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VSEBINA

V tokratni številki so objavljeni prispevki v slovenščini, angleščini, španščini in hrvaščini.

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Uvodnik

Razumeti ustavo

Ustava ni ena.[1] Medtem ko je pravna država že zaradi pojmovne nujnosti lahko – v nekem trenutku na danem ozemlju z določenima ljudstvom in nosilcem suverenosti – zgolj ena sama, ali pa je ni,[2] moremo v istem okviru vedno razločiti več ustav. S poudarkom, da to drži vedno, izpuščam obravnavo sestavljenih državnih tvorb, kakršne so (kon)federacije, in ozemelj s prebivalstvom, ki si jih hkrati lasti več držav. Tudi če odmislimo slovenski mejni spor z Republiko Hrvaško, bomo namreč ugotovili, da imamo več kot eno ustavo. Teh ni lahko prešteti, za nekatere izmed njih pa je sploh težko natančno določiti, od kdaj veljajo in kdo je njihov avtor.

V tem oziru najprej obravnavam v nadaljevanju *besedilno ustavo* – in argument namena, s katerim razlagalci včasih radi istovetijo svoje odločitve v konkretnem sporu z voljo ustavopisca. Če bi takšna istovetnost obstajala (ali če bi lahko govorili vsaj o neki nujni skladnosti med razlago in *namenom* besedila), bi bilo morda res odveč razlikovati besedilno ustavo in *predstavnoskladne ali ideološke ustave*. Pa ni. Na primeru bom utrdil, da je omenjeno razlikovanje celo nezadostno in da je pozornost treba nameniti vsaj še eni vrsti ustave. A začnimo z avtorstvom Ustave Republike Slovenije iz leta enaindevetdeset.

Najbolj na očeh je besedilna ustava. Že pri njej pa je težko nesporno oznaniti avtorja. So njeni avtorji ustavni očetje, ki so v podvinskem gradu napisali osnutek, ali je pravilneje kot take šteti člane takratne Skupščine Republike Slovenije, ki so ustavno besedilo izglasovali? Naj bi v časih, ko so ti še živi, njih pozivali k avtentični razlagi? — Vprašanji imata odločilno vlogo v tistih primerih, ko se razlago ustave utemeljuje z »namenom« ustavodajalca. Ker je teh primerov nekaj tudi v sodobni ustavnosodni praksi, sklepam, da se vsi (pa naj bodo še tako vrli) razlagalci ustave ne zavedajo, kako votlo legitimnost ima argument namena, kadar se z njim utrjuje razlaga besedil, ki so sprejeta v okviru zbornih, tj. veččlanskih teles.

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1 Pričujoče besedilo je nastalo ob dvajsetletnici ustave RS in je bilo (skoraj enako) objavljeno tudi v jubilejnem zborniku. Glej Kaučič (2012).

2 Drugačne trditve, ki jih nekateri pravni strokovnjaki razširjajo v publicističnih zapisih, so vse po vrsti plod metonimije. Če je etični vzor znanosti razlikovanje, pa bo v tem zapisu na mestu opozorilo proti tovrstnemu mešanju različnih pojmov pod okriljem istega imena.

Učno uro nam v tem smislu dajejo že spori med javno prepoznanimi sopisci istih ustavnih vrstic, ki tem pripisujejo vsaj delno izključujoče si pomene (tj. norme). Zgolj primeroma naj spomnim na 103. člen Ustave Republike Slovenije (v zvezi z dopustnostjo ali prepovedjo tretjega nezaporednega mandata na mestu predsednika republike).[3]

Dodatno kaže na utemeljenost zgornjega svarila ob argumentu namena običaj pritrdilnih ločenih mnenj na samem ustavnem sodišču: ta tudi institucionalno odraža neskladnost med koalicijami odločevalcev zaradi vrednot, politik ali ciljev (na teh gradi navadno argument namena) in koalicijami zaradi besedilnega izreka. Ne da bi odpirali zahtevna vprašanja s področja filozofije uma in filozofije dejanja, pa žebelj v krsto razlaganja po namenu morda le zabijejo izidi raziskav ameriških pravnih realistov. Ti so – čeprav tudi ne za ustavodajni zbor – na podlagi izkustvenih podatkov dokazali, da se koalicije zaradi besedilnega izreka v pomembno velikem številu primerov delijo na dve ali več koalicij zaradi vrednot, politik ali ciljev.[4] Iz tega dokaza izhaja, da je vsakemu besedilnemu sklopu in torej vsakemu ustavnemu določilu mogoče pripisati dva ali več različnih namenov (ne trdim, da se v vsakem postopku to tudi dejansko stori). Vsak od namenov pa ob danem življenjskem primeru lahko pravno »utemelji« drugačen pomen (besedilu pripisano normo), s tem pa drugačno sodno razrešitev spora.

Prvi nauk je tu: argument namena (le navidez se z njim avtorju izkazuje spoštovanje) je retorična figura, za katero razlagalec bodisi zavestno ali nezavedno skrije svojo odgovornost, odločitvi pa prilepi mitsko ustavodajno legitimnost zgodovinskega besedilotvorca. A le, če bi imeli institut avtentične razlage ustave in mandat članov ustavodajnega telesa ne bi bil časovno omejen (člani pa bi bili vrh tega še nesmrtni), bi z razlago po namenu avtorjev besedila morda v kakšnem primeru res prišli do ene same pravno pravilne rešitve. V večini zadev pa bi z razlago besedila po namenu avtorjev tudi pod temi pogoji dobili vsaj dve ali tri pravno veljavne rešitve.[5]

Ker je argument namena obenem samo eden od danes sprejemljivih razlagalnih argumentov – na množino besedilu pripisljivih pomenov (tj. norm) pa poleg teh vplivajo še odprtost naravnega jezika, pestrost dogmatičnih predstav in, nenazadnje, občutek razlagalcev za pravičnost –,[6] se od vprašanja, kdo je avtor, zdaj verjetno že lahko premaknem k naslednjemu: Kaj sploh ostane avtorju?

3 103. člen URS: »Predsednik Republike je izvoljen za dobo petih let, vendar največ dvakrat zaporedoma.« O sporu Krivic (2001). Podoben spor bi hipotetično lahko doživel mdr. tudi 17. člen URS (v zvezi z dopustnostjo ali prepovedjo splava): »Človekovo življenje je nedotakljivo.«

4 Beim, Cameron & Kornhauser (2010).

5 Govorim seveda o statični veljavnosti po Kelsenu (2001) oz. o podstatni veljavnosti po Ferrajoliju (2012).

6 Podrobneje npr. Guastini (2010 in 2011: 1. del, III. pogl., § 3).

Enega najlepših odgovorov na to vprašanje je dal v knjigi in na filmih ovekovečeni poštar Pabla Nerude.[7] Na opazko, češ da je svoji izvoljenki na dušo pihal s tujo poezijo, on z naivno plemenito mešanico užaljenosti in jeze odvrne, da je poezija od tistega, ki jo uporabi!

Povedano velja tudi za pravna besedila. Če bi zdaj hotel narediti uslugo analitični filozofiji in jo popularizirati med ustavnopravnimi strokovnjaki, bi prav to zgodbo uporabil za naslednje miselno popotovanje. 1., izkaže se, da z isto poezijo lahko tako poštar kot Pablo Neruda osvojita vsak eno dekle. 2., mogoče si je zamisliti, da bi z isto poezijo lahko in poštar in Pablo Neruda osvojila katero koli dekle. 3., mogoče si je zamisliti, da bi z isto poezijo poštar lahko osvojil katero koli dekle, Pablo Neruda pa nobenega. 4., mogoče si je zamisliti, da bi z isto poezijo lahko tako poštar kot Pablo Neruda osvojila isto dekle. 5., mogoče si je zamisliti, da bi z isto poezijo in poštar in Pablo Neruda nekatera dekleta lahko osvojila, drugih pa ne. — Ta miselni eksperiment ne izčrpa vseh možnih svetov. Bo pa spodaj ob ustreznem prevodu na naše področje zadoščal pri dokazu, da je koristno v ustavni teoriji vsak trenutek razlikovati med tistimi tremi vrstami ustav, s katerimi v zgornjem besedilu lahko nadomestimo a) poezijo (tj. besedilo), b) poštarja oziroma Pabla Nerudo (tj. različne razlage) in c) dekleta (družbeno podlago). Zatrjeno v hipu pojasnim.

Spor med poštarjem in pesnikom je, če smo čisto iskreni, nerešljiv. Nemogoče je ugotoviti, ali naj uspeh v primeru (1) pripišemo besedam ali interpretoma. Vendar je drugače že v umišljenih primerih (2) in (3): v drugem je očitno odločilnega pomena besedilo, v tretjem interpret. Ali to drži? — Če je z isto poezijo mogoče osvojiti katero koli dekle na svetu (in to ne glede na to, kakšna je interpretacija), potem moremo uspeh nesporno pripisati besedilu. Kadar je, nasprotno, ena od interpretacij besedila takšna, da prepriča vsakogar, druga pa nikogar, bomo morali priznati, da je za (ne)uspeh zaslužen samo interpret. Kaj pa lahko rečemo o primeru (4)? — Tu sta dve interpretaciji dosegli isti cilj, zato bo dopustno sklepati, da osebni šarm poštarja oziroma poeta na uspeh ni imel značilnega vpliva. Vprašanje ostaja, ali je imelo v tem primeru res odločilno vlogo besedilo? In če se razlog uspeha skriva v dekletu?

