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Kelsen on Natural Law Theory
An Enduring Critical Affair

In a series of essays published from the late 1920s up to the mid-1960s, Hans Kelsen carried out a radical critique of natural law theory. The present paper purports to provide an analytical reconstruction and critical assessment of such a critique. It contains two parts. Part one surveys the fundamentals of Kelsen's argumentative strategy against natural law and its theorists. Part two considers, in turn, two critical reactions to Kelsen's criticisms: by Edgar Bodenheimer, on behalf of traditional natural law theory; by Robert P. George, on behalf of “the new natural law theory”. As the analysis suggests, Kelsen's critique stands up to the criticisms.

Keywords: Hans Kelsen, natural law theory, Tribunal of Science, Edgar Bodenheimer, Robert P. George

1 THE TRIBUNAL OF SCIENCE

In the writings of Hans Kelsen, the phrase “natural law theory” (or else “natural law doctrine”, both translating the German expression ‘Naturrechtslehre’) refers to the variegated set of theories, from antiquity to the present age, sharing three fundamental claims: (i) a natural law does exist as an objective normative order different and independent from positive law (the ontological claim); (ii) men can know it (the epistemological claim); (iii) natural law theorists are scientific expositors of natural law as it really is (the scientificticy claim).

The critique of natural law theory (NLT) represents a core issue in Kelsen’s jurisprudence. In fact, from the late 1920s until the end of his long and productive scholarly life, he painstakingly pursued one and the same critical approach, along the following lines: prosecute the NLT before the “Tribunal of Science” (as he sets out expressly to do in a famous 1949 essay), bring to the fore its several shortcomings, and, on the basis thereof, get the NLT definitively sentenced as being ideology (and precisely: ideological thinking, and argument, about justice), mostly of conservative allegiance, operating under the guise of a genuinely scientific enterprise.¹

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To prevent misunderstandings, one point must be made clear from this point on. In Kelsen’s opinion, there is only one, true, tribunal of science. This is the tribunal acting on the basis of a radical positivistic epistemology (“scientific-critical philosophy”, “relativistic positivism”, “critical positivism”, critical empiricism). The main tenets thereof may be briefly recounted as follows:

1. **Ontological monism**: there is only one reality liable to scientific inquiry, and this is the reality of experience, the world of natural and social phenomena that can be perceived by our senses and ordered by reason (our “knowing faculty”);

2. **Relativistic epistemological standard**: there is no absolute “Truth”, but only experience-based truths relative to rational criteria of scientific inquiry;

3. **Epistemological moderate optimism as regards to reason and senses**: even though they are unable to carry our inquiries beyond the boundaries of experience, even though their use requires basic assumptions and the constant exercise of epistemic doubt, reason and senses are to be considered as fairly efficient and reliable tools for empirical investigations;

4. **Epistemological pessimism as regards to different pretended tools of inquiry**: imperfect as they may happen to be, reason and senses are the only genuine tools of scientific inquiry available to us; other pretended tools really do not do for “the quest of [scientific] truth”, being instead tantamount to more or less open forms of “wish-fulfilling imagination”;

5. **Universal epistemic validity**: the scientific-critical approach holds not only for inquiries into the realm of (causally connected) facts, but also for those concerning the realm of norms and values. The tribunal competent to adjudicate upon NLT (and, more generally, upon law, politics, morality and the theories thereof) is the same that, say, would hear a case about an allegedly miraculous therapeutic discovery in medical science;

6. **Meta-ethical subjectivism and non-cognitivism**: from the standpoint of science, **subjectivism** (there are no objective moral norms, no objective moral values; moral norms and values depend on human acts of will mirroring their preferences, emotions, interests) and **non-cognitivism** (reason, our knowing faculty, cannot solve the problem of justice by itself, nor any other practical problem) are the only acceptable meta-ethical views. History, sociology, psychology, and anthropology all converge to support this conclusion.²

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1 See, e.g., Kelsen 1928a; Kelsen 1928b; Kelsen 1949; Kelsen 1953; Kelsen 1957; Kelsen 1960b; Kelsen 1961; Kelsen 1964.

My paper contains two parts. The first one aims at providing an analytical reconstruction of Kelsen’s case against NLT (§ 2). The second one considers, in turn, two critical reactions in defense of NLT, both centered on Kelsen’s *The Natural-Law Doctrine Before the Tribunal of Science:* on the one hand, the case for “traditional”, rationalistic, NLT, as argued by Edgar Bodenheimer (§ 3); on the other hand, the case for “the new” Thomistic NLT, as argued by Robert P. George (§ 4). A few concluding lines will follow concerning the enduring significance of Kelsen’s critique of natural law thinking (§ 5).

2 KELSEN’S CASE

Upon a fair reconstruction, Kelsen characterizes NLT, as I said at the outset, as making three fundamental claims: an ontological claim, according to which there is an objective normative order, natural law, that is different and independent from positive legal orders; an epistemological claim, according to which men can know natural law; a scientificity claim, according to which natural law theorists are scientific expositors of natural law as it really is. Kelsen makes each claim the target of a set of arguments. In accounting for these arguments, I will try to present them in their best, perspicuous, light.

2.1 The Critique of the Ontological Claim

The NLT ontological claim is in fact the combination of four related claims: (1) there exists a natural law (2) that is a normative order (3) different and (4) independent from positive law.

The strategy Kelsen adopts for undermining the NLT ontological claim focuses on the alleged difference (3) and independence (4) of natural law from positive law. It shows a double-tiered structure. First, Kelsen identifies the differences between natural law and positive law, as they may be gathered from what he considers a fair reconstruction of mainstream NLT. Secondly, he brings to the fore the problems such differential traits of natural law make from a scientific perspective: arguing, as we shall see, that natural law, as “a system of norms distinct and independent from positive law”, has no scientific standing (“one cannot accept its validity” from “a scientifically rational standpoint”6) and is, in any case, “not possible”.7

3 Kelsen 1949.
4 Bodenheimer 1950.
5 George 2000.
6 Kelsen (1964: 114).
7 Kelsen (1928a: 39); Kelsen (1960b: §33).
2.1.1 Sorting out Natural Law from Positive Law

According to Kelsen’s account, NLT claims natural law to be different from positive law under five counts: objectivity, absolute value, absolute validity, static structure, and hierarchical superiority.

Objectivity. Natural law is an objective order of human conduct: its existence does not depend on any human act of law-making or law-creation. It is instead a natural order, intrinsic (“inherent”) in nature generally or in the specific nature of man, and being for humans something “given” like mountains and oceans and the starred sky. Contrariwise, positive law is man-made law: it is a human artifact, having necessarily a subjective character, since it necessarily depends on the subjective acts of will of men who happen to act as legal authorities in human societies.8

Absolute value. Natural law is endowed with absolute value: its norms are necessarily the norms of absolute justice, prescribing what is in itself just for every man at every time and place to do as regards to other men. Contrariwise, positive law norms are norms of justice only by way of contingence: namely, if, but only if, they embody the natural law standards of absolute justice; they have consequently only a relative value. Indeed, if there is a value that may be considered as necessarily connected to positive law, this value is not justice, but peace: the value of a peaceful (i.e., pacified) society. Obviously, peace may go along with gross violations of the standards of justice: (as we all know) positive law may bring peace at a very high price for the disadvantaged groups of a society (the ruled class, the “inferior” caste, the “subversive” parties or movements, etc.).9

Absolute validity. Provided natural law norms are endowed with absolute value, they are also endowed with absolute validity: they ought to be obeyed and applied as such, whatever the time and space. They enjoy, as natural law theorists sometimes claim, an “inner necessity”.10 Because of the absolute validity or inner necessity of its norms, natural law is an anarchical normative order: coercion and organization do not figure among its structural features. Contrariwise, positive law norms are only endowed with relative validity: they ought to be obeyed and applied, from a strictly positive-legal point of view, if, but only if we presuppose – by means of a juristic “hypothesis”11 or a juristic “fiction”12 – the validity of a basic norm the function of which is turning some original historical fact of un-authorized law-making by men disposing of su-

