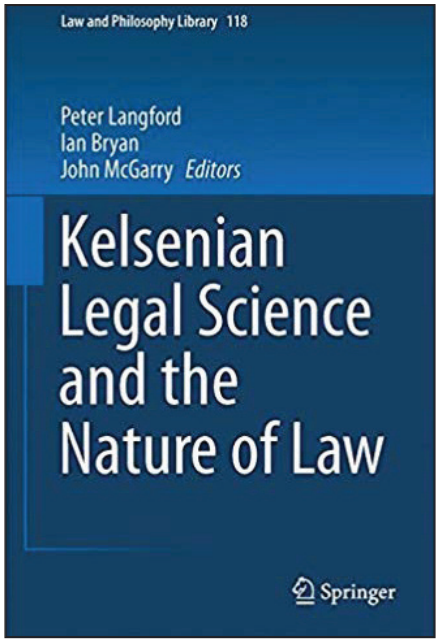

Kelsenian Legal Science and the Nature of Law

Edited by Peter Langford, Ian Bryan, and John McGarry

Springer International Publishing, Cham, Switzerland, 2017. 320 pages, $129.

Reviewed by Christopher Faille

Hans Kelsen (1881-1973) was an Austrian jurist and philosopher. The book under review, *Kelsenian Legal Science and the Nature of Law* is a collection of contemporary reactions to his work.

Kelsen considered his theory of law to be "pure," because it was undiluted by the natural sciences, or for that matter by the social sciences, morality, or theology. Kelsen contended that jurisprudence must be an autonomous science, because it is "objectivistic and universalistic."

Kelsen continued to develop his theories and published an expanded edition of *Pure Theory of Law* many years later, in 1960, while he served on the faculty of the University of California at Berkeley.

Against Natural Law

In 1949, Kelsen wrote *The Natural Law Theory Before the Tribunal of Science*, which was a forthright statement on the theory of "positivism." This is the view that laws are the commands, which some human beings give to others, and that the laws can and should be understood as facts in the world. Kelsen landed firmly on the "is" side of an is/ought dichotomy. In essence, Kelsen's argument for positivism was presented in six steps:

1. There is only one reality—there is no separate platonic realm, where these natural laws can dwell;
2. Our knowledge of this one reality is limited and relative;
3. Despite the acknowledgement in step 2, Kelsen regarded human perception and reason as reasonably efficient at approximating the reality mentioned in step 1;
4. Any tools, other than perception and reason, which may be aimed at grasping the one reality, are failures. Notable failures include religious faith and scriptural exegesis, which must be abandoned as acts of "wish-fulfilling imagination";
5. Science is a single endeavor—the same science by which we judge the validity of medicine or whether a bridge will hold up once heavy vehicles begin traversing across it—is the science that must pass upon questions of law;
6. Rejecting wish-fulfilling imagination, this science, also of necessity, rejects natural law theory.

Kelsenism also argues that a legal system is, by necessity, a hierarchical arrangement. Some laws are inferior to others. In cases of conflict, definitionally, the superior laws prevail; they represent that which is law without adjective. The most superior law is the "Basic Norm," on which every other norm depends. The Basic Norm is not natural law; it is an act of political will, one ascertainable as a matter of historical and empirical study. When subordinate laws are struck down because they fail to comply with superior norms or laws, this is in itself a positive fact.

One might say that Kelsen recreated something akin to American constitutionalism and judicial review (of an originalist sort), spinning it out of a priori reasoning. Kelsen also identifies the state with the body of its laws.

Ambivalent on International Law

A significant issue for Kelsen, as he developed his foundational ideas in the 1920s, when the League of Nations was formed and regarded by many as a hopeful sign of a new order, was the issue of the relationships among sovereign states and, ultimately, the question of an international body of law.

Kelsen acknowledged that international law, as created by the concord of nation-states, was real and binding—although only insofar as it was accepted as such by the nation-states involved. International law, he emphasized, was primitive and fragmentary. In his work after World War II, particularly after the second publication of *Pure Theory* in 1960, Kelsen tried to make room for international law, but the effort came into tension with the basics of the system set out in the original *Pure Theory*. Since he identified states and their laws, he was beholden to the notion of a law binding upon states only insofar as any given state agreed—which is not binding at all, insofar as most of us understand the idea.

Kelsen's view of positivism is distinctively Continental and not the Anglosphere's positivism. It is a positivism that owes a great deal to Immanuel Kant, and less to Thomas Hobbes.

Indebted to Kant

In his 1949 essay against natural law, Kelsen spoke of his debt to Kant. Kelsen acknowledged that some may argue that his idea of a "basic norm," at the heart of a legal system, bears some resemblance to the ideas of natural law. However, Kelsen argued (drawing on Kant) that the apparent resemblance is misleading, much like how Kant broke from traditional metaphysics and accepted Hume's skepticism about it yet spoke of the transcendental conditions of natural science. Likewise, Kelsen wrote, he and other pure theorists of law may break from the metaphysics of natural law theories, while at the same time acknowledging a basic norm as the minimum conceptual

condition without which the science of law is impossible.