Primerjava med primerom (4) in primerom (2) pokaže, da sta si različna. Takšna teorija, ki razloge za uspeh lahko pripiše samo besedilu ali interpretaciji, pa teh dveh primerov ne zna razlikovati (v obeh primerih odločilno vlogo pripisuje besedilu; še slabše jo odnese ob primeru (5), ki ga nima kam uvrstiti). Podobno tudi v večjem delu slovenske ustavne teorije danes nimamo ustreznega pojmovnega orodja za vprašanje, ali je v določenih okoliščinah treba nujno spremeniti besedilno ustavo (ali njeno razlago) ali pa je za dosego cilja treba pač poseči v družbeno podlago. Stvar pretehtane razprave in ocen je, ali in v

7 *Il postino* (režija: Micheal Radford), Cecchi Gori Group, 1994; posneto po knjižni predlogi Skármete (1985).

kakšnem smislu se neki cilj lahko doseže s posegom v besedilno ustavo ali v družbeno podlago. *Sama za sebe pa govori odsotnost tovrstnih razprav.*

Za konec želim zato poudariti naslednje: vso pozornost si ob besedilni ustavi zaslužijo tudi predstavnoskladne oziroma ideološke ustave in pa družbena ustava.[8] Prve usmerjajo razlago besedila (celo bolj kot volja ustavopisca), druga pogojuje njihov vpliv. *Besedilni ustavi* s tem ne jemljem njenega pomena. Vsi vemo, kakšen vpliv je imel poseg v besedilo 47. člena Ustave Republike Slovenije (v zvezi z izročitvijo slovenskih državljanov) ali v besedilo 68. člena Ustave Republike Slovenije (v zvezi z lastninsko pravico tujcev), pa navajam le primeroma. Vendar naša družbena ureditev ni odvisna zgolj od besedilne ustave niti ni od besedila odvisna v največji meri. Do pomembnih sprememb v njej je mogoče priti s tem, da nekateri ključni igralci v političnem prostoru do tedaj vplivno razumevanje ustave zamenjajo z drugim.[9] Gre za tisto razumevanje, ki vzpostavlja *ideološke oziroma predstavnoskladne ustave.* Primer tega sta lahko dve različni videnji ustave kakor družbene pogodbe, saj nas ti ob vprašanju ustavne vezanosti zakonodajalca pri opravljanju političnih izbir pripeljeta do mestoma precej drugačnih normodajnih zaključkov.[10] Tovrstne primere sprememb poznamo tudi iz ustavnosodne prakse.[11] Nazadnje pa je kot najpomembnejši tu še habitus v smislu *družbene ustave*. Nekaterih družbenih sprememb namreč ni mogoče uresničiti ne z drugačnimi ustavnimi razlaganji ne s spremembo besedilne ustave, saj na njih morda odločilno vpliva družbena podlaga.[12]

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8 Zaradi prostora izpuščam vrsto drugih razčlenitev, ki so tudi ključne, če želimo ustavo dobro razumeti. Glej vsaj: Aguiló Regla (2007), Comanducci (2000), Gardner (2011) in Troper (1999).

9 O pojmu in pomenu vplivnosti v pravnem redu je v *Revusu* že pisal Bulygin (2010).

10 Glej Wintgens (2011) in Kristan (2011b) prav tako v *Revusu*. Dodaten primer so različne predstave o ustavni demokraciji: Teršek (2009).

11 Glej npr. odločbi Ustavnega sodišča št. Up-150/03 z dne 12. 10. 2005 in št. Up-309/05 z dne 15. 5. 2008 glede odvetnikove svobode izražanja v funkciji obdolženčeve pravice do obrambe.

12 V zvezi s habitusom v smislu družbene ustave strnjeno Kristan (2011a). Sicer pa temeljno Bourdieu (2002). Glej tudi Le Roy (1999).

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Kazimierz Opałek & Jan Woleński

Dejstvo, najstvo in logika

Ser, deber y lógica

Kazimierz Opałek† & Jan Woleński*

Dejstvo, najstvo in logika

Avtorja obravnata problem je/naj z vidika razmerja med deontično logiko in logiko norm. Najprej se osredotočita na nekognitivistični rešitvi Weinbergerja in von Wrighta. Ti zavrneta kot neuspešni, sama pa predlagata nejezikovno razumevanje norm, po katerem je normiranje dejanje, norma tvorba tega dejanja in normativna izjava izraz te norme. | Razprava je bila objavljena (brez podnaslovov) v angleščini v *Archiv für Rechts- und Sozialphilosophie*, Vol. LXXIII (1987) No. 3, 373–385. Za *Revu*s sta jo prevedla Vojko Strahovnik in Vesna Česen.

Ključne besede: problem je/naj, deontična logika, logika norm, Weinberger, von Wright, nejezikovno pojmovanje norm

1 UVOD

Opazila sva povečano zanimanje za tako imenovani problem je/naj (angl. *Is/Ought problem*) in posledice, ki jih ima ta za logiko.[1] Ta problem ima tudi nekatere nadaljnje vidike, med drugim ontološke in epistemološke, vendar se bova v tem članku osredotočila na logične vidike, medtem ko bova druge omenila zgolj obrobno.

Logični problem je/naj je povezan z določenim razredom izjav, ki jih bova začasno imenovala »najstvene izjave«. Najstvene izjave so, prvič, stavki v slovničnem smislu. Drugič, so bodisi enostavni stavki bodisi z vezniki sestavljeni stavki. In nazadnje, so premise in zaključki sklepanj, ki jih bodisi intuitivno sprejemamo kot logično pravilne bodisi ne. Preproste in sestavljene najstvene izjave in sklepanja, v katerih te nastopajo, niso nikakršna filozofska iznajdba, kajti zlahka jih najdemo v običajnem jeziku ali pa v strokovnem jeziku moralistov in pravnikov. Torej je logična analiza najstvenih izjav očitno upravičena s sklicem na prisotnost tovrstnih izjav v jezikovnih sistemih, ki so v rabi v vsakdanji praksi ljudi.

Raba izraza »najstvene izjave« ničesar ne predpostavlja, saj je ta izraz razmeroma nevtralen. Reči, da se v določenem jeziku pojavljajo najstvene izjave, pomeni zgolj izpostaviti neko dejstvo. Nič onkraj tega tudi ne izrečemo s tem, da so najstvene izjave enostavne ali sestavljene ali pa da so členi v sklepanjih. Na videz so stvari drugačne, saj bi se lahko zdelo, da s tem izrazimo določene

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1 Glej Stuhlmann-Laeisz 1983; von Wright 1985: 263–281; Weinberger 1984: 454–469.

logične ali pa vsaj slovnične resnice. Vseeno pa je nenavadno, da v sedanjih slovničnih razvrstitvah ni razdelka za »najstvene izjave«. Edino neizpodbitno dejstvo s slovničnega vidika je to, da najstvene izjave obravnavamo kot stavke. Torej problema najstvenih izjav ne moremo izpeljati zgolj iz slovnice. Kako je ta problem sploh nastopil in kako je povezan s problemom je/naj? Ne misliva ga pojasnjevati s pomočjo kakšne kratke zgodovinske analize, saj naju zanima zgolj sedanje stanje tega vprašanja.

Samo poimenovanje našega problema napeljuje k razlikovanju med dejstvom in najstvom oziroma med »je« in »naj«. Ponovno morava poudariti, da takšnega razlikovanja ne moremo izpeljati iz obstoječe slovnice, ki kvečjemu upravičuje razlikovanje med povednimi, vprašalnimi in velelnimi stavki. Vendar pa se filozofu ni treba omejevati s slovničnimi razlikovanji. Če bi bilo tako, potem se problem modalnih stavkov sploh ne bi vzpostavil in se z razmerjem med npr. »je« ter »nujno je« niti ne bi ukvarjali.

Če izvzamemo poskuse zvedbe najstvenih izjav na ukaze, potem lahko okvirno prepoznamo naše vprašanje kot to, ki zadeva razmerje med povednimi dejstvenimi stavki (angl. *is-sentences*) in najstvenimi stavki (angl. *ought-sentences*), tj. stavki, ki vsebujejo besede iz družine »naj«. Za zdaj ne bova izpostavila nobene analogije med problemom modalnih stavkov in problemom najstvenih stavkov. Če bi začela s to analogijo, bi s tem v resnici zgolj zameglila sliko. Ločevanje med trdilnimi, problematičnimi in apodiktičnimi stavki je navzoče znotraj množice povednih stavkov, medtem ko je razlika med dejstvenimi in najstvenimi stavki včasih razumljena kot takšna, ki sodi izven obsega povednih stavkov. To je povezano z dvojno rabo izraza »najstvena izjava«. V prvem primeru izraz uporabljamo za povedne stavke, ki opisujejo obstoj predpisov, prepovedi ali dopustitev, povezanih npr. z določenim pravnim ali moralnim sistemom; za takšne najstvene izjave bova odslej uporabljala izraz »deontične izjave«. V drugi rabi pa z najstvenimi izjavami merimo tudi na norme. Problem je/naj je problem, ki zadeva razmerje med povednimi stavki in normami. V glavnem se ta problem zvede na razmerje med povednimi stavki, ki niso deontični stavki, in normami, čeprav, kot bomo videli kasneje, celostna obravnava vključuje tudi razmislek o razmerju med deontičnimi stavki in normami. Za zdaj pa bova vseeno omejila razpravo na najpogostejšo različico problema je/naj, na različico, s katero se srečamo v polemiki med kognitivizmom in nekognitivizmom.