8 Kelsen (1928a: 28–30); Kelsen (1949: 142).
9 Kelsen (1928a: 37 & 56–57); Kelsen (1928b: 435).
11 Kelsen 1934; Kelsen 1960a; Kelsen 1960b: § 52.
12 Kelsen 1979.
perior physical force ("power", Macht) into an authorized act of law creation.\textsuperscript{13} Jurists, \textit{qua} expositors of positive law, cannot presuppose at will the validity of the basic norm of a positive normative order. This can be done if, but only if, the norms of that order are by and large effective. Effectiveness is motivated by the coercive sanctions officials are empowered to apply. Accordingly, the relative validity of positive legal orders depends, ultimately, on coercion and organization. Whereas natural law is anarchical, positive law gets its "perfection" in the form of \textit{state} legal order, i.e., of a coercive and highly organized normative order.\textsuperscript{14}

\textit{Static structure.} At least so far as mainstream NLT is considered, natural law "ideally tends to be" a \textit{static} normative order: i.e., a set of norms that includes one \textbf{basic material norm} and the norms derivable from it by means of "a mere intellectual operation".\textsuperscript{15} For instance, the natural law order identified by the basic norm \textit{"Suum cuique tribuere"} ("Give to everyone his own") is composed of that norm, plus the norms derived from it by way of (right) reasoning, like, e.g.: "Do not steal", "Comply with duly entered contracts", "Do not take undue advantage of people in dire straits", etc. Contrariwise, positive legal orders are essentially \textbf{dynamic} normative orders: they are sets of norms that include one \textbf{basic formal or competence norm} and the norms produced by the authorities that such a basic norm directly or indirectly establishes.\textsuperscript{16} For instance, the positive legal order identified by the basic norm "Whatever the Queen enacts is law" is made of that empowering norm, plus all the norms enacted by the Queen or her delegates. The static nature of natural law points to another fundamental difference from positive legal order. Natural law norms are set once and forever: they are immune to changes, they persist in their content through the ages; they are, in other words, "eternal, unalterable" norms. Contrariwise, positive legal orders, as dynamic orders, display an in-built, structural liability to change over time and place.\textsuperscript{17}

\textit{Hierarchical superiority.} Finally, due to its absolute value and absolute validity, natural law represents a \textbf{superior} normative order as regards to \textbf{inferior} positive legal orders. The relationship between the two normative orders is necessarily a relationship of \textit{hierarchical ordering}.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{13} Kelsen (1928b: 435–437).
\item \textsuperscript{14} Kelsen (1928a: 33–34); Kelsen (1928b: 441).
\item \textsuperscript{15} Kelsen (1928b: 399–400); as we shall see at § 2.2, Kelsen considers the theories of natural law making the case for dynamic, "purely delegating", natural law basic norms as "inconsistent" with the "pure idea of natural law".
\item \textsuperscript{16} Kelsen (1928b: 400).
\item \textsuperscript{17} Kelsen (1928a: 38).
\item \textsuperscript{18} Kelsen (1928b: 410–411); Kelsen (1960b: § 50).
\end{itemize}
2.1.2 Undermining the Ontological Claim

As I said, the laying bare of the peculiarities that would mark natural law off, according to the “pure idea” of a natural law order, from positive legal orders is the first, preparatory, stage of Kelsen’s critique of the NLT ontological claim. Indeed, he seems to suggest, as soon as we get a clear picture of the alleged basic features of natural law, as soon as we try, out of intellectual honesty, to take them seriously from a scientific standpoint, our “skeptical reason” cannot help but seeing flaws, questionable views, and wishful-thinking.

The arguments Kelsen deploys against the NLT ontological claim aim at three targets: first, the idea of natural law as an objective normative order endowed with absolute value; second, the idea of natural law norms as endowed with inner necessity; third, the idea of natural law as a static, self-applying, order that can be “developed” by means of purely intellectual acts, in its connection with the idea of natural law as a distinct and independent order from positive law.

A. Questioning Natural Law’s Objectivity and Absolute Value

To undermine natural law’s alleged objectivity and absolute value, Kelsen apparently deploys four arguments, namely: an argument from strangeness, a genealogical argument, an argument from human psychology (the psychological argument), and, finally, an argument from the necessity of theism. All the labels, here and in the following, are the outcomes of my own reconstruction of Kelsen’s critique.

None of these arguments, as we shall see, may be properly regarded as having knock-down force; nor does Kelsen in fact pretend them to be so. Rather, they are meant to set up a web of reasons jointly suggesting the plausibility of rejecting the NLT ontological claim from a scientific standpoint (Provided these would be the main features of a natural law order: Are they acceptable from the standpoint of a dispassionate rational inquiry? Would they make of it a viable normative order?).

The Argument from Strangeness. Natural law theorists tend to present the objectivity and absolute value of natural law as a matter of course. However, as soon as we cast the cold eye of reason on them, such alleged properties of natural law look deeply controversial. In fact, both commit their supporters to ontological dualism. The idea of natural law as a normative order not made by

19 By the way, Kelsen’s reconstruction of the “pure idea” of a natural legal order, far from being weird or idiosyncratic, seems in line with different reconstructions even by authors sympathetic to natural law thinking. For instance, Mark Murphy identifies three basic features of “the paradigmatic natural law view”: (1) objectivity (“the natural law is given by God”); (2) absolute validity (“it is naturally authoritative over all human beings’); (3) liability to knowledge (“it is naturally knowable by all human beings”). See Murphy (2011: § 1.4.).
20 Kelsen (1928b: 435).
men, but being instead, for them, something of a “given”, carries with it the idea of a double normative reality: on the one hand, the empirical, surface, reality of man-made norms of positive law and social morality, which can be grasped by our senses and ordered by our reason; on the other hand, the “higher” or “deeper” reality of natural law norms, that are not man-made. Likewise, the idea of the absolute value of natural law, which is, as we have seen, the absolute value of justice embodied in natural law norms, suggests a double reality of values: on the one hand, the empirical, surface, reality of subjective, relative, human values, that depend on man-made norms; on the other hand, the “higher” or “deeper” reality of objective values, that depend on objective norms and are “values in (and by) themselves”, like there are “things in themselves” as opposed to the ordinary, imperfect, things within empirical reality.

Ontological dualism (“the duplication of the sphere of cognition”) – Kelsen maintains - “forms the elementary kernel of all metaphysics and religion”, the building block of a “tragi-comic undertaking” by which “man produces the illusion of growing beyond himself”. Indeed, as soon as one asks natural law theories such unavoidable questions as “How were natural law norms made?”, “Where do they come from?”, “What is the source, if any, of the absolute value of justice?”, “What sort of thing is the higher or deeper reality of not man-made norms and values?”, etc., one gets answers that point to a law-giving nature, to a nature intrinsically endowed with objective directive force, or, more often, to a (transcendent) deity who created nature, and men as part thereof, and put inside of it natural law norms and the standards of absolute value.

By the argument from strangeness, however, Kelsen, so to speak, asks us to stop one step before entering, and scrutinizing, the (fantastic) world of metaphysical and religious thought. He asks us, in our quality of judges in the tribunal of science, to consider ontological dualism as such: as a claim, whatever its merits, that runs contrary to critical empiricism’s ontological monism. If we do so, Kelsen suggests, we cannot help concluding how “strange” the hypothesis of an ontological dualism of norms and values is: how weird is the idea of a second world, made of “higher” or “deeper” norms and values concerning human conduct, which nonetheless are not man-made like the positive and moral laws of our empirical world.

The argument from strangeness elicits an obvious reply: the alleged strangeness of an ontological dualism of norms and values is in the eye of the beholder. If ontological dualism really were such a “strange hypothesis” as Kelsen claims it to be, why whole generations of philosophers and people at large, including

Kelsen (1928b: 419).