This new anthology, *Kelsenian Legal Science and the Nature of Law*, takes a look at Kelsen's jurisprudence from a variety of perspectives. The defense of natural law, and thus of a conception of human rights that transcends positive law, is one of the chief themes running through these essays. Kelsen's overall place within the history of modern philosophy is another.

One contribution, by Pierre-Yves Quiviger of the University of Nice in France, takes issue with Kelsen's understanding of Kant and with the analogy paraphrased above, linking Kelsen's view of the science of law with Kant's view of the science of nature.

Quiviger observes that it is perfectly possible for positive enactments of law, at the same hierarchical level, to contradict one another, perhaps simply through legislative inadvertence. This would create a situation with which enforcement and interpretive authorities would then have to struggle and it would not generate a metaphysical paradox. It is not, on the other hand, possible for one physical law to contradict another one, such as gravity contradicting thermodynamics. From this viewpoint, Quiviger concludes that Kant's *Critique of Pure Reason* and Kelsen's *Pure Theory* are dealing with very different subjects, sufficiently different to ruin the analogy.

Quiviger also regrets the fact that Kelsen derives his notion of Kant entirely from the *Critique of Pure Reason.* In this, Quiviger believes that Kelsen is typical of the neo-Kantianism of Hermann Cohen. More fruitful premises for jurisprudence, though, are to be found in Kant's later works.

Concluding Thought

I admire the scholarship and analytical rigor of this collection. My own view, for what it is worth, is that positivism of either the Continental or the Anglophonic variety is misguided. Here, I can phrase my own view in a Kantian fashion: The study of law cannot be "pure" in the same way that reason cannot be "pure." The former cannot be separated from the needs of society any more than the latter can be separated from the needs of the reasoning individual.

Still, for those who seek to understand legal positivism in depth, and comprehend the debates surrounding it in recent decades, this book is a must read! ⊙

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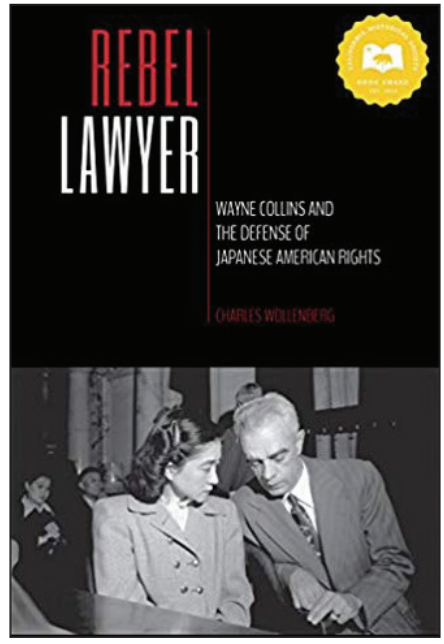

Rebel Lawyer: Wayne Collins and the Defense of Japanese American Rights

By Charles Wollenberg

Heyday Books, Berkeley, Calif., 2018.

160 pages, $19.79.

Reviewed by Richard Dean

Rebel Lawyer: Wayne Collins and the Defense of Japanese American Rights is an elegantly written volume that describes three cases handled by Wayne Collins; it is not a full biography. Collins is not an iconic lawyer, but he was without question the leading advocate on behalf of the legal rights of Japanese-Americans during World War II and in the years immediately thereafter. The book details Collins's defenses of Fred Korematsu, Tokyo Rose, and Japanese-Americans who renounced their citizenship while in detention camps and became subject to deportation proceedings. The publication of *Rebel Lawyer* coincides with the current immigration debates, which address some of the same legal issues confronted by Japanese-Americans. The past is, as they say, prologue—and *Rebel Lawyer* establishes that point.

Collins graduated from San Francisco Law School in 1927. He developed a wide-ranging solo practice, which was successful enough to not only allow him to raise a family, but also permitted him to handle many constitutional rights cases for Japanese-Americans without a fee.

Collins began his representation of Japanese-Americans when he was retained as counsel to Fred Korematsu in *Korematsu v. United States,* 323 U.S. 214 (1944). Korematsu was an American citizen who refused government orders to "report and assemble" after the outbreak of World War II. Collins and the Northern California Chapter of the ACLU represented Korematsu. However, the National ACLU instructed the Northern California Chapter to withdraw from representing Korematsu. The ACLU feared not only a backlash against the organization, but it also drew a distinction between the assembly and removal aspects of the executive orders, which it thought were constitutional, and the incarceration provisions, which it thought were not. *Rebel Lawyer* aptly details the clash within the ACLU and the constitutional issues raised by the executive orders.