2 PROBLEM NEKOGNITIVISTOV

Kognitivisti razumejo najstvene izjave kot neke vrste povedne stavke, medtem ko nekognitivisti trdijo, da te izjave tvorijo posebno kategorijo. Obstajajo seveda različni kognitivizmi in različni nekognitivizmi. Kognitivizem je lahko naturalističen ali nenaturalističen, medtem ko gre pri nekognitivizmu vselej za

bolj ali manj skrajno obliko emotivizma. Kognitivisti zagovarjajo, da so najstvene izjave lahko resnične ali neresnične, nekognitivisti to zanikajo. Za kognitivizem se najstvene izjave nanašajo na materialno ali idealno stvarnost in imajo zatorej tudi običajne logične vrednosti, medtem ko za nekognitiviste izražajo zgolj človekove naravnanosti in zato niso niti resnične niti neresnične. Po tem orisu razlik lahko sedaj opustiva rabo nevtralnega izraza »najstvena izjava« in uporabljava izraz »norma«.

Ti premisleki razkrivajo, da so razlogi za trditev, da norme bodisi imajo običajne logične vrednosti bodisi jih nimajo, raznoliki ter segajo do temeljnih filozofskih vprašanj, npr. ali se norme nanašajo na stvarnost, in če se, na kakšno stvarnost. Kot sva že opozorila, naju prvenstveno zanimajo logični vidiki problema je/naj. Na splošno rečeno se ta problem izteče v vprašanje obstoja logike norm. Problem sestavljenih norm in sklepanj, ki »vključujejo« norme, se pokaže kot pomemben šele v razpravi med kognitivizmom in nekognitivizmom. Eno izmed vprašanj, o katerih mora nekognitivist razmisliti, je, kako so sploh mogoča normativna sklepanja, tj. sklepanja, ki vsebujejo norme kot premise ali sklepe oz. zaključke, ko pa norme niso niti resnične niti neresnične. Stanje glede obeh stališč si lahko zamislimo s pomočjo »igre«, ki se začne z vprašanjem, ali so norme resnične oz. neresnične. Kognitivist odgovori pritrdilno in zanj se igra s tem prvim korakom tudi konča. Posledica takšnega odgovora je tudi pritrdilen odgovor na vprašanje, ali je logika norm mogoča. Kognitivistu tako preostanejo zgolj formalni problemi, kot je npr. izbira jezika in aksiomatike te logike. Nekognitivist na izhodiščno vprašanje odgovori nikalno in zanj se igra s tem nikakor ne konča. Postavi si nadaljnje vprašanje, ki meri zgolj na obstoj logike norm. Če nanj odgovori pritrdilno, potem jo bo razglasil za »specifično logiko norm« ter jo začel graditi, če tako želi. Lahko pa odgovori tudi nikalno, da torej logika norm ni mogoča. Obe sta zastopani v obstoječi literaturi. Ota Weinberger zagovarja logiko norm, medtem ko ji Georg Henrik von Wright nasprotuje. Obstoj normativnih sklepanj upravičuje prvo stališče, medtem ko za drugo pomeni postavko, ki je ni lahko razložiti. Spomnimo se na t. i. Jörgensenovo dilemo, ki lepo ponazori položaj nekognitivizma.[2] Dilema izhaja iz naslednjih trditev:

(1) Deli logično pravilnih sklepanj so lahko zgolj povedne, tj. resnične oz. neresnične izjave.

(2) Norme niso povedne izjave.

(3) Norme torej ne morejo biti deli logično pravilnih sklepanj.

(4) Obstajajo logično pravilna normativna sklepanja.

Uvidimo lahko, da trditev (3) sledi iz (1) in (2), a da ni združljiva s (4). Nekognitivisti, kot je Weinberger, poskušajo vseeno upravičiti trditev (4) s skli-

2 Jörgensen 1938: 288–296; Woleński 1977: 265–276.

cevanjem na posebno logiko norm, medtem ko morajo nekognitivisti, kot je von Wright, najti kakšno drugo rešitev. V temu smislu je von Wrightovo pojmovanje »tehničnega najstva« predlog prav v tej smeri.[3] Obravnavala ga bova v nadaljevanju prispevka.

Poleg ontoloških, epistemoloških in psiholoških argumentov se nekognitivisti opirajo tudi na argument o vrzeli med dejstvom in najstvom, med je in naj. Ta argument zatrjuje, da je norme nemogoče izpeljati zgolj iz povednih izjav, in obratno. Argument, ki ga je oblikoval Hume, ponovil Kant in ga v natančnejšo obliko prenovil Poincaré, je dandanes skoraj brez izjeme sprejet.[4] Tudi midva ga sprejemava. Ne glede na to tega argumenta ne smemo razumeti kot odločilnega v sporu med kognitivizmom in nekognitivizmom. Kognitivisti lahko norme razumejo kot vrsto modalnih izjav v širšem smislu. Vendar pa se norm v družini modalnih izjav ne da razločiti od drugih po tem, da niso izpeljive iz čistih povednih, tj. nemodalnih izjav. Med tezami modalne logike imamo primera LA → A in A → MA. Ti tezi izražata logično povezavo med modalnimi in nemodalnimi izjavami. Predpostavimo zapis »XBA« za izjavo »X je prepričan, da A«. V okviru logike stavkov o prepričanjih ne moremo sprejeti niti XBA → A niti A → XBA. Stavki tipa XBA torej niso logično izvedljivi iz povsem povednih stavkov in obratno. Hkrati pa je vsaka izjava tipa XBA resnična ali neresnična, torej je izjava v logičnem smislu. Argument o neizpeljivosti norm iz povednih izjav torej ni dokončen glede spora, ki nas zanima, kajti norme so lahko resnične ali neresnične in hkrati neizpeljive iz takšnih izjav. Torej logična vrzel med dejstvi in najstvi ne izključuje možnosti logike norm. Sklicevanje na to vrzel pa ima omejitve tudi zaradi drugih razlogov. Obstaja namreč mešano sklepanje, ki je sestavljeno iz norm in povednih izjav. Argument vrzeli zanje ne velja, čeprav so ta sklepanja nedvomno normativna. Ta problem je bistven in tak, da še vedno poraja vprašanje, ali imajo norme običajne logične vrednosti resnice in neresnice.

Kot sva že poudarila, se logični vidiki problema je/naj nanašajo predvsem na vprašanje obstoja logike norm. Tako kognitivisti kot nekognitivisti sprejemajo obstoj deontičnih izjav in njihove, tj. deontične logike. Priznati gre, da sicer ni strinjanja glede »pravega« sistema deontične logike, toda ne glede na različna stališča o tem vprašanju prevladuje splošno strinjanje, da je deontična logika povsem upravičeno del sodobne formalne logike. Glede vprašanja o obstoju logike norm pa lahko zavzamemo (i) kognitivistično stališče, da logika norm obstaja, ker so norme lahko resnične ali neresnične, (ii) pozitivno nekognitivistično stališče, da logika norm obstaja, a ne temelji na pojmih resnice in neresnice, ali (iii) negativno nekognitivistično stališče, da logike norm ni.

3 Von Wright 1985: 275 in nasl.; glej tudi von Wright 1984: 451 in nasl.

4 Edini pomembnejši nasprotnik teze o logični vrzeli med dejstvi in najstvi je Searle (1964: 43–58); glej tudi Searle 1969.

Na podlagi sprejemanja obstoja deontične logike lahko tako razlikujemo med naslednjima stališčema:

(I) Deontična logika obstaja, logika norm pa ne.

(II) Obstajata tako deontična logika kot logika norm.

Sprejemanje (II) dodatno vodi do nadaljnjega vprašanja: kakšen je odnos med deontično logiko in logiko norm? Odgovora nanj določata naslednji dve stališči:

(IIa) Deontična logika in logika norm sta vzporedna sistema.

(IIb) Logika norm je pogoj deontične logike.

Zagovarjala bova stališče (I), vendar morava poprej kritično analizirati stališče (II).

Ad (IIa). To stališče predpostavlja dvojno razlago »najstva«, in sicer opisno in predpisno.[5] Člani družine »naj« so glede na prvo razlago vključeni v deontične izjave, glede na drugo pa v norme. Oblikujemo lahko abstraktni formalizem, ki ga lahko razlagamo bodisi opisno bodisi predpisno. Takšno razumevanje navadno temelji na domnevi, da sta množici opisnih in predpisnih tez sintaktično identični. Seveda pa se postavlja vprašanje, kakšen je namen takšne dvojnosti. Medtem ko je deontična logika nekako semantično opredeljiva, dobimo logiko norm brez takšne semantične upravičenosti oz. utemeljenosti. Predpostavimo sedaj, da zagovornik takšne razlage trdi, da množici tez teh dveh logik nista nujno identični. Torej bi obstajala določena teza v logiki norm, ki hkrati ne bi bila teza deontične logike, in obratno. V tem primeru bi morali potem tudi zavrniti obstoj univerzalnega formalizma glede te dvojne interpretacije ter semantično pojasniti razliko med obema množicama tez. V teh razlagah, kolikor so nama znane, nisva našla nobenega takšnega pojasnila oz. razlage. Sklenemo lahko torej, da takšno razumevanje ne ponuja teoretičnega upravičenja logike norm z vidika nekognitivizma; za kognitivizem pa takšno vzporedno razumevanje tako ali tako ni zanimivo.

