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Reconciling Positivism and Realism: Kelsen and Habermas on Democracy and Human Rights¹

[Revised 4/26/13]

Abstract: It is well known that Hans Kelsen and Jürgen Habermas invoke realist arguments drawn from social science in defending an international, democratic human rights regime against Carl Schmitt’s attack on the rule of law. However, despite embracing the realist spirit of Kelsen’s legal positivism, Habermas criticizes Kelsen for (Part I). I argue, to the contrary, that Kelsen’s legal positivism may be best described as functionalist, which emphasizes a conceptual connection between law and social science. Kelsen’s legal positivism arguments in developing his theory of law are drawn from legal positivism, as can be seen from his recent work. Kelsen and Habermas’s theories of law and development depend on “global domestic policy” for their full enjoyment. This acknowledgment, I submit, brings Habermas’s legal philosophy closer to Kelsen’s monistic view that a supranational human rights regime must regulate political as well as purely legal matters (Part III). Given this stronger analogy between domestic and global institutions of governance, I argue (Part IV) that a global human rights regime must also incorporate features of constitutional review. Conceding this point, however, raises further questions about the insulation of international law from so-called extra-legal (political) influences. I conclude that not only do multicultural differences in understanding human rights (conflicts between legal paradigms) generate political problems for international courts but so do competing subsystems of international law.

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Key Words: Habermas, Kelsen, Schmitt, law, democracy, human rights, positivism, realism, legitimacy, judicial review.

I. Habermas Versus and Kelsen?

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In a remarkable passage, Habermas pays tribute to a founding figure in modern legal positivism

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Is analogical reasoning a better measure of executive functions?

Date of publication and section name

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A commentary on

Deficits in analogical reasoning in adolescents with traumatic brain injury.

by Krawczyk, D. C., Hantson, G., Wilde, E. A., Li, X., Schmelle, K. P., Merkle, T. L., Vasquez, A. C., Cook, L. G., McClelland, M., Chapman, S. B., and Levin, H. S. (2010). *Front. Hum. Neurosci.* 4:62. doi: 10.3389/fnhum.2010.00062

The present paper by Krawczyk et al. (2010) adds to a growing list of studies that have shown analogical reasoning to be critically dependent on what is known as executive functioning in the neuropsychological literature, and working memory in the cognitive (neuro)science literature. Specifically, analogy requires the maintenance, manipu-

and understand (Holyoak and Thagard, 1995; Dunbar and Blanchette, 2001). Thus, theories of the development of analogy in children have frequently focused on relational knowledge as a necessary precondition for analogy (Rattermann and Gentner, 1998; Goswami, 2001). The importance of relational knowledge may also be seen in patients with damage to the temporal lobe. Morrison et al. (2004) and Krawczyk et al. (2008) and colleagues have previously found that patients with broad damage to anterior temporal lobe, an area associated with semantic knowledge, have difficulty with both verbal and visual analogies in spite of having preserved executive functions; however, the patterns of deficit are different than those of patients with damage to prefrontal cortex and their associated executive dysfunction. These findings are

via modeling that the development of such advanced relational knowledge networks themselves may be dependent on executive functions (Dourmas et al., 2010).

Thus, analogy is not simply another measure of executive functions, rather it is a whole brain activity, that is a profound test of our ability to think in everyday life, and as such is an excellent measure to evaluate the impact of traumatic brain injury on patients’ ability to function.

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