As it is well known, a similar argument, “the argument from queerness”, has been deployed against moral objectivism in general by Mackie (1977: 38–42).
some of the most brilliant minds ever born, would have considered it a matter of course?

Against such a reply, Kelsen resorts to the genealogical and psychological arguments. As we shall see in a moment, the former purports to deny ontological dualism any scientific plausibility by appealing to its historical origins in human societies and cultures. The latter purports to explain the ever-lasting success of ontological dualism by appealing to human psychology: in particular, to two typical drives of the human mind.

The Genealogical Argument. Where does ontological dualism come from? Like any human construct, it cannot be but the output of human thinking. Which sort of thinking? The idea of a natural law is the idea of norms, laws, or principles for human behavior that are “inherent” in “nature”, that “come from”, are “to be found in”, nature. From the standpoint of scientific-critical thinking, however, nature is a chaos of facts perceived and perceivable by our senses, and ordered by reason by means of the principle of causality and other principles of scientific inquiry. Accordingly, nature as conceived by critical empiricism cannot be the norm-giving and norm-containing nature that natural law theorists have in mind. It must be a different kind of nature. Now, Kelsen claims, the idea of a norm-giving, norm-containing nature has its most ancient origin in primitive thinking. Primitive men see the whole natural environment surrounding their villages (trees, woods, sources, lakes, hills, wild animals, stars, etc.) as inhabited by spirits which ought to be properly worshipped and appeased in order to avoid evil consequences (illness, famine, drought, etc.). Primitive men see such an animated nature as part of their society: as a set of entities who prize men’s right behaviors and punish the wrong ones. By observing the “behavior” of such entities, men learn what they ought to do or to forbear. Primitive animism is the cradle of the idea that there are objective norms for human behavior, and, consequently, the cradle of ontological dualism of norms and values. Primitive thought has been gradually replaced, almost everywhere by now, by more sophisticated forms of religious thought, up to the great monotheistic religions. A transcendent deity is replaced to the spirits of trees and mountains, but the basic thinking-format is preserved: some transcendent deity is the source of objective laws, laws not-made by men, which can be discovered by “reading” the (teleological-theological) “book of nature”, and are absolutely binding upon the humans.

The Psychological Argument. Why generations of philosophers and people at large did endorse, and do keep endorsing, ontological dualism concerning norms and values? Why are they so watertight to the argument from strangeness and the genealogical argument? Kelsen suggests that this is so not because

23 Kelsen (1960b: § 31).
24 See Kelsen (1928b: 422–423); Kelsen (1949: 137 ff.).
ontological dualism is a true scientific claim, critical empiricism notwithstanding. Rather, this is so because ontological dualism, as suggested by the genealogical argument, is no scientific claim at all. It belongs to the realm of practice. It is an ideological device, whose grip on the said generations of philosophers and people at large may be explained by the interplay of two typical drives in the human mind. On the one hand, there is the “primitive mind” drive towards a personal-responsibility eschewing, absolute, heteronomous foundation (that is to say, source and justification) for the ultimate standards of human conduct. On the other hand, there is the opportunistic drive that favors ways of thinking which are able to secure to the promotion of one's own (individual- or group-) interests the stamp of objective and absolute value. Practical convenience would be, accordingly, the ultimate motive behind the persistence of ontological dualism of norms and values among humans.25

The Argument from the Necessity of Theism. Some natural law theorists try, so to speak, to sever the destiny of natural law – or rather, of the peculiar natural law they argue for – from the destiny of theism (the belief in a transcendent deity): they tend to deny any necessary connection between natural law, on the one hand, and any theological foundation thereof, on the other. This is so, Kelsen suggests, for they wish to make the case for natural law stronger, by showing that natural law does not need a foundation of theological kind, which is philosophically controversial. Unfortunately, Kelsen claims, such a separation of natural law theory from a religious foundation is not possible. The argument from the necessity of theism is quite complex. Kelsen brings to bear on it the key tenets of his empiricist Weltanschauung and theory of norms. In a nutshell, it may be recounted as follows. Natural law is a normative order whose norms are not man-made. A norm is the prescriptive meaning-content (Sinngehalt) of an act of will directed at somebody's behavior. Natural law norms, by hypothesis, cannot be the meaning-contents of human acts of will. Consequently, they must be the meaning-contents of acts of will of some non-human willing entity. Unless we are primitive animists, believing in the souls and spirits of trees, rivers, mountains, etc., we have only one way to go: we must assume the existence of a transcendent deity by whose will the natural law norms have been posited for men’s guidance.26

25 Kelsen (1928b: 419 ff.); Kelsen (1952: 22); Kelsen (1953: 10–11 & 22–24); Kelsen (1960b: § 51); Kelsen (1964: 114 ff.). Kelsen seems perfectly aware of the persuasive “gap” of his arguments. Critical empiricism can bring the ultimate practical motives of men’s belief in ontological dualism to the fore. It can also advocate “the modern mind” of moral autonomy and ultimate personal responsibility in practical matters, against the “primitive mind”. But, since it tacitly rejects so-called “reason’s optimism” as unsound, it must stay content with that and hope for mature and honest thinking to prevail among humans, sooner or later.
26 See Kelsen (1928b: 422 ff.); Kelsen (1949: 138); Kelsen (1960b: § 32); Kelsen (1964: 114 ff.).
To sum up. According to Kelsen, there are at least four good reasons to get rid of the idea that there exists a natural law as an objective normative order, endowed with absolute value. First, it is a strange hypothesis from a strictly rational-scientific standpoint. Second, it originates from the animistic confusion between society and nature, which is typical of primitive thinking. Third, it belongs to the realm of practice and ideologies, where it fits two typical drives of the human mind, converging on the convenience of postulating an objective order for human conduct. Fourth, it cannot stand “on its own”, but needs of a theological “foundation” (in both meaning of such a word) in order to account for what we now would call the “normativity” of natural law.

B. Questioning the Inner Necessity of Natural Law Norms

Natural law theorists sometimes claim natural law norms to be endowed with an “inner necessity”. Now, from Kelsen’s perspective, that claim can be understood in two different ways.

According to a first reading, the idea of the “inner necessity” of natural law norms is tantamount to the idea of natural law norms’ absolute validity. Absolute validity depends, as we have seen, on absolute value. Absolute value depends in turn on the existence of the objective order of natural law norms. Accordingly, the first reading of the “inner necessity” claim is questionable for the four reasons making ontological dualism questionable.

There is, however, a second reading available. In this case, claiming that natural law norms are endowed with an “inner necessity” is tantamount to claiming that the connection between the antecedent and the consequent of natural law norms is not the normative connection of imputation, but is, rather, a (sort of) causal connection between an antecedent expressing a condition, and a consequent expressing its necessary effect.

This second reading, Kelsen suggests, is affected by unredeemable confusion and has obnoxious effects for NLT.

First, by presenting natural law norms, that are ought, deontic laws (“if somebody finds oneself in a situation in which he could steal, then he ought not to steal”), as if they were must, causal laws (“if somebody finds oneself in a situation in which he could steal, then he will necessarily not steal”, which is like “if a metallic body is heated, then it will necessarily expand”), it erroneously obliterates the distinction between norms proper, on the one hand, and causal empirical statements, on the other. In so doing, NLT shows a primitive, culturally under-developed, cast of mind, for the confusion between normative and causal connections, between society and nature, it typical of primitive thinking.

27 Kelsen (1928a: 35).
Secondly, by presenting natural law norms as (a sort of) causal laws, NLT makes a self-defeating claim: indeed, if natural law norms really are (like) causal laws, then they are “banished from the sphere of the normative”. They cannot in any way direct human behavior, like the law of gravity cannot “direct” us to stay with our feet on the ground. If, for instance, the sentence “might is right” is read not as expressing a normative principle that justifies and legitimates whatever rule is effective (“Mighty people ought to rule”), but as expressing a causal law of human societies (“Mighty people must rule”, “Mighty people are necessarily led to rule”, “If in a society there are mighty people, then these people will necessarily rule”), it loses any directive force. A natural law made of such statements about necessary human behaviors would be no law, no normative order, at all: it could not fulfill the normative function natural law theorists usually do ascribe to it.