Ad (IIb). Splošne razloge za tezo, da je logika norm pogoj deontične logike,[6] lahko izpostavimo na naslednji način. Deontične izjave so relativne v smislu, da so predpisi, prepovedi in dopustitve vedno utemeljeni v nekem normativnem sistemu, tj. sistemu, ki sestoji iz norm. Logične relacije med normami so torej predhodnice logičnim relacijam med deontičnimi izjavami, in tako deontična logika predpostavlja logiko norm. Takšno stališče lahko privzamejo tako kognitivisti kot nekognitivisti. Vendar bo za kognitivista to razlikovanje zgolj razlikovanje med absolutno in relativno deontično logiko. Zaradi tega nas v zvezi s tem

5 Stenius 1963: 247–260.

6 Weinberger 1984: 426 in nasl.; Kalinowski 1974: 39–63.

zanima zgolj nekognitivistično stališče. In tudi tu glede stališča (IIb) velja enako kot prej za (IIa) – logiko norm je treba semantično upravičiti oz. utemeljiti.

Ad (IIa) in (IIb). V obeh primerih je torej problem v semantičnem upravičenju logike norm, ki se – glede na izhodišča nekognitivizma – ne more sklicevati na klasično modelnoteoretsko semantiko, kajti ta temelji na pojmu resnice.

Argumente v podporo (IIb) je nedavno podal Ota Weinberger,[7] ki predpostavlja določeno semantično ustreznico za predpisujoči govor. Vendar pa gre za dokaj splošen predlog, ki nam ne razkrije, kako lahko v tej »novi semantiki« nadomestimo tradicionalne semantične pojme kot npr. izpolnitev, resnica in model, in brez tega nadaljnja razprava o tem predlogu ni mogoča. Bolj določni so njegovi predlogi o tem, da je treba preseči standardno pojmovanje logike, ki mu pravi »pojmovni konservatizem«.

3 WEINBERGER

Weinberger (1984: 459) zapiše:

> Prepričan sem, da obstajajo tehtni razlogi za to, da pojmovno ne izenačujemo logike in logičnih operacij (posebej sklepanja) z resničnostno-funkcionalnimi opredelitvami teh pojmov. Zdi se, da bi bila naloga analiziranja vprašanj, normativnih stavkov, neekstenzionalnih operatorjev (npr. »zato ker«), formalnih teleoloških relacij in formalne aksiologije zelo otežena, če ne že povsem nemogoča, če bi privolili v to, da logika ni nič drugega kot resničnostno-funkcionalna analiza.

Weinberger tako nadalje, sklicujoč se na načelo tolerantnosti Rudolfa Carnapa, predpostavi preseganje logike, ki je utemeljena na pojmu resnice.

Opozoriti pa velja na to, da je prav v navedenih Weinbergerjevih delih zaslediti »pojmovni konservatizem«. Carnapovo načelo tolerantnosti se nanaša na izbiro sintakse in je bilo oblikovano v obdobju, ko je bila logika zvedena na sintakso. Od tridesetih let naprej pa imamo na polju logike obdobje semantike. To tudi pomeni, da mora biti kateri koli logični sistem raziskan tudi z vidika semantične popolnosti, te pa ne moremo niti formulirati onkraj teorije modelov. Tako bi torej Weinberger moral razširiti Carnapovo načelo tolerantnosti na semantiko. Temu pa bi sledili že omenjeni problemi semantike za logiko norm. Dokler to ni razrešeno, lahko upravičeno dvomimo glede logike norm, teh dvomov pa ne moremo obravnavati zgolj kot »pojmovnega konservatizma«. Z najinega vidika lahko štejemo uspešnost »nove« semantike za ne preveč verjetno, kajti opredelitev izpolnitve nekako naravno vodi k opredelitvi resnice in ni lahko razumeti, kako bi lahko vodila kam drugam.

Weinberger ponudi tudi nekaj bolj specifičnih argumentov za logiko norm. Nekateri izmed njih opozarjajo na nezadostnost deontične logike in naj bi zara-

7 Weinberger 1984: 458 in nasl.

di tega razloga upravičevali posebno logiko norm. Pri obravnavi teh argumentov, ki sledi, bova izpustila težave glede dopustitev oz. dovoljenj, o katerih sva govorila že v predhodnih člankih.[8]

3.1. Weinberger trdi, da nekonsistentnosti v normativnem sistemu ne moremo zvesti na nekonsistentnost deontičnih izjav. Predpostavimo, da imamo v normativnem sistemu S dve normi, OA in O¬A. Takšno situacijo lahko opišemo z izjavama (a) in (b):

(a) »A je v S zapovedan.«

(b) »A je v S prepovedan.«

Obe izjavi sta resnični, čeprav sta normi OA in O¬A protislovni. Očitno pa je, da dve resnični izjavi ne moreta biti v protislovju. Vendar je veljavnost tega argumenta odvisna od tega, kako bi takšno situacijo obravnavala logika norm, kajti v sistemu S imamo dve protislovni normi, ki jima je treba pripisati različni »logični vrednosti«. Kako lahko to storimo, če pa normi pripadata istemu sistemu? Za zdaj je torej teza o logiki norm kot pogoju deontične logike vprašljiva. Ne želiva pa se izogniti najinemu komentarju Weinbergerjevega argumenta. Po najinem mnenju težava ni povezana z deontično logiko, ampak s pojmom normativnega sistema. Logika nam namreč narekuje pojmovanje, po katerem je normativni sistem konsistenten. To pa se zdi v neskladju s tem, da so nekonsistentni predpisi v normativnih sistemih pogost pojav. Smo torej prisiljeni sprejeti obstoj nekonsistentnih normativnih sistemov? Predpostavimo, da ima sodnik na voljo pravni sistem s parom norm OA in O¬A. Če se bo odločil uporabiti OA, se bo postavilo vprašanje, zakaj ni upošteval O¬A. Verjetno bo odgovoril, da je O¬A neveljavna, in obratno, če bo uporabil O¬A, bo trdil, da je OA neveljavna. Lahko bi torej rekli, da v tem primeru *de facto* obstajata dva različna normativna sistema. Torej je resnična izjava (a) ali pa izjava (b), nikoli pa obe hkrati. Po drugi strani iz deontične logike sledi, da lahko iz protislovne množice deontičnih izjav izpeljemo katero koli izjavo, to pa je posledica pripoznavanja protislovnih deontičnih izjav kot resničnih.

3.2. Drugi Weinbergerjev argument, o katerem želiva razpravljati, je povezan s t. i. sankcijskimi normami. Predpostavimo (c) in (d):

(c) »A je obvezen oz. predpisan.«

(d) »Če ¬A, potem mora nastopiti *s*.«

Pri tem *s* pomeni določeno sankcijo. Ampak ko predpostavimo t. i. semantiko popolnih svetov, ni nobenega takšnega sveta, v katerem bi bila resnična tako A kot ¬A. Iz (c) in (d) pa sledi (e):

(e) »Nastopiti mora *s*.«

8 Opałek & Woleński 1973: 169–185 in 1986: 83–88; Woleński 1980a: 507–510.

Ta posledica pa ne more biti resnična v nobenem popolnem svetu, ker je ¬A v vsakem takšnem svetu neresničen. Sankcijske norme so tako z vidika deontične logike nesmiselne. Spet pa ni znano, kako bi to težavo razrešila Weinbergerjeva logika norm. Z najine strani lahko zgolj nakaževa, kaj bi bilo treba storiti v deontični logiki, pri čemer pa ne trdiva, da tukaj obstaja rešitev, ki bi bila brez vsakih težav. Izjava (e) je glede na semantiko popolnih svetov resnična v t. i. dejanskem svetu, če in samo če je izjava ¬A → *s* resnična v vsakem popolnem svetu. Ker je ¬A v vsakem takšnem svetu neresnična, je potem izjava ¬A → *s* resnična. To bi že lahko bil tudi odgovor na Weinbergerjev problem, če ne bi bilo nobenih drugih resničnih izjav, ki bi ¬A pripisovale katero koli drugo sankcijo; kar pa nikakor ni dobra posledica. Lahko pa predpostavimo, da je vedno v veljavi pravilo, ki prepoveduje predpis kakršnih koli sankcij za prepovedana dejanja, razen tistih, ki so izrecno predvidene. Potem v nobenem popolnem svetu ne bi moglo biti tako, da je *s*, ki je povezana z ¬A, ali katera koli druga *s* resnična. Poleg tega ne vidiva temelja, da bi izpeljali (e) iz kakšnih premis; dejansko se zdi, da je (e) kot ločena norma neutemeljena. Če kdo ne bi sprejel tega razmišljanja, bi se lahko oprl tudi na razširitev deontične logike na t. i. nepopolne svetove, ki so med drugim predlagani prav zaradi razlage situacij kršitev dolžnosti.[9]

Če povzameva, lahko torej ugotoviva, prvič, da ni prav lahko uvideti, na kakšen način naj bi bila logika norm pogoj deontične logike, in drugič, da lahko Weinbergerjeve argumente proti deontični logiki zavrnemo znotraj slednje. Torej ni nobenih drugih razlogov za upravičenje obstoja logike norm.

