

The Idea of a Pure Theory of Law, by Christoph Kletzer, Oxford, Hart Publishing, 2018, 149 pp., £50.00 (hardback), ISBN-10: 1509913435

In this deceptively slim volume¹ Christoph Kletzer joins a chorus of recent enthusiasts for the rehabilitation of the idea that one cannot or should not think about law without thinking about the use of force.² In some circles, of course, this idea never went out of fashion. Derrida did not take himself to be in the front line of philosophical controversy when he wrote that ‘there is no such thing as law that does not imply in itself, in the analytic structure of its concept, the possibility of being “enforced”, applied by force.’³ What could be more obvious? For many of us working in the Anglophone philosophical tradition this is a case where obviousness is a poor guide to truth. H.L.A. Hart argued that the connection between the existence of law and the use of force is ‘contingent on human beings and the world they live in’⁴ and thus not, as Derrida supposes, ‘in the analytic structure of the concept.’ Joseph Raz furnished a famous thought-experiment (known as the ‘society of angels’ thought-experiment) in support of Hart’s claim.⁵ Many were persuaded, myself included. Our ‘Oxford School’ demotion of the law’s use of force (45) from ‘an attribute’ to ‘an accessory’ (22) is the principal target of Kletzer’s book (22). He stands for a revival of Kelsen’s view, and more broadly the ‘Vienna School’ view (2), that the difference

¹ Kletzer, *The Idea of a Pure Theory of Law* (Hart Publishing 2018). From here on, page references to this book appear in parentheses in the text.

² I am thinking mainly of Frederick Schauer, *The Force of Law* (Harvard UP 2015) and Arthur Ripstein, *Force and Freedom* (Harvard UP 2009).

³ Derrida, ‘Force of Law: The Mystical Foundation of Authority’, in Drucilla Cornell, Michael Rosenfield and David Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992).

⁴ Hart, *The Concept of Law* (Clarendon Press 1961), 195.

⁵ Raz, *Practical Reasons and Norms* (Hutchinson 1975), 157ff.

between legal systems and other dynamic normative systems lies in the subject-matter that law regulates. By its nature, or 'essentially', law regulates (specifically: permits) the use of force.

I call Kletzer's book 'deceptively slim' because its tussle with the Oxford School over the law-force relationship orientates but by no means exhausts its content, which is extremely wide-ranging. Kletzer takes us on a whirlwind tour of various Vienna School preoccupations, upsets our preconceptions about several of them, and adds to our appreciation of them all. There is a chapter, for example, devoted to whether we should think of the law's most rudimentary normative operation as obligating, empowering, or permitting. Kletzer departs from Kelsen, or perhaps only from received wisdom about Kelsen, in defending the 'permitting' view, contributing helpfully in the process to important debates in deontic logic. There is also a short chapter explaining the sense in which law should be understood as a 'schema of interpretation'. (Answer: nothing to do with Dworkin!) Another chapter defends 'normative monism' (and hence the nowadays unfashionable 'legal monism' of the Vienna School) according to which no two norms are simultaneously valid unless they stand in a 'normative relation to each other' (92). Finally there is a chapter standing up for the view (which Kletzer calls 'absolute positivism', 120) that even philosophical questions about law are open to legal answers. This closure, for Kletzer, represents a distinct but often overlooked ambition of the 'pure theory of law' that gives his book its title: the theory is pure not only of sociology and morality but also of philosophy, conceived as a discipline bearing down upon it from the outside.

That so much is squeezed into a book enjoyably readable in one afternoon is a tribute to Kletzer's intellectual agility as well as his exuberant attitude and his nice way with words. The stylistic contrast with Kelsen's own major contributions could scarcely be more marked. Yet for the pace and economy one inevitably pays a price in completeness and convincingness of argumentation. Let me mention a couple of points on which I was left

particularly unsatisfied by what Kletzer says. Perhaps my choice of them reflects typical Oxford School fixations.

(a) Given the centrality of the idea to his project, Kletzer is more casual than one might have hoped in explaining what he means by 'force'. The principal treatment of the topic appears in a footnote (21, note 1). Kletzer rightly differentiates force from both sanctions and coercion, and rightly berates those who confuse the thesis that law essentially regulates force (or is 'an order of force', 5) with the thesis that law is essentially coercive or the thesis that law essentially administers sanctions. However, he is quite content to equate force with violence (they strike me as very different) and to explain what force/violence might be only by example: 'acts like killing, grasping, hitting, attacking, and defending' (21). This is a motley list. There are clearly nonviolent ways of killing (e.g. withdrawing life support in a mercy killing, making CO leak from a gas boiler) and we may be attacked and defend ourselves (e.g. in court or on social media) without so much as meeting our accusers, never mind using force or violence against them. Kletzer says that he has a 'literal concept of physical force' in mind but the list of examples, themselves taken literally, does not seem to bear this out. Perhaps more importantly, hitting is essential to golf; attacking and defending are essential to football; grasping is essential to wrestling. Golf, football, and wrestling are normative systems. Are they legal systems? If legal systems differ from other dynamic normative systems only in being orders of force (i.e. in essentially regulating force) they would certainly seem to be. Or do legal systems differ also in some other way? In dialogue with Hart, Kletzer asks what 'allows us to distinguish law from other "serious" normative systems' (47). Isn't football serious?

(b) Raz argued that, relative to football, legal systems make a distinctive claim to supremacy.⁶ Law claims to regulate football

⁶ See Raz, above note 5, 151-2.

but football does not claim to regulate law. Legal systems, said Raz, are also distinctive in respect of comprehensiveness and openness.⁷ Kletzer has various doubts about these claims. But some of them appear to be red herrings. Part of the case for the 'order of force' view seems to be that the regulation of force is required for efficacy: 'even if one wanted to understand the law as simply setting standards, in order for those standards to be legal standards, they need to be enforced or at least assured' (48). Raz's criteria for distinguishing legal systems from 'the local bridge club' are said to 'exclud[e] effectiveness and force' (52). But they do not exclude effectiveness. Effectiveness is assumed. As Raz sees it, a legal system is a system of norms that enjoys de facto authority over a population; when the de facto authority ebbs away, the system is no longer the law relative to that population.⁸ The problem confronted by Raz is that the rules of the local bridge club also have de facto authority over a population (the club membership). So why does the local bridge club not have, or qualify as, its own legal system? Kletzer seems to think that Raz's proposals on this front could be defeated by showing that a bridge club too might have 'comprehensive and open rules' (52). Raz's point, however, is that unlike a legal system it need not have such rules. Legal systems, by contrast, are *necessarily* open and comprehensive, and *necessarily* claim to be supreme. It seems odd that Kletzer ignores the 'necessarily' here while making so much of it in laying out his own position. The bridge club might permit the use of force (e.g. the confiscation of trophies from errant members) but, according to Kletzer, a legal system differs in *necessarily* permitting the use of force. Raz replies: no it doesn't, but it necessarily claims that rules of law prevail over whatever rules the bridge club may have.

⁷ Ibid, 150-1 and 152-4.

⁸ Ibid, 128.

As you can tell even from these sample challenges (and of course I have more), I remain unconvinced by Kletzer's case for the 'order of force' view of law. Maybe I could have been convinced by a book that did not leave so many stones unturned. Be that as it may, I am glad that Kletzer did not write that longer book. What he wrote is a fascinating iconoclastic adventure, refreshing in its approach, offering delicious food for thought on every page. If nothing else, it should renew interest in Vienna School ideas for an Anglophone audience that is (alas) no longer much engaged with the works of the great Hans Kelsen.

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