Collins represented Korematsu individually; therefore, he was not directly impacted by this internal split. Collins challenged the constitutionality of the "assembly" provisions, arguing they were racially motivated and violated the principles of Equal Protection. That challenge was summarily denied by the U.S. District Court for the Northern District of California. Korematsu was undeniably guilty of not "assembling," as required by the orders, but at trial Collins called Korematsu to testify in order to demonstrate that Korematsu presented no risk to the United States of America. Indeed, Korematsu had twice sought to enlist in the U.S. Army but had been rejected as physically unqualified. Korematsu received a very light prison sentence. However, Collins appealed the district court's decision to the Court of Appeals for the Ninth Circuit, which affirmed the lower court's findings. Subsequently, the U.S. Supreme Court agreed to hear the case.

Collins's oral argument to the Supreme Court was rhetorical flame throwing; Collins was a street fighter and not the usual understated appellate advocate. He also advanced many accusations of unethical conduct by government counsel. Years later, these allegations were proven to be true in

Korematsu v. United States, 584 F. Supp 1406 (N.D. Cal. 1984). While Collins lost Korematsu's case in a 6-3 decision, that ruling is now viewed as a dark chapter in American jurisprudence. The three separate dissents are well worth reading, particularly Justice Robert H. Jackson's dissent. On the same day that *Korematsu* was decided, another Japanese-American, Mitsuye Endo, received a favorable 9-0 decision from the Supreme Court on the incarceration portion of the order, where Collins also filed a brief. The Supreme Court accepted the distinction drawn earlier by the ACLU. *Korematsu* started in 1942 and ended in late 1944. Collins received no fee and paid many of the out-of-pocket expenses himself.

Collins' lengthiest and most stunningly successful cases were known as the "renunciation" cases, where Japanese-Americans who were detained renounced their American citizenship. There were a variety of reasons for the renunciations: some were outraged at their confinement, some assumed they were going to be sent back to Japan regardless of the outcome of the war and families needed to rescind citizenship in order to stay together, and some alleged that they were tricked or coerced. After the renunciations, the government made aggressive efforts to deport the "renunciants." The ACLU and the Japanese American Citizens League refused to help the renunciants. Collins did not think he could handle the thousands of cases involved, given the large time commitment. However, when no other legal group would assist the renunciants, Collins agreed to provide representation. Impressively, Collins was able to obtain an injunction barring mass deportation of the renunciants. He also filed a separate suit seeking the restoration of their citizenship. His basic argument was that citizens could not simply give up their constitutional rights and that government duress in the internment camps had led to the "renunciation."

The broad injunction originally granted by the district court was subsequently vacated by the Court of Appeals for the Ninth Circuit, finding that the decision was overbroad, which necessitated 20 additional years of individual hearings and a complex affidavit process. Thousands of Japanese-Americans regained their citizenship and hundreds of others avoided deportation. Collins did receive some fees for these cases, but it certainly was not a reasonable fee for 20 years of work.

Collins became better known by the general public when he litigated the "Tokyo Rose" case. Ironically, there was never an actual "Tokyo Rose." Rather, the name represented an amalgam moniker for female radio broadcasters used by the Japanese in support of its war effort. One of those women was an American citizen, Iva Toguri D'Aquino. She was born in California to Japanese immigrant parents. She graduated from the University of California-Los Angeles. In the summer of 1941, prior to the attack on Pearl Harbor, she went to Japan to help care for an aunt. After the war broke out, she was unable to evacuate Japan and return home. She was forced by the Japanese government to serve as a disc jockey for a program called "Zero Hour." Only a few of her recordings were recovered after the war and none contained any political content. She was arrested by the U.S. military in Japan and investigated by the Justice Department, which concluded that she had not violated any laws. She applied for a passport in 1947, desiring that the child she was carrying would be born in the United States. Egged on by the broadcaster Walter Winchell and the American Legion, the Justice Department investigated her once again and for a second time concluded no prosecution was warranted. However, Attorney General Tom Clark overruled that decision; political pressure dictated that there would be a trial. D'Aquino was deported to San Francisco and charged with eight counts of treason. Collins spent two decades defending her, without any real fee paid for his services.

In trying to prove treason, the government had major problems. There were no overt acts; only her words could be used to substantiate the government's case. However, there was no tangible evidence of those words. Some servicemen testified that they had heard Tokyo Rose on the radio, but it was not clear whether they had heard D'Aquino speaking, as opposed to one of many other female broadcasters. Despite extremely thin evidence and due to the continuing hysteria, in 1949 she was convicted of one count of treason and was sentenced to 10 years in prison. She was released in 1956, due to good behavior. On her release from prison, she was met by an immigration official and told she was being deported; however, Collins prevented her deportation. After Collins's death, D'Aquino was pardoned by President Gerald Ford on the last day of his presidency. By that time, Collins' son had become one of D'Aquino's lawyers.

It is well known that civil liberties are an early casualty of war. As Justice Jackson himself once noted, "the rights of our clients, like the liberties of our people, are only what some lawyer can make good in a courtroom." *Rebel Lawyer* makes clear that one lawyer can make a significant impact in that regard. ⊙

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