distributed* manifold of spontaneous orders, the DNA of the modern civil condition.

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