C. Questioning the Possibility of Natural Law as a Normative Order Distinct and Independent from Positive Law

The last argument against the ontological claim of NLT runs as follows: also leaving aside all the preceding arguments, the ontological claim would face, in any case, a fatal problem. In Kelsen’s terms, “the whole problem” of natural law. This is the problem of individualization (Individualisierung, Konkretisierung). According to Kelsen, it is a problem NLT must cope with; but, unfortunately, it cannot do so without giving up the ontological claim of natural law as a normative order distinct and independent from positive law. This (as we may call) argument from the necessity of positivization runs, roughly, as follows. Natural law, like any normative order, must contain general norms (even the purest of dynamic systems must contain one general norm empowering its supreme norm-making authority, like, e.g., “People ought to behave according to the King’s enactments”). Natural law, being a static normative order (§ 2.1.1), must contain material general norms (like, e.g., “Bonum faciendum, malum vitandum”). Material general norms, being “abstract” norms, cannot work as standards for individual cases, cannot be applied to individual cases, without being individualized or concretized (they necessarily face the “individualization gap”). The process of individualization of material general norms, so far as positive legal orders are considered, is necessarily a discretionary process: a process of discretionary substitution of general norms by (not necessarily “corresponding”) individual norms, that depends not only on acts of knowledge, but also on acts of will (the law-applying organ must establish “constitutively” that an individual case of the same kind considered in the antecedent of a general norm has oc-

28 Kelsen (1928a: 50).
29 Kelsen (1928a: 34–36); Kelsen (1949: 139); Kelsen (1956: 177).
30 Kelsen (1928a: 39).
curred and must also establish “constitutively” what precise legal consequences ought to follow for it). NLT usually overlooks this problem, tacitly regarding natural law general norms as self-applying: as applying to individual cases by means of pure acts of cognition on the part of their addressees. In order for such a solution to be capable of preserving the identity and existence of the natural law order as a separate normative order, however, NLT would have to assume that all men are equally wise and good moral agents: only on such an assumption would the general norms of natural law be applied uniformly to individual cases; only on such an assumption would these norms work as “self-applying” to individual cases. Unfortunately, the assumption that all men are equally wise and good moral agents is too strong even for NLT’s imagination. Only relatively few men are wise and good for the task of applying natural law general norms. Accordingly, in order to make the natural law order viable, these men must be entrusted with the application of natural law general norms in forms and ways that are universally binding. This move, however, is tantamount to transforming these wise and good men into as many applying organs of natural law norms; furthermore, in order to make their judgments effective, some form of coercion must be provided for. This means, however, that natural law must become positive law: to be a viable normative order, it must undergo a process of positivization. If such is the case, however, we must conclude that natural law, as a normative order distinct and independent from positive law, is simply “not possible”.

In the eye of a natural law fan, Kelsen’s argument from the necessity of positivization may seem self-serving. It points, however, to a capital technical problem for NLT. If we take NLT’s claim about the existence of a natural legal order seriously, the problem of how such an order can work in practice becomes unavoidable. And if it may be shown that it cannot work in the form of a purely objective, self-applying, normative order, the whole NLT enterprise appears to promise more than it can maintain. Its overall directive value appears illusory: consisting, at most, in pointing out a set of (very) abstract principles to be developed authoritatively by a selected set of wise and good interpreters, expositors and appliers. In fact, Kelsen is aware that natural law theorists usually maintain natural law does require the existence of positive legal orders. And, as we shall see (§ 2.3), he regards that as a telling “incoherence” on their part.

So far, we have dealt with Kelsen’s critique of the ontological claim. As I said at the outset, however, in Kelsen’s perspective NLT makes two further claims: men can (get to) know natural law (the epistemological claim of NLT); natural law theorists are scientific expositors of natural law as it really is (the scientificity claim of NLT). The scientificity claim is parasitic upon the epistemological claim: it stands, or falls, as a consequence of the soundness or unsoundness of

the latter; indeed, if men cannot know natural law, natural law theorists cannot act as its scientific expositors. Nonetheless, Kelsen’s critique of NLT contains, apparently, a few arguments that are aimed against it directly. In what follows, I will consider Kelsen’s criticisms of these two claims in two separate sections.

2.2 The Critique of the Epistemological Claim

According to the epistemological claim, men can (get to) know natural law: as an objective order of human conduct endowed with absolute value and validity, natural law is a suitable matter for human knowledge.

Against this claim, Kelsen adopts an argumentative strategy purporting to show that none of the methods NLT sets forth as methods for knowing natural law norms lives up to the test of scientific-critical philosophy. No one can be regarded, in other words, as a genuine method of scientific inquiry. Three main arguments are deployed here: (1) the logical fallacy argument, (2) the no self-evidence argument, (3) the argument from the self-contradiction of practical reason.

The Logical Fallacy Argument. NLT claims that natural law norms can be “derived” from nature, that they are “deduced” from nature. Now, taken at face value, such a claim cannot be accepted from the standpoint of rational-scientific philosophy, for it is logically flawed. The claim tacitly assumes nature to be a set of facts. From statements about facts alone, however, no normative conclusion can be logically derived; for instance, from the statements “men are naturally inclined to society” and “big fish eats small fish”, it does not follow that “men ought to behave in such a way as to preserve society”, nor that “big fish ought to eat small fish”. Such an inference is possible if, but only if, some norm is being presupposed: like, e.g., the norms that “men ought to behave according to their natural inclinations”, and “animals ought to behave as they usually do”.

Of course, natural law theorists can reply to the logical fallacy argument that, in their view, nature is not just a set of facts; that it also contains natural law norms, that it has in-built norms. Furthermore, they may claim that they do not properly “derive” natural law norms from (statements about) nature; that they rather perceive, find, discover them in it.

In such a case, however, from a Kelsenian perspective one may retort that talking of “deducing” or “deriving” natural law norms “from nature” is misleading. The process of knowledge would be, rather, one of interpreting the transcendent will that, by hypothesis, has created nature and natural law norms, as suggested by the argument from the necessity of theism. Concerning such an

33 See above, § 2.1.2; see also Kelsen (1949: 138: “examining nature amounts to exploring God’s will”).
interpretive activity, however, NLT has provided no strict, outcome-determining, reliable, method. The logical fallacy argument seems, accordingly, to point to a serious methodological failure of NLT, whichever way one understands the key notion of nature. This conclusion is further corroborated by the two other arguments of Kelsen's critique.

The No Self-Evidence Argument. NLT also claims natural law norms, or, at least, its supreme principles, to be self-evident (evidently existing, evidently valid, in and by themselves). All men would be able to grasp them by means of their (rational) understanding. The history of NLT, however, shows that a plurality of different, often incompatible, natural law norms have appeared as self-evident to different natural law theorists (for instance, concerning equality, slavery, private property, autocratic government, social welfare, etc.). Accordingly, from a strictly scientific standpoint, one must conclude that self-evidence fails as a reliable, objective, test for telling true from false natural law norms. And one may even venture to suggest that the claim about natural law norms’ self-evidence plays the role of a device by which the natural law norms each natural law theorist, on her subjective value judgment, finds convenient, can be presented as a matter of pure evidence.

Natural law theorists of a rationalistic allegiance - usually working within a tradition inspired by Thomas Aquinas – may reply that, contrariwise to the no self-evidence argument, men do in fact see as self-evident the same basic natural law principles. Think, for instance, of such principles as “suum cuique tribuere”, “bonum faciendum, malum vitandum”, “always do act according to the right mean”, etc. Think, to consider an eminent representative of the “New Natural Law Theory”, John Finnis, at the catalogue of basic goods (life, knowledge, play, aesthetic experience, friendship and sociability, practical reasonableness, and religion) that are necessary for humans to flourish and such as to lead to “general moral standards”, by way of the principles of practical reasonableness, themselves part of natural law.