V povezavi s sedanjo razpravo o logičnih vidikih problema je/naj pa morava obravnavati še pojem tehničnega najstva, ki ga je vanjo vpeljal Georg Henrik von Wright.[10]

4 VON WRIGHT

Problemi, povezani s tehničnim najstvom, so, sicer pod različnimi imeni, že dolgo predmet praktične filozofije. Za najin namen se nama ni treba ukvarjati z vsemi različnimi stališči in podrobnostmi te problematike. Dovolj je poudariti, da so po prevladujočem stališču, ki ga sprejema tudi von Wright, izjave, ki izražajo tehnično najstvo, dejstvene izjave, ki izražajo praktično nujnost glede določenega ravnanja kot sredstva za doseganje izbranega cilja; so torej povedne izjave.

Tehnično najstvo je glede na von Wrightovo pojmovanje najprej mogoče uporabiti pri dokazovanju, da so poskusi izpeljave najstva iz dejstev, ki jih naj-

9 Jones & Pörn 1985: 275–290.

10 Von Wright 1985.

demo v sodobni razpravi (John R. Searle, Max Black), zmotni (4.1). In drugič, z njim lahko presežemo težave, ki so v logiki norm in deontični logiki povezane s t. i. hipotetičnimi normami (4.2).

4.1. Pri prvem vprašanju von Wright zapovrstjo analizira pogosto obravnavano izpeljavo Searla in nato še Blacka.

Searlovo izpeljavo lahko zvedemo na sklepanje naslednje oblike:

Prva premisa: Kdor koli da obljubo, si s tem naloži obveznost, da jo izpolni.

Druga premisa: A je obljubil *p*.

Zaključek: A mora storiti *p*.

Medtem ko von Wright sprejema Searlov pogled, da sta obe premisi dejstveni izjavi, hkrati trdi, da zaključek ne izraža pristnega najstva, ampak tehnično najstvo praktične nujnosti, tj. če *p* ne bo storjeno, potem se obljuba ne bo uresničila. Zaključek je torej prav tako dejstvena izjava, kar pomeni, da je izpeljava najstva iz dejstev zgolj navidezna. Opozoriti je treba, da se pri razlikovanju med predpisi in opisi v naravnem jeziku, v katerem je omenjeno sklepanje podano, srečamo s težavami.[11] Tako prvo premiso kot tudi zaključek lahko razumemo različno. V običajnih kontekstih bi tako zaključek pomenil: »A je obljubil *p* in torej mora storiti *p*« (pristno najstvo), in ne »A je obljubil *p*, torej je *p*, ki ga stori A, potrebno sredstvo za izpolnitev obljube« (tehnično najstvo). Von Wrightova rešitev se tako ne sklada z običajnim pomenom zaključka in torej ne pomeni prepričljive zavrnitve Searlove izpeljave.

Prav tako moramo biti pozorni na naravo tega sklepanja. Če to temelji na t. i. neformalni logiki, potem pravzaprav ne gre za sklepanje, temveč za besedno manipulacijo oz. zavajanje, ki izkorišča nejasnost našega običajnega jezika. Če je po drugi strani mišljeno kot deduktivno sklepanje, potem je že vnaprej jasno, da je Searlov cilj nedosegljiv, kajti v zaključku ne moremo imeti ničesar, kar ne bi bilo vsebovano že v premisah. Tako bi morali razumeti »moral bi storiti *p*« v skladu s prvo premiso v smislu »si s tem naloži obveznost *p*« (pripoznano kot opisno) ali pa to v prvi premisi razumeti kot »mora storiti *p*« (pripoznano kot predpisno). V prvem primeru tako izpeljava najstva iz dejstev ne uspe, v drugem primeru pa se pretvori v izpeljavo najstva iz najstva in dejstev (v t. i. mešano sklepanje, ki ga nekateri avtorji intuitivno upravičujejo, a je vseeno sporno, ker umanjka teoretična podlaga za takšno upravičenje). Podobno bi morali tudi glede na von Wrightovo razlago vključiti tehnično najstvo v zaključek in v prvo premiso; to bi resda pomenilo odmik od problema, ki ga zastavi Searle, a hkrati ne bi šlo za umeten način vpeljave tehničnega najstva.

Avtorji, ki zagovarjajo mešano sklepanje, ugovarjajo, da Searlovo sklepanje vsebuje skrito normo o dolžnosti izpolnitve obljube, kar zavrne izpeljavo

11 Stuhlmann-Laeisz 1983: 24.

najstva iz dejstva ter jo nadomesti z izpeljavo najstva iz najstva in dejstva. Še bolj preprosto pa bi bilo postaviti pod vprašaj status prve premise kot dejstvene izjave, kajti – kot nam to pokaže formulacija določenih pravnih pravil – pod takšno obliko izražanja je lahko skrit predpis (»si s tem naloži obveznost« bi lahko pomenilo »je obvezan, da …«). Vendar moramo biti pozorni na to, da status zaključka, prve premise in tudi domnevne skrite premise ostaja nejasen, kajti vse so oblikovane v naravnem jeziku. Tudi če bi privzeli, da vključujejo pristno najstvo, bi jih lahko razlagali bodisi kot norme bodisi kot deontične izjave (z opisnim najstvom). V slednjem primeru pri sklepanju tako ne bi šlo za izpeljavo najstva iz dejstva (ali najstva iz najstva in dejstva). Enako je ugotovil tudi von Wright.

Če pa predpostavimo, da sklepanje vključuje predpisno najstvo, potem ga moramo glede na pravilno interpretacijo celote pripoznati kot mešano sklepanje v obliki t. i. praktičnega silogizma. Če obe premisi razumemo kot povedni izjavi, potem bo tak tudi zaključek in ne bo šlo za izpeljavo najstva iz dejstva (ali najstva iz najstva in dejstva). Enako lahko sklenemo tudi, če ob sprejemanju predpisnosti zaključka kot predpisno razumemo tudi prvo premiso. To ne zadovolji Searla, ki želi najstvo izpeljati zgolj iz opisnih premis. Obenem to ne zadovolji von Wrighta zaradi logično dvomljive narave mešanih sklepanj, zaradi česar tudi vpelje tehnično najstvo.

Blackovo sklepanje je bolj enostavno od Searlovega in se glasi:[12] »A in B igrata šah. A poskuša matirati B-ja. Torej mora sedaj potegniti naslednjo potezo … Položaj je takšen, da če ne potegne ravno te poteze, nikakor ne more zmagati v tej partiji.« V tem primeru je von Wrightova kritika utemeljena; gre za tehnično najstvo in izpeljava (pristnega) najstva iz dejstev je zgolj navidezna. Hkrati pa ni očitne podobnosti med obema sklepanjema (tj. Searlovim in Blackovim), zato tudi ne moremo oblikovati skupne oz. enake kritične rešitve.

Če bi želeli Blackov primer obravnavati po analogiji s Searlovim, potem bi lahko rekli samo, da ima v dani situaciji – kot tudi v kateri koli drugi – A obveznost oz. dolžnost, da povleče eno od množice potez, ki so dopustne v tej situaciji glede na pravila šaha (pristno najstvo). Čemur tukaj pravimo »situacija«, je enako dvomljivo kot Searlove premise, kajti razlagati bi jo bilo treba takole:

Prva premisa: Vsakdo, ki se odloči igrati šah, si s tem naloži obveznost, da sprejema pravila igre šaha.

Druga premisa: A se odloči igrati šah; … skupaj z vsemi nadaljnjimi dvomi o naravi I. premise in zaključka. Tehnično najstvo torej ne ponuja nobene rešitve za Blackovo »popravljeno« sklepanje, enako kot je to pri Searlu.

Tehničnemu najstvu tako spodleti pri »popravi« mešanih sklepanj, na katera se na koncu zvedeta Searlov pa tudi »dopolnjeni« Blackov argument, in s tega

12 Black 1964.

vidika je tudi von Wrightovo pojmovanje postavljeno pod vprašaj. Pri tem izraz »popraviti« morda ni najustreznejši, kajti z njim smo nameravali pokazati, da je mešana narava sklepanja očitna, kar pa ni bilo dokazano.

4.2. Preostane še drugi problem tehničnega najstva kot nepogrešljive kategorije deontične logike v luči težav, s katerimi se ta logika sooča glede semantične interpretacije formalizmov t. i. hipotetičnih norm. Zdi se, da v njem sprejema pogled, po katerem tehnično najstvo kot orodje dopolnjuje tradicionalno razumljene deontične modalnosti predpisa, prepovedi in dopustitve; v tem primeru bi imeli opravka z deontično logiko, ki je razširjena z operatorjem tehničnega najstva. Obrazložitev tega pogleda pa ni podana v takšni meri, da bi bili lahko prepričani o pravilnosti te razlage in bi lahko tudi ocenili sprejemljivost takšne razširjene različice deontične logike.

Potemtakem obogatitev pojmovnega aparata z vpeljavo tehničnega najstva ne razreši našega temeljnega problema, torej vprašanja obstoja logike norm. Odprti ostajata tako stališče (I) kot (II) – in to v obeh interpretacijah.