From a Kelsenian perspective, however, a couple of (easy) replies are available.

First, it is by no means evident that all those principles belong to the one true natural law order; that, far from enjoying of true objectivity, they are just culturally dependent, contingent standards.

Second, in any case, such allegedly universal, self-evident, principles are so abstract as to be empty and, consequently, practically pointless. Indeed, they cannot provide any guidance whatsoever to human actions, unless and until

34 This point is conceded, apparently, by Murphy 2011.
36 Finnis (2011: 23 ff. & 85 ff.).
they are duly interpreted, specified, concretized, individualized, and coordinated. Unfortunately, as to the way of performing such necessary operations, NLT does not provide any reliable, scientific method.\(^{37}\) Indeed, from a dispassionate standpoint, what we see are but exercises in normative argument.

The Argument from the Self-Contradiction of Practical Reason. Sometimes, NLT supports the epistemological claim by appealing to practical reason. The principles of natural law would be knowable to men’s practical reason: they would be the principles revealed to them by a faculty that, at the same time, knows what it is absolutely right and good to be done, and wants that it ought to be done. From the perspective of rational-scientific philosophy, however, knowledge by practical reason must be rejected as unreliable. Indeed, the very idea of a practical reason, of a reason that simultaneously knows the good and wants it to be done, is self-contradictory. From a scientific standpoint, knowing and willing are two separate, though empirically related, faculties. Any claim about their ontological combination in one and the same faculty is to be rejected as unscientific: only metaphysical arguments and acts of faith can support it.\(^{38}\)

### 2.3 The Critique of the Scientifiicity Claim

The critique of the epistemological claim undermines the scientifiicity claim — natural law theorists are scientific expositors of natural law as it really is — as to its presupposition: namely, by denying any true, scientifically reliable, knowledge of natural law to be viable. In so doing, it is a critique of the scientifiicity claim since it suggests that natural law theorists are in fact unable to do what they claim to be doing. Taking stock of the critique of the epistemological claim, this one is directly addressed to the scientifiicity claim and completes it, so to speak, by suggesting that natural law theorists do in fact perform a different, and indeed heterogeneous, task from what they claim to be performing. In short, they are participating in an ideological enterprise, consisting in doing normative, subjectively value-laden, moral, political and legal philosophy, under the pretense of scientifiic exposition of an objective order of human affairs. To support such a conclusion, Kelsen deploys, apparently, three main arguments: (1) the incoherence argument, (2) the reverse deduction argument (or argument from “projection”), (3) the functional argument.

The Incoherence Argument. NLT claims a natural law order does exist, that is endowed with absolute value and absolute validity, and is hierarchically superior to positive legal orders. If we take such claims seriously, Kelsen suggests, we should come to the conclusions that, from the standpoint of natural law,

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positive law is to be considered either as superfluous, whenever its norms do correspond to natural law norms, or as invalid (null, void), whenever its norms do not correspond to natural law norms.39 Natural law theorists, however, usually do resist both conclusions.

On the one hand, they usually claim that a natural law-abiding positive law, far from being superfluous, is in fact necessary. This is so because, they add, many men, out of arrogance and vicious inclinations, would fly in the face of natural law norms unless there were positive law norms providing coercive sanctions.40

On the other hand, they usually conceive the relationship between natural law and positive law in such a way that any conflict between them is made either altogether impossible (Hobbes), or, if possible, such that the invalidity of positive legal norms contrary-to-natural-law does not follow automatically, and usually does not imply agents are relieved from the duty to obey them.41 Furthermore, most natural law theorists rule out the existence of a natural right to resist (even seriously) unjust positive law norms, and entrust the interpretation of natural law norms to state, positive law, officials.42

On both counts, in Kelsen’s opinion NLT defends views that are incoherent with its own basic claims. Now, Kelsen claims, such incoherence is so serious that it amounts “to a complete denaturation of the natural-law doctrine”.43 Why is that so? One may suppose such an incoherence to be the output of careless thinking. Or, alternatively, one may even suppose that the flaw is in fact in the eye of the beholder: that is to say, that the presumed “incoherence” Kelsen sees in NTL is, on a charitable reading, no incoherence at all.

To press his point, however, Kelsen suggests the following reading. Surely, such an “incoherence” of NLT is not a logical one. It is, we may say, a “pragmatic” one; more accurately, I would say, a piece of a telling “weirdness”. It is, furthermore, not by chance, so to speak, but by design. In fact, it denounces that most natural law theories have an unmistakable, built-in, justificatory goal: they tend to justify existing legal orders as – either presumptively, or all-things-considered – morally just and legitimate normative orders. Such a function, however, is clearly ideological, not scientific.44

39 Kelsen (1949: 142 & 144); Kelsen (1960b: § 50).
40 Kelsen (1960b: 113–114, quoting Aquinas on men “quidam protervi, et ad vitia proni, qui verbis de facile moveri non possunt /…/ quidam male dispositi non ducuntur ad virtutem, nisi cogantur”).
41 Kelsen (1949: 144–151); Kelsen (1960b: 114–115).
43 Kelsen (1949: 150).
44 See e.g. Kelsen (1960b: §50), where, following Troeltsch, he set to the fore the Stoics’ and the Christian Church’s transformation of positive law, whatever its content, into an imperfect form of natural law.
The Reverse Deduction Argument (or Argument from Projection). The ideological nature of NLT is suggested, according to Kelsen, also by another view which most natural law theorists endorse. This is the view that natural law norms are to be deduced not by human nature as a whole, but only from the good (the rational, the right) side of it. Now, by this way of proceeding the pretended “deduction” (“derivation”, “grasping”) of natural law norms from the nature of man or nature in general is turned upside down:

It is not from the nature of man as it actually is that Pufendorf – and all other writers – deduce what they consider to be the natural law: it is from the nature of man as it should be, and as it would be if it would correspond to natural law. It is not the law of nature that is deduced from the nature, the real nature, of man – it is the nature of man, an ideal nature of man, which is deduced from a natural law presupposed in some way or another.45

In fact, Kelsen suggests, the building up of a standard NLT may be regarded as a two-stage process. In the first stage, the natural law thinker decides which are the principles of natural law: of the true, genuine, natural law. In the second stage, she finds support for them in the nature of man and human condition. In this way, the natural law theorist projects her view about natural law upon nature. Such a projection is denounced by the inevitable selection of natural data any natural law theorist performs, ruling out those data – those natural inclinations, or drives, of the human mind (typically, the inclination to aggression, domination, free-riding, etc.) – which should not form the basis for any corresponding natural law principle.46

The Functional Argument. The functional argument (the argument from actual functions of NLT), the last that I am going to consider in this account of Kelsen’s critique of natural law thinking, is really parasitic upon the preceding ones. It may be recounted as follows. Natural law theorists claim to be scientific expositors of natural law as it really is. The arguments against the epistemological claim cut the grass beneath such a scientificity claim (see § 2.2. above). Leaving them aside, however, it seems possible to reach the same conclusion by the following questions: What is, what has been, in fact the historical, immediate, function of NLT? Does such a function belong to the sphere of scientific knowledge or, rather, to that of practice (politics, morality, law)? As the argument from incoherence already suggests, natural law theories have always played, and do play, a justificatory function: the idea of a natural law has been, and is being, used to justify either the conservation, or the reform, or even, in rare cases, the revolutionary change of existing governments and positive legal orders. Such a justificatory function – whatever its moral, political and legal significance – is clearly outside of the domain of scientific inquiry, as defined by

45 Kelsen (1949: 144); see also Kelsen (1960b: §§ 33–36).
the rational-scientific philosophy of “relativistic positivism”. It is an ideological, normative function.47

3 THE NATURAL LAW THEORY STRIKES BACK: BODENHEIMER V. KELSEN

In 1950, Edgar Bodenheimer published The Natural-Law Doctrine before the Tribunal of Science: A Reply to Hans Kelsen. There he set to the task of defending traditional, rationalistic, non-theological, NLT against Kelsen’s “vehement attack”, by meeting him, “the leading representative of logical positivism in jurisprudence”, on “his own battleground”: that is to say, by “challenging the validity of his conclusions on a ‘secular’ basis, without the aid of religious or metaphysical axioms”.48

Bodenheimer’s defense of NLT rests on several arguments. Some of them are in fact open confessions of the ideological character of NLT. This is the case, for instance, when Bodenheimer criticizes Kelsen for endorsing a (we would say) value-neutral concept of law, one that does not even rule out the possibility of including “arbitrary, capricious, and irrational commands in the term ‘law’”, instead of setting forth a rational concept that would “advance the cause of the law” and “preserve the good name of the law”.49

Leaving aside such overtly self-defeating moves, I will focus on five arguments that, at least prima facie, seem to pose a real challenge to Kelsen’s critique of NLT. They are – the labels and reconstruction are, as before, mine: (1) the no charitableness argument, (2) the argument from the contingency of theism, (3) the argument from success, (4) the argument from no rigid separation between facts and norms, (5) the argument from the empirical un-tenability of ethical subjectivism. I will consider them in turn and see which reply, if any, can be made from a Kelsenian perspective.

3.1 The No Charitableness Argument

According to Bodenheimer, Kelsen’s attack on NLT is grossly uncharitable, since it overlooks one of the basic aspects of natural law thinking and, in so doing, provides an unfairly debasing picture of it.

The point of departure of this approach may be simply a consideration of certain basic traits and needs of human beings which the law cannot afford to disregard. For example, a statement to the effect that a human law prohibiting any sexual intercourse between

47 Kelsen (1960b: §§ 50–52).
48 Bodenheimer (1950: 335).
49 Bodenheimer (1950: 363).
men and women would be contrary to “natural law” would not necessarily require the support of theology. Religious believers as well as agnostics would agree that a law prescribing a working day of twenty-two hours contravenes the laws of nature which demand of men a certain amount of sleep. A law providing that people should walk on all fours, or that infants during their first weeks of life should be fed with chunks of meat, would most certainly be held ‘unnatural’ by any-body /…/ the natural-law doctrine, in this particular facet of its manifold ramifications, merely recognizes the existence of certain elementary traits, drives, and instincts of human nature which, although they may be controlled and channeled by the human lawmaker, cannot be disregarded or entirely suppressed. If laws unbearable to human nature are enacted, men will actively or passively resist such laws and set them aside at the earliest opportunity. All that is involved in this particular aspect of the doctrine is a realization that there is an element in human nature that limits the power of the legislator and acts as a restraint on his arbitrary will. Such a position is compatible with a secular as well as a religious approach to the law.50

From a Kelsenian perspective, however, the argument from no charitablyness can be rejected on several counts.

First, Kelsen’s critique of NLT is perfectly aware of the empirical limits the human condition (i.e., human physiology and psychology) sets to the efficacy of positive legal norms. For instance, while dealing with the problem of social justice, he maintains that a legal order grounded on a mutually satisfactory compromise between the several competing interest groups is likely to be more stable (peaceful, effective) than a legal order where “the winner party takes all”.51

Second, Kelsen would object to calling “natural law” the set of empirical statements about the normal physical and psychological features of humans (“men and women cannot endure a life without sexual intercourse”, “humans cannot work twenty-two hours per day”, “babies cannot be fed with chunks of meat”, etc.). This is so, for such a use of the phrase “natural law” is likely to promote confusion between such a purely empirical “natural law”, on the one hand, and normative natural law, as a set of norms allegedly “derived” from natural features of humans, on the other hand. Furthermore, this unduly suggests, as Bodenheimer does in the afore-mentioned lines, the passage from the former to the latter to be a matter of course.

Third, Kelsen would remind Bodenheimer that NLT’s core business is not to be concerned with necessary or impossible human conducts as contents of positive law norms; it is, rather, to be concerned with the sphere of optional behaviors and their “right” regulation by a “just” government.

51 See Kelsen (1952: 21–22).
3.2 The Argument from the Contingency of Theism

We have seen why NLT must have a theological foundation according to Kelsen (see § 2.1.2 above).

According to Bodenheimer, however, this claim of Kelsen’s can be rejected. In order to support that conclusion, Bodenheimer appeals to the authority of Hugo Grotius, the father of 17th century rationalistic NLT:

Grotius goes even further in his attempt to put the natural law on an immanent rationalistic foundation, declaring the law of nature to be binding on God and denying His power to alter it. These are his words: ‘The law of nature, again, is unchangeable - even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend /.../ Just as even God, then, cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil.’ Grotius thereby dissociated the natural law from the revealed will of a transcendental God. He grounded it on an independent eternal reason pervading the cosmos, although he admitted the alternative possibility of a theological foundation.52

From a Kelsenian perspective, one may reply as follows. Grotius’s words are no argument against the necessity of theism. In fact, they beg the question. Grotius claims that natural law “can be dissociated from the revealed will of a transcendental God”. He also claims natural law to be “grounded”, instead, on “an independent eternal reason pervading the cosmos”. Unfortunately, he provides no support for such claims: except, perhaps, for an appeal to their self-evident correctness. However, in such a thorny issue, as revealed by Kelsen’s elaborate reasoning, the appeal to self-evidence is an appeal to wish-fulfilling imagination. Bodenheimer’s argument rests on Grotius’s argument. Grotius provides no argument: indeed, if we cast a cold eye over it, the grounding “independent eternal reason pervading the cosmos” is an entity even more mysterious, and baffling, than any transcendental deity. As a consequence, Bodenheimer’s case for the contingency of theism rests on no argument; it is made, apparently, of pure wishful thinking.

3.3 The Argument from Success

One of the key features of Kelsen’s critique, as we have seen, is the claim that NLT is not a genuinely scientific enterprise, but rather a moral, political and legal ideology (and argument) in disguise (see § 2.3 above).

According to Bodenheimer, however, Kelsen’s claim is, so to speak, too swift to be good:

The fact that the postulates of a just law set forth by them [rationalistic modern natural law theorists] became, in the eighteenth and nineteenth centuries, the basis of the

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laws of all civilized countries of Europe and America tends to show that their assumptions with regard to human nature and a “natural law” conforming to it were perhaps less “un-scientific” than the modern opponents of the doctrine would have us believe.\textsuperscript{53}

Bodenheimer’s argument, however, claims too much. Indeed, from a Kelsenian perspective, one could reply as follows.

First, as a matter of undisputable historical fact, political and institutional success came not for all the postulates of justice within modern, rationalistic, natural law thinking, but only for those traceable to Locke and Rousseau.

Second, the political and institutional success of the postulates of a liberal-democratic government does not “show” at all the “scientific” character of the connected views about human nature; it simply shows that influential groups of men chose and endorsed them as their guiding principles, while other influential groups, at the same time, chose and acted upon different principles, the principles of political absolutism and religious intolerance, as likewise grounded on “natural law”.

Third, the human nature NLT takes into account, as suggested by the reverse deduction argument (see § 2.3 above), really is an ideal, ideological, construct, not the outcome of a piece of genuine scientific investigation.

3.4 The Argument from No Rigid Separation between Facts and Norms

In his critique of NLT, Kelsen defends a “rigid separation” between facts and values, reality and norms – this, apparently, is the way Bodenheimer understands Kelsen’s insistence on the is/ought divide and the logical fallacy argument (see § 2.2 above).