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Naj opomniva, da dosedanja razprava glede zadevnega vprašanja razkrije določeno domnevo, ki je skupna obema udeleženima stranema, in sicer:[13]

(L) Norme so jezikovne izjave.

To domnevo (L) lahko razumemo kot značilno tezo jezikovne teorije norm. Dejstvo je, da (L) še bolj zaostri problem, posebej za nekognitivista. Ta mora pripoznati, da obstajajo norme, ki so sestavljene iz preprostih norm in veznikov, identičnih običajnim logičnim konstantam, in da obstajajo sklepanja, katerih deli so tudi norme. In če norme obstajajo kot jezikovne izjave in se za nekatere njihove relacije zdi, da so logične, potem je to težko razložiti. Takšno stanje je precej dramatično v zvezi s stališčem (I), kajti obstaja »logika brez logike«; v zvezi z obema stališčema (II) je nekoliko manj sporno, vendar – kakor sva poskusila pokazati – obe temeljita na dvomljivih predpostavkah. Sedaj se nam zastavi vprašanje, zakaj se ne bi preprosto odločili za kognitivizem, saj argument je/naj ne dokazuje kaj dosti. Sama nameravava postaviti pod vprašaj domnevo (L), ki jo sprejema tudi kognitivizem, medtem ko se nama zdi nekognitivizem brez teze (L) pravzaprav pravilno stališče. A vrnimo se za trenutek k nekognitivizmu z (L). To stališče nam dovoljuje, da norme motrimo s sintaktičnega in pragmatičnega gledišča, vendar zanika semantično naravo norm, kajti če bi norme imele svojo semantiko, potem bi imele tudi svojo logiko. Norme, razumljene kot izjave, imajo nedvomno svoj jezikovni smisel in jih razumemo,

13 Woleński 1980b: pogl. III in 1982: 65–73; Opałek 1987.

kar na manko semantike vrže še posebej čudno senco. Ampak ta manko ni nič naključnega, kakor je pokazala analiza (II).

Zavrnitev (L), ki vodi do nejezikovnega pojmovanja norm, je skrajni korak, ki odpravi celoten problem, kajti če norme niso jezikovne izjave, potem ni nič čudnega, da ni logike norm.

5 NEJEZIKOVNO POJMOVANJE NORM

Obstaja nekaj argumentov, ki govorijo v prid nejezikovnemu pojmovanju norme. Očitno je, da izognitev problemu logike norm ne more biti edini argument, ampak je potrebno tudi neodvisno upravičenje. To sva predstavila že v najinih drugih člankih, tako da bova tukaj zgolj ponovila ter dopolnila nekaj najinih argumentov.[14]

Ko npr. pravniki analizirajo jezik prava, praviloma niso nagnjeni k trditvi, da so norme neposredni predmet te analize. Prej bi se strinjali, da izjave, ki jih analizirajo, izražajo norme. To vseeno ni nedvoumna izhodiščna točka, kajti kdo bi lahko trdil, da so pomeni (norme v logičnem smislu kot analogne propozicijam v logičnem smislu) to, kar je izraženo z zadevnimi izjavami. Zaradi več razlogov, ki jih tu ne bova pojasnjevala, norm ne želiva razumeti kot pomenov najstvenih izjav. Boljše izhodišče je situacija, v kateri bi nekdo govoril o sprejemanju, upoštevanju ali o veljavnosti norm. S tem zagotovo ni mišljeno, da so izjave – ali pa pomeni takšnih izjav – tisto, kar je sprejeto, upoštevano ali veljavno.[15] Reči, da nekateri ljudje upoštevajo oz. ubogajo, drugi pa kršijo norme kot izjave, je v nasprotju s slovnico jezika, v katerem govorimo o normah. Po drugi strani pa brez težav sprejmemo govor, da so ukazi ali odločitve tisto, kar je sprejeto, upoštevano in veljavno. In prav to je tisti vzgib za oblikovanje pojma norme, po katerem ta ni izjava.

5.1. Na tej točki se nejezikovno pojmovanje norm sreča z Austinovo teorijo performativov. Ta teorija govori o vrsti izjav, ki jo imenujemo performativi, in jih raziskuje v razmerju do dejanj, ki jih spremljajo. Austinovska teorija govornih dejanj gre še naprej od tega in vse stavčne izjave razume kot performative, to je izjave z ilokucijsko močjo. Austinova rešitev pa je z najinega vidika nezadostna, kajti performativi so hkrati dejanja in izjave, medtem ko sama želiva izrecno ločiti med performativi kot dejanji in performativnimi izjavami. Performative vedno razumemo kot dejanja nekoga, v smislu Brentanove opisne psihologije in še natančneje v smislu razlike med dejavnostmi oz. dejanji in nji-

14 Obstaja podobnost med nejezikovnim pojmovanjem norm in t. i. ekspresivnim pojmovanjem norm, ki sta ga predstavila Alchourrón & Bulygin (1981: 95–124).

15 Black 1962: 100 in nasl.

hovimi produkti oz. tvorbami, ki jo uvede Twardowski.[16] Takšna dejanja so med drugim zastavljanje vprašanj, ukazovanje, odločanje na en ali drug način, presojanje, tvorbe teh dejanj pa so vprašanja, ukazi, odločitve in sodbe. Povejmo to določneje: vprašanje je to, kar je vprašano, ukaz je to, kar je ukazano, odločitev je to, kar je odločeno, in sodba je to, kar je presojeno. V tem smislu vprašanja, ukazi, odločitve in sodbe niso izjave. Če nekdo želi izraziti vprašanje, ukaz, odločitev ali sodbo, potem mora uporabiti določeno izjavo. In potem je stvar nadaljnje analize, da najdemo odgovor na vprašanje, ali je izjava, ki jo uporabimo za izražanje tvorbe določenega dejanja, tudi sama tvorba tega dejanja ali nekega nadaljnjega dejanja. Tega vprašanja tu ne bomo razrešili. Ker je vprašanje vedno vprašanje nekoga, ukaz vedno ukaz nekoga, odločitev vedno odločitev nekoga in sodba vedno sodba nekoga, potem ni presenetljivo dejstvo, da imajo izjave, izražajoče vprašanja, ukaze, odločitve in sodbe, obliko, ki jo je Austin razumel kot značilnost performativov (glede na njegovo pojmovanje): sprašujem (ukazujem, odločam in sodim) to in to. Trdiva, da je tudi normiranje dejanje določene vrste, norma tvorba takšnega dejanja in normativna izjava izraz te norme. Podrobnejša opredelitev dejanja normiranja tu ni potrebna. Dovolj je reči, da je norma vedno neka odločitev. In tako kot normativno izjavo prepoznava izjavo tipa »Normiram tako in tako«; gre za prvotno normativno izjavo. Normativna izjava ima očitno performativno naravo. Osrednje vprašanje pa je tole: Ali je performativna izjava izjava v logičnem smislu? Austin je to zanikal in razlikoval med performativi in konstativi. Zgolj slednje lahko – glede na njegovo stališče – razumemo z vidika resničnosti in neresničnosti, medtem ko lahko performative razumemo z vidika posrečenosti oz. učinkovitosti in neposrečenosti oz. neučinkovitosti. Najino stališče je drugačno. Trdiva, da je učinkovitost oz. neučinkovitost lastnost performativov glede na najino pojmovanje (tj. dejanj) in da so performativne izjave vedno resnične ali neresnične. Zanikanje tega (kot to stori Austin) je po najinem mnenju posledica tega, da ne razlikujemo dovolj jasno med povednimi in opisnimi izjavami. Ko izrečem »Ukazujem …«, prav gotovo ne opisujem, kaj počnem, ampak (zgolj) razglasim, da to počnem. Lahko rečemo, da je performativna izjava resnična, če in samo če je zadevni performativ posrečen oz. učinkovit.

Vzemimo sedaj neko najstveno izjavo, tj. neki najstveni stavek. Kaj takšna izjava pomeni? Z vidika nejezikovnega pojmovanja teorije norm pomeni, da jo je govorec uporabil kot prvotno normativno izjavo ali pa da je s tem nakazal, da je on sam ali pa nekdo drug že pred tem izvršil zadevno dejanje normiranja; v slednjem primeru lahko govorimo o drugotni normativni izjavi. Kakor koli, v vsakem primeru je normativna izjava resnična ali neresnična, tj. deontična izjava. Iz tega sledi, da pri najstvu nimamo dvojne, opisne in predpisne razlage, ampak zgolj opisno. Prav tako lahko privzamemo, da je formalizem deontične

16 Twardowski 1977.

logike uporaben oz. velja tako za prvotne kot tudi drugotne normativne izjave. Ne moreva najti nobenega nasprotnega primera, ko bi kakšen zakon deontične logike veljal za prvotne izjave, hkrati pa ne za drugotne, in obratno.