Such a rigid separation, Bodenheimer claims, must be rejected. For the following reasons:

\textit{many legal norms are deeply rooted in the objective conditions of reality and are forced upon the lawmaker either because of certain peculiar traits of human nature or by the dynamic laws of social and economic development} /…/ The meaning and purpose of a legal norm frequently cannot be ascertained without an examination of the historical and sociological circumstances in which it had its origin /…/ a complex interpenetration of value and fact occurs in social development, and the law is one of the most significant reflections of their mutual interaction /…/ normative regulations may be still-born or may become dead letters in the course of time, and a proper understanding of the normative system is frequently impossible without a thorough study of how it actually “works” in practice. By this approach, the alleged chasm between value and fact is spanned by numerous solid bridges.\textsuperscript{54}

\textsuperscript{53} Bodenheimer (1950: 339, italics added).

\textsuperscript{54} Bodenheimer (1950: 341, 342 & 344).
From a Kelsenian perspective, Bodenheimer’s argument against “the chasm between value and fact” misses the point. It is indeed a clear instance of *ignoratio elenchi*. Let us see why. Bodenheimer argues against the “rigid” separation between facts and values, reality and norms, by pointing to the several empirical connections that do in fact hold between items belonging to the two allegedly separate worlds. However, neither Kelsen’s critique of NLT, nor his general theory of law (“the pure theory of law”), has ever denied that the content of legal norms comes from “society”: from human needs and interests, from human philosophies of justice and political strategies. The “chasm” Kelsen defends between fact and value, between facts and norms, as we have seen, is not an empirical, but a logical chasm. It amounts to the logical impossibility of deriving normative conclusions from purely factual premises. This point, however, totally escapes Bodenheimer’s scrutiny.

3.5 The Argument from the Empirical Un-tenability of Ethical Subjectivism

Kelsen critique of NLT is grounded, as we have seen (§ 2), on a staunch version of meta-ethical subjectivism and non-cognitivism.

According to Bodenheimer, however, such “doctrine of ethical relativity” would be disproved by experience:

The doctrine of ethical relativity loses its force if it is proved that 90 per cent or 95 per cent of the historically known societies agree on the need of outlawing certain practices deemed incompatible with the requirements of organized social life. It is not even necessary, however, in order to disprove the theory that all law and ethics are relative, to show a universal agreement among all peoples with regard to certain standards of conduct. If it can be demonstrated that civilized and mature societies tend to share certain value judgments and concur in some fundamental axioms of socially desirable conduct, we would thereby carve out an important area of absolute or near-absolute standards of civilized men. It was, in fact, a natural law of this type that the classical law-of-nature jurists had in mind.

From a Kelsenian perspective, Bodenheimer’s argument invites the following reply.

First, experience does indeed show that no human society is viable unless certain practices are outlawed in order to protect life, personal integrity, and goods. This statement concerning a “minimal” or “empirical” natural law (as H. L. A. Hart calls it), however, simply says that life, limbs and goods must be protected, if a society is to be viable. It does not say anything, though, about how life, limbs and goods ought to be protected; nor does it say anything about

whose life, limbs and goods ought to be protected. The whom and the how of such a “minimal natural law” constraints are precisely where group- and personal- interests and preference step in; where a variety of ultimate, incompatible, principles of justice has been adopted over times and places; where the most different social arrangement, all taking into account those “natural constraints”, have been established, each one claiming for itself the blessing of absolute justice.

Second, Bodenheimer’s argument also refers to “an important area of absolute or near-absolute standards of civilized men” which would be objective, natural law, standards. Such a conclusion, however, is totally unwarranted: the liberal-democratic standards are the standards approved by the men Bodenheimer approvingly calls “civilized”. From a strictly empirical, scientific, standpoint, they are relative to these men and their culture. Their eventual success, as we saw before, is no evidence of their privileged “natural law” status.

As a whole, from the standpoint of Kelsen’s scientific-critical philosophy, Bodenheimer’s case for NLT is a total failure. Indeed, if it succeeds in something, its success consists, paradoxically, in showing that NLT is really no scientific undertaking at all, but a value-laden, ideological, enterprise grounded on moral and political argument.

4 THE CASE FOR NEW NATURAL LAW THEORY: GEORGE V. KELSEN

The phrase “New Natural Law Theory” refers, as it is well known, to the Aquinas’s inspired natural law theory developed from the 1960s, among others, by Germain Grisez, John Boyle, and John Finnis.58

On the fiftieth anniversary of Kelsen’s 1949 The Natural-Law Doctrine before the Tribunal of Science, Robert P. George, a follower of the New NLT, dedicated to it a review essay, where he purports to defend Aquinas’s natural law doctrine and the central tenets of the New NLT built upon it (George 2000). At the end of the essay, George claims to have established the following points:

First, Kelsen’s 1949 account of NLT “has virtually no points of contact with Aquinas’s thought”, whose work is not even mentioned.

Second, Kelsen’s critique of NLT has, as a consequence, “little or no applicability to Thomistic natural law theory. Neither Aquinas’s theory of the identification of natural law principles, nor his account of their relation to divine power and to positive law, nor his views regarding their implications for the problems of legal injustice and tyranny, are captured in Kelsen’s exposition and critique”.

58 See Grisez, Boyle, Finnis 1987; Finnis 1980; George 1999; Bix (2002: 85–89); Murphy 2011.
Third, “Kelsen did well, one might conclude, to avoid mentioning Aquinas if he was to insist on describing ‘the natural-law doctrine’ as he did. Still, it is odd, to say the least, for the ‘tribunal of science’ to have left unheard and unmentioned the thought of so central an exponent of the natural law tradition”.59

On behalf of New NLT, George poses a very serious challenge to Kelsen’s critique. Indeed, if George is right, the Kelsenian critique of NLT would be, at the same time, self-serving, since it would deal with a straw-man, and pointless, since it would avoid playing the “real match”, against Aquinas’s NLT, i.e., against NLT in its assumedly strongest and best form.

Unfortunately, in my view George is incorrect in his accusations and for the following reasons.

1. Kelsen – it is true – never mentions Aquinas’ natural law thinking in the 1949 essay that George reviews. However, Kelsen did not ignore Aquinas’ natural-law doctrine. In fact, he expressly considered that line of thought in other of his writings devoted to the criticisms of NLT.60 As a consequence, the third point George makes, correct as it may be so far as the 1949 essay is concerned, does not hold in the light of Kelsen’s critique of NLT as a whole.

2. While relying on such an incomplete account of Kelsen’s critique of NLT, George also claims, in the second point he makes, that such a critique does have “little or no applicability to Thomistic natural law theory”. In particular, to mention the issue that I wish to focus on in the following, Kelsen’s critique would have nothing to say about “Aquinas’s theory of the identification of natural law principles”.

In the light of Kelsen overall critique of NLT, however, George’s second point must also be rejected.

Let us consider “Aquinas’s theory of the identification of natural law principles” as George accounts for it. The core of the theory runs as follows: natural law principles are objective, self-evident, reasons for action, which men can know, and be motivated by, by means of their practical reason.

Is Kelsen’s overall critique of NLT really ill equipped to cope with such a view? I think it is by no means so.

(a) To begin with, we should recall three arguments that Kelsen deployed in his critique of the epistemological and scientificity claim of NLT: the no self-evidence argument, the argument from the self-contradiction of practical reason, and, not least, the reverse deduction argument, or argument from projection (§§ 2.2, 2.3).

59 George (2000: 30).
60 See Kelsen (1960b: §§ 32, 34, 40, 43, 47, 50 a., e. and f.); Kelsen (1964: 136 ff).
The former, if you remember, emphasized how unreliable the self-evidence test is as an objective, scientific, test for knowing true natural law principles; and it did so by appealing to the history of ethical theories, where a variety of incompatible first principles of natural law have been, and are being, “discovered” by different natural law theorists as “self-evident”.