5.2. Kako nejezikovno pojmovanje norm razreši obravnavane probleme, povezane s stališčema (I) in (II)? Sama sprejemava stališče (I), kajti če norme niso izjave, potem tudi logika norm ne more obstajati. Vsako »normativno sklepanje« je sedaj razumljeno kot sklepanje z deontičnimi izjavami; mešana sklepanja pa so sestavljena iz deontičnih in nedeontičnih izjav. Deontična logika je pogojena z normami, ker so deontične izjave resnične ali neresnične glede na obstoj ustreznih dejanj normiranja. V semantiki deontične logike je to dejstvo izraženo s predpostavko, da so logične vrednosti deontičnih izjav odvisne od t. i. relacije deontične alternativnosti. Deontična logika je pogojena z normami (in ne z logiko norm), kajti če ne bi bilo norm kot tvorb dejavnosti normiranja, potem bi bila deontična logika nepotrebna, saj bi bilo vse ravnodušno oz. izravnano in verjetno nihče ne bi niti pomislil na idejo o problemu je/naj.

Dvojna interpretacija deontičnega formalizma, ki jo zagovarjajo nekateri, ima ustreznico tudi v nejezikovni teoriji norm, kajti ta formalizem lahko uporabimo tako za prvotne kot drugotne normativne izjave. Nejezikovna teorija norm lahko torej razreši vse probleme, ki jih je treba razrešiti.

Poglejmo še nekaj splošnejših problemov. Predlagano razumevanje temelji na domnevi, da v jeziku obstajajo zgolj izjave v logičnem smislu.[17] Kaj naj torej storimo z vprašalnimi in velelnimi izjavami? Po najinem mnenju so krajša oblika zadevnih performativnih izjav. Iz tega pa še ne sledi, da ni nobene potrebe po logičnih razlikovanjih v tej splošni kategoriji povednih izjav.

Splošno sprejet je pogled, da vsaka izjava v logičnem smislu izraža propozicijo, tj. sodbo v logičnem smislu. Zdi se, da to nasprotuje najinemu razlikovanju presojanja kot kategorije dejanj. Trdiva, da ima presojanje kot dejanje za tvorbo sodbo v psihološkem smislu. Torej ni nobene neskladnosti s tezo, da je vsaka izjava sodba v logičnem smislu, kajti tukaj imamo opravka zgolj z dvojnim pomenom izraza »sodba«.

In na koncu je tu še vprašanje o razmerju med nejezikovnim pojmovanjem norm ter kognitivizmom in nekognitivizmom. Na prvi pogled bi se lahko zdelo, da gre za kognitivizem, kajti normativne izjave razumeva kot resnične ali neresnične ter najstvo razlagava zgolj kot opisno. Pozorni pa moramo biti na to, da kognitivizem vključuje pripis resničnostnih vrednosti normam kot izjavam. Zato nejezikovno pojmovanje norm ne spada pod oznako kognitivizma. Tako pojmovanje je nekognitivistično, ker domneva, da je normiranje drug tip deja-

17 Alchourrón & Bulygin 1983.

nja kot pa presojanje. Rečeva lahko: norme niso tvorbe dejanja presojanja. In to je po najinem mnenju pravilna oblika vrzeli je/naj.[18]

Dodatna opomba. Ko sva dokončala ta članek, sva se imela priložnost seznaniti s člankom Ota Weinbergerja (1986), ki večinoma vsebuje podrobno kritiko nekaterih pogledov, ki se sprašujejo o obstoju logike norm (Jørg Jørgensen, Karl Engliš, Hans Kelsen, Carlos E. Alchourrón in Eugenio Bulygin, Georg Henrik von Wright). Analiza te kritike presega obseg najinih pripomb. Kar pa zadeva Weinbergerjeve (1986: 77–79) pozitivne predloge, lahko opazimo, da se avtor, podobno kot poprej, omeji na zelo splošne postulate, ki kažejo na potrebo po logiki norm. Nadalje se zdi, da je Weinberger (1986: 58) nekoliko spremenil svoje poglede na razmerje med deontično logiko in logiko norm. Zdaj trdi, da je deontična logika načeloma odvečna, ker bi bila zgolj ponovitev pristne logike norm. A ta pogled bi bil prepričljiv oz. sprejemljiv le v primeru, da bi imela logika norm zadosten semantični temelj, vendar ni tako, kakor sva tudi pokazala. Zaradi teh razlogov vztrajava pri »skepticizmu« glede logike norm.

Iz angleškega izvirnika prevedla
Vojko Strahovnik in Vesna Česen.

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Ser, deber y lógica

Este artículo discute el problema del ser y el deber ser a la luz de la relación entre lógica deóntica y lógica de normas. Los autores se centran primeramente en las soluciones no-cognoscitivistas de Weinberger y von Wright. Luego de refutar a ambas concepciones por considerarlas fallidas, defienden una concepción no-lingüística de las normas. Según esta última, normar es una especie de acto, norma es el producto de ese acto, y enunciado normativo es la expresión de una norma. | El articulo se publicó en ingles en *Archiv für Rechts- und Sozialphilosophie*, Vol. LXXIII (1987) No. 3, 373–385. Sebastián Figueroa Rubio lo tradujo al español para *Revus*.

Palabras claves: problema del ser y el deber ser, lógica deóntica, lógica de normas, Weinberger, von Wright, concepción no-lingüística de normas

1 INTRODUCCIÓN

Hemos percibido un incremento en el interés por el denominado problema del ser y el deber ser y sus consecuencias para la lógica.[1] Este problema tiene muchos aspectos, ontológicos y epistemológicos entre ellos. De todas formas, en este trabajo nos concentraremos en sus aspectos lógicos, mientras que los otros serán mencionados solo marginalmente.

El problema lógico entre el ser y el deber ser está conectado con una determinada clase de enunciados a los que denominaremos provisionalmente "enunciados de deber". Los enunciados de deber son, en primer lugar, oraciones en un sentido gramatical. En segundo lugar, son tanto oraciones simples como oraciones compuestas por medio del uso de conectivas. Por último, son premisas y conclusiones de razonamientos que pueden ser o no aceptados intuitivamente como lógicamente correctos. Ni los enunciados de deber, sean simples o complejos, ni los razonamientos en que se dan, son invenciones filosóficas: estos pueden ser encontrados fácilmente en el lenguaje ordinario o en los lenguajes especializados de filósofos morales y juristas. Por lo tanto, el análisis lógico de enunciados de deber encuentra una justificación obvia, solventada en la ocurrencia de este tipo de enunciados en los sistemas lingüísticos aplicados en la práctica humana cotidiana.

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1 Comp. Stuhlmann-Laeisz 1983; von Wright 1985: 263–281; Weinberger 1984: 454–469.

El uso del término "enunciados de deber" no prejuzga nada, siendo bastante neutral. Cuando decimos que en un determinado lenguaje ocurren enunciados de deber estamos registrando solo un hecho. No se dice mucho más indicando que los enunciados de deber son simples o complejos, o que son eslabones de ciertos razonamientos. Aparentemente las cosas se presentan de forma distinta, ya que podría parecer que por esta vía son dichas algunas verdades lógicas o, al menos, gramaticales. Sin embargo, resulta extraño que en las clasificaciones gramaticales actuales no exista una sección de "enunciados de deber". El único hecho duro, desde el punto de vista de la gramática, es tratar a los enunciados de deber como oraciones. Por consiguiente, el problema de los enunciados de deber no puede ser derivado solo de la gramática. ¿Cómo surgió este problema y por qué fue conectado con el problema entre el ser y el deber ser? No intentaremos explicar esto por medio de un análisis histórico ya que estamos interesados solamente en el estado actual de la cuestión discutida.

La denominación de nuestro problema sugiere contrastar "ser" con "deber". Nuevamente tiene que ser subrayado que dicho contraste no puede ser derivado de la gramática actual, la cual, a lo más, justifica el contraste entre oraciones declarativas, interrogativas e imperativas. De todas formas, el filósofo no está obligado a limitarse a las distinciones gramaticales. Si esto último fuera el caso, el problema de las oraciones modales no emergería y la relación entre, e.g. "ser" y "es necesario" no sería tomada en cuenta.

Dejando fuera de consideración los intentos de reducir enunciados de deber a órdenes, de forma provisional podemos identificar nuestra interrogante como aquella acerca de la relación entre oraciones de deber (i.e., oraciones que contienen palabras provenientes de la familia de los términos de deber) y oraciones de ser declarativas.

Hasta ahora no hemos sugerido ninguna analogía entre el problema de las oraciones modales y el de las oraciones de deber. De hecho, comenzar con esta analogía solo oscurecería el panorama. La división entre oraciones asertivas, problemáticas y apodícticas se realiza dentro de la clase de oraciones declarativas, mientras que la división entre oraciones de ser y oraciones de deber a veces se considera fuera del alcance de las oraciones declarativas. Esto se vincula al doble uso del término "enunciado de deber". Este término es aplicado, en primer lugar, a oraciones declarativas que establecen la existencia de prescripciones, prohibiciones y permisos con respecto, e.g., a un determinado sistema jurídico o moral; llamaremos a los enunciados de deber de este tipo "enunciados deónticos". En segundo lugar, el término en cuestión también puede aplicarse a normas. El problema entre el ser y el deber ser es el de la relación entre oraciones declarativas y normas. Por lo general este problema es reducido a la relación entre oraciones declarativas distintas a las deónticas y normas, pero, como veremos más adelante, una discusión completa de este problema requiere que tam-

bién se considere la relación entre oraciones deónticas y normas. Sin embargo, en este momento limitaremos nuestras observaciones a la versión discutida con mayor frecuencia del problema entre el ser y el deber ser, la versión con que se lidia en la controversia entre cognoscitivismo y el no-cognoscitivismo.