It also pointed out, perhaps in a way even more damaging to NLT, that the self-evidence of certain pretended natural law principles, like “Give to everyone his own”, “Do what is good and abstain from what is bad”, “Act according the just mean”, etc. – and, we may add, of such judgments as “Consider life, knowledge, play, etc., as basic goods for human flourishing”, and the like –, was bought at the price of “discovering” absolutely empty practical principles: that is to say, principles totally unable to provide any clear guidance to human actions, unless supplemented by a content-providing process of interpretation and concretization.

Likewise, Kelsen’s analysis of practical reason suggested such a notion to be self-contradictory from the standpoint of empirical human psychology, since it would be one faculty of the human mind mysteriously combining in itself two heterogeneous faculties such as knowing and willing. So, from the standpoint of Kelsen’s critique, the key features of Aquinas’s theory of the identification of the principles of natural law (self-evidence from the standpoint of practical reason), far from “passing unscathed”, as George claims, are the full targets of a radical criticism.

Perhaps, we may stop to consider that Kelsen’s critique of Aquinas’s notion of practical reason is, in a way, uncharitable. Nonetheless, in the light of the argument from reverse deduction (or argument from projection), Kelsen may reply to Aquinas – and to George and his fellow New NL theorists – that they invoke practical reason, such a prodigious and mysterious faculty, as the basic tool for projecting their own views about good life, true knowledge, true friendship, and the like, on the seemingly objective data of natural basic goods.

(b) In his account of Aquinas’s theory, does George perchance add some further ingredient that Kelsen’s critique does not, and cannot, cope with? Let’s see.

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61 The passages he quotes from Aquinas concerning the imperative nature of practical reason – in particular, the line “ratio imperat de his quae sunt ad finem” – may also be read to mean that reason “teaches” which courses of actions are instrumentally necessary to get to a goal that the will has previously selected. See Kelsen (1960b: 88 ff. text and fn. 4). It must be observed, however, that George seems to adopt precisely such a hybrid conception of practical reason Aquinas’ style that Kelsen criticizes.

62 Kelsen would be delighted, by the way, in seeing that different “new natural lawyers” identify different catalogues of the basic natural goods, and may also “derive” different rules out of them, by exercising their practical reasonableness. See, on this point, the clear account provided by Murphy 2011.
George emphasizes two points worthwhile considering. First, Aquinas’s natural law principles are not prescriptions, but reasons for actions. Second, Kelsen’s Hume-inspired ethical subjectivism and critique of practical reason fly in the face of people’s ordinary ways of thinking about their own moral life; in other words, they provide a poor account of them, notwithstanding their claim to be in tune with empirical human psychology.

The principles of natural law, George says, are not prescriptions to be obeyed because they come from a superior will, but reasons for action; their directive force comes from their being reasonable, from their appearing reasonable to rational creatures:

Unlike many later theorists of natural law, Aquinas eschewed the voluntarism implied by this conception of moral obligation. The force of practical—including moral—principles, according to Aquinas, is rational; these principles state reasons for action and restraint; to defy them is wrong inasmuch as it is unreasonable. And, in this sense, the natural law is no extrinsic imposition of an alien will—whether the “will” of nature or anything (or anybody) else. It is, rather, intrinsic to human beings; its fundamental referents are the human goods that constitute human well-being and fulfillment and precisely as such are reasons for action.

The passage seems to suggest that Kelsen’s argument from the necessity of theism may be wrong or, at least, misfired, if used against Aquinas-inspired NLT. That argument, if you remember, claimed that provided natural law norms are norms and not empirical statements, there must be a norm-giving authority which, by hypothesis, must be a transcendent deity by whose will they are created. But Aquinas claims natural law to be “intrinsic to human beings”, and to concern “human goods”, that “constitute human well-being and fulfillment and precisely as such are reasons for action”.

Is Kelsen’s critique of NLT able to cope with such a rationalistic stance? I think it can. Indeed, the principles of natural law show to men what they ought to do in view of reaching perfection (“well-being and fulfillment”) as human beings. Perfection, here, is an objective notion, independent of human reason and will. The whole picture, then, is clearly informed by the Aristotelian doctrine of entelechy: it is a teleological picture of man, as a being with an inbuilt objective drive to an objective goal of perfection. Such a teleological picture cannot be but the design of some maker of the universe. It is indeed the design worked out by God’s practical reason. Accordingly, a theological foundation eventually seems to pop out, even in a natural law as reasons for action approach.

Suppose for the sake of argument, however, that such a theological back-up does not (and need not) show up. Suppose that the reasons for action identified by practical reason can stand by themselves, as Grotius himself suggested. Would Kelsen’s critique of NLT be harmless? Perhaps, we have to set aside the

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argument from the necessity of theism. However, there are other arguments from Kelsen’s panoply – the three I recalled a moment ago – that may be resorted to, and are capable of imparting a few fatal blows to the New NLT.

George, however, would dissent. In his criticism of Kelsen’s ethical subjectivism and critique of practical reason, he claims, as I said, that they fly in the face of people’s ordinary ways of thinking about their own moral life:

Hume and his followers, perhaps including Kelsen, suppose that if “values” cannot be derived from “facts,” then they cannot be objective (or “true”), but must, rather, be mere projections of feeling, emotion, or other sub-rational factors capable of motivating human behavior. They deny that practical reasons, as such, can motivate people. So they conclude that, unless natural law theorists commit “the naturalistic fallacy” of purporting to derive “ought” from “is,” their doctrine collapses into a form of ethical non-cognitivism. But this simply begs the question against Thomists and others who claim that we can understand, and thereby be motivated to act for the sake of, more-than-merely-instrumental practical reasons. It does a poor job of accounting for the experience of most people who, after all, often suppose that they are moved to do things (or to avoid doing things that they might otherwise do) not as a matter of brute desire, but, rather, because they perceive the worth or value, and thus the practical point, of doing (or avoiding doing) them.⁶⁴

The key-passage, for the present purpose, is the last, italicized one. Here, from a Kelsenian perspective, three remarks are in order.

First, people’s own “suppositions” about the way their moral thinking works may be wrong: “supposing” that a mental process realizes such and such (namely, discovers the objective value of a given course of action) is not a conclusive, reliable, evidence that it does in fact realize such and such (namely, that it in fact discovers the objective value of that course of action).

Second, it appears in a clear light how the miracle of practical reason, namely of a faculty that would be, at the same time, knowing and direction, depends on the spell of words. As soon as we get rid of such a spell, however, we realize that there is something wrong in the idea of “being moved to do things” by “perceiving the worth or value” of doing them. Let us consider the following. To begin with, perceiving the worth or value of a painting does not move me to buy that painting unless I am, say, a rapacious private collector, or wish to insure it for the City Museum. An independent desire (purpose, goal) is necessary for that action to take place. Furthermore, it is by no means clear that “perceiving” is the proper verb to employ with regards to the worth or value of human conduct: does it really make sense to say that “I perceive the worth of beheading all the misbelievers I can put my hands on”? Which sort of “perception” is that? Is not that word being used outside of its ordinary contexts, so that it runs afoul to play a rhetorical trick? Kelsen, I think, would have opposed George with something like this line of argument.

Third, like all detractors of ethical subjectivism, George presents ethical subjectivism as committed to “brute desires”. But that is not necessarily the case. Ethical subjectivism claims that the ultimate norms of our behavior to depend on our own preferences and emotions; that reason cannot solve the moral problem for us. This view does not necessarily rule out, however, that the choice of ultimate norms may depend rather on “educated” and “reflexive” desires.

5 IS KELSEN RIGHT, AFTER ALL?

My survey of Kelsen’s critique of NLT leads to a perhaps unexciting result. Kelsen’s critique of NLT looks enduring. It resists, apparently, both the replies on behalf of traditional, rationalistic, NLT, as presented by Edgar Bodenheimer, and the counter-criticism on behalf of the New NLT, as presented by Robert George. If I am right, the freaks of Götterdämmerung will still have to wait for another occasion.

Bibliography