2 EL PROBLEMA DE LOS NO-COGNOSCITIVISTAS

Los cognoscitivistas consideran a los enunciados de deber como un tipo de oración declarativa, mientras que los no-cognoscitivistas reivindican que estos enunciados forman una categoría distinta. Hay diversos cognoscitivismos y no-cognoscitivismos. El cognoscitivismo puede ser naturalista o anti-naturalista, mientras que el no-cognoscitivismo es siempre un emotivismo más o menos radical. El cognoscitivismo afirma que los enunciados de deber son verdaderos o falsos, mientras que el no-cognoscitivismo lo niega. Para el cognoscitivismo, los enunciados de deber refieren a una realidad material o ideal y, por consiguiente, tienen valores lógicos normales, mientras que para el no-cognoscitivismo dichos enunciados solo expresan actitudes humanas y, por lo tanto, no son verdaderos ni falsos. Habiendo esbozado los puntos de vista podemos abandonar el término neutral "enunciado de deber" y usar el término "norma".

Las consideraciones precedentes demuestran que las razones para afirmar que las normas tienen o no tienen valores lógicos normales son diferentes, y se extienden a preguntas filosóficas fundamentales, e.g., si las normas refieren a la realidad y, de ser así, a qué realidad refieren. Cómo ya hemos mencionado, estamos interesados principalmente en el aspecto lógico del problema entre el ser y el deber ser. Hablando en términos generales, el problema se resuelve en la pregunta por la existencia de una lógica de normas. El problema de las normas complejas y el de los razonamientos en que "participan" normas deviene relevante solo dentro de la controversia entre cognoscitivismo y no-cognoscitivismo. Una de las preguntas que el no-cognoscitivista debe considerar es la siguiente: ¿Cuán posibles son los razonamientos normativos (i.e., razonamientos que contienen normas como premisas y/o conclusiones) siendo que las normas no son ni verdaderas ni falsas? La situación existente entre ambos puntos de vista puede concebirse por medio de un "juego". Este juego comienza con una pregunta: ¿Puede decirse que las normas son verdaderas o falsas? El cognoscitivista responde afirmativamente a esta pregunta y el juego termina para él en la primera jugada. La consecuencia de ello es que da una respuesta afirmativa a otra pregunta: ¿es la lógica de normas posible? Para el cognoscitivista entonces solo restan problemas formales, tales como la elección de un lenguaje y una axiomática. El no-cognoscitivista responde a la primera pregunta con una negación y bajo ningún respecto el juego ha terminado para él en el primer movimiento. Él se pregunta la segunda cuestión, concerniente a la lógica de normas. Cuando

responde afirmativamente se manifestará a favor de una "lógica de normas específica" y comenzará a construirla, si lo desea. También puede responder negativamente, i.e. que la lógica de normas es imposible. Ambas posturas son defendidas en la literatura contemporánea. Ota Weinberger argumenta a favor de una lógica de las normas y Georg Henrik von Wright en contra de ella. La existencia de razonamientos normativos justifica el primer punto de vista y se convierte en algo muy difícil de explicar para el segundo. Permítasenos evocar el así llamado dilema de Jørgensen que ilustra bien la situación del no-cognoscitivista.[2] El dilema se deriva de los siguientes enunciados:

(1) Solo enunciados declarativos, i.e. verdaderos o falsos, pueden formar parte de razonamientos lógicamente correctos.

(2) Las normas no son enunciados declarativos.

(3) Normas no pueden formar parte de razonamientos lógicamente correctos.

(4) Existen razonamientos normativos correctos.

Es fácil ver que (3) se sigue de (1) y de (2), pero que es incompatible con (4). El no-cognoscitivista a la Weinberger intenta justificar (4) a través de una lógica de las normas especial, mientras que el no-cognoscitivista a la von Wright debe buscar una solución alternativa; la concepción de von Wright de los "deberes técnicos" es una nueva propuesta al respecto.[3] Será discutida más adelante en este trabajo.

Fuera de los argumentos ontológicos, epistemológicos y psicológicos, los no-cognoscitivistas hacen uso del argumento del abismo lógico entre el ser y el deber ser. Este argumento establece que es imposible deducir normas a partir de enunciados declarativos, y viceversa. El argumento en cuestión, formulado por Hume, sostenido por Kant, y renovado de forma precisa por Pontcairé, es casi comúnmente aceptado hoy en día.[4] Nosotros, por nuestra cuenta, también suscribimos a él. Sin embargo, este argumento no debe entenderse como concluyente para el debate entre cognoscitivismo y no-cognoscitivismo. El cognoscitivista puede tratar a las normas como un tipo de enunciado modale en sentido extenso. De todas maneras, las normas no se disciernen, dentro de la familia de los enunciados modales, desde el punto de vista de su no deducibilidad de enunciados puramente declarativos, i.e. enunciados no modales. Tenemos LA → A y A → MA como ejemplos de estas tesis de lógica modal. Estas tesis afirman el nexo lógico entre enunciados modales y no-modales. Utilicemos la notación "XCA" para el enunciado "X cree que A". En lógica de oraciones de creencia no se puede aceptar ni XCA → A, ni A → XCA. Las oraciones del tipo XCA,

2 Jörgensen 1938: 288–296; Woleński 1977: 265–276.

3 Von Wright 1985: 275 ss; véase también von Wright 1984: 451 ss.

4 El único oponente relevante de la tesis del abismo lógico entre el ser y el deber ser es Searle (1964: 43–58); véase también Searle 1969.

entonces, no son deducibles lógicamente de oraciones puramente declarativas y viceversa. De todas formas, cada enunciado del tipo XCA es verdadero o falso, i.e. es un enunciado en el sentido lógico. Entonces, el argumento de la no deducibilidad de las normas a partir de enunciados declarativos no es concluyente para la resolución de la disputa en cuestión, ya que las normas pueden ser verdaderas o falsas sin ser deducibles de estos últimos. En particular, el abismo lógico entre el ser y el deber ser no prejuzga la imposibilidad de una lógica de normas. Apelar a este abismo es limitado también por otra razón. Existen, a saber, razonamientos de carácter mixto, compuestos por normas y enunciados declarativos. El argumento del abismo no se aplica a ellos, al tiempo que dichos razonamientos mixtos son indudablemente normativos. El problema es de carácter esencial y uno en el cual la pregunta aún está presente: si las normas tienen valores lógicos estándar de verdad y falsedad.

Como se ha afirmado más arriba, el aspecto lógico del problema entre el ser y el deber ser consiste principalmente en la existencia de una lógica de normas. Tanto cognoscitivistas como no-cognoscitivistas aceptan la existencia de enunciados deónticos y de su lógica, i.e. lógica deóntica. Cierto es que hay controversias acerca del sistema de lógica deóntica "adecuado", pero más allá de la existencia de divergentes puntos de vista sobre este tema, es opinión común que la existencia de una lógica de normas es una parte completamente justificada de la lógica formal contemporánea. En la cuestión acerca de la existencia de una lógica de normas uno puede adoptar o (i) la posición cognoscitivista de que la lógica de las normas existe porque las normas son verdaderas o falsas; o adoptar (ii) la posición no-cognoscitivista positiva de que la lógica de normas existe, pero que no se fundamenta en los conceptos de verdad y falsedad; o también adoptar (iii) la posición no-cognoscitivista negativa de que la lógica de normas no existe. Aceptando la existencia de la lógica deóntica, se pueden distinguir los dos siguientes puntos de vista:

(I) La lógica deóntica existe, pero no existe lógica de normas.

(II) La lógica deóntica existe y también existe lógica de normas.

La aceptación de (II) dirige a la siguiente pregunta: ¿Cuál es la relación entre lógica deóntica y lógica de normas? La respuesta a esta pregunta determina los siguientes puntos de vista:

(IIa) Lógica deóntica y lógica de normas son sistemas paralelos;

(IIb) La lógica de normas es una condición de la lógica deóntica.

Defenderemos el punto de vista I), pero antes debemos realizar un análisis crítico de (II).

Ad (IIa). Este punto de vista implica una interpretación dualista de "deber" -una descriptiva y una prescriptiva-.[5] Según la primera interpretación "deber"

5 Stenius 1963: 247–260.

está contenido en enunciados deónticos, mientras que de acuerdo con la segunda está contenido en normas. Se puede construir un formalismo abstracto, apto para ser interpretado tanto descriptiva como prescriptivamente. Esta concepción usualmente se basa en el supuesto de que los conjuntos de tesis descriptivas y prescriptivas son idénticos en términos sintácticos. Entonces, surge la pregunta sobre cuál es el propósito de dicha dualidad. Además de ello, mientras la lógica deóntica de alguna forma es definible en términos semánticos, obtenemos la lógica de normas sin legitimación semántica. Asumamos ahora que quien adhiere a la interpretación en discusión asegura que los conjuntos de tesis de ambas lógicas no tienen que ser idénticos. Existirían, entonces, algunas tesis de lógica de normas que no serían tesis de lógica deóntica, o viceversa. En este punto se tendría que rechazar la existencia de un formalismo universal a ser interpretado de forma dualista, y explicar en términos semánticos las diferencias entre los respectivos conjuntos de tesis. En las concepciones "paralelistas" que conocemos, no encontramos tal explicación. Consecuentemente, el punto de vista bajo discusión no da una justificación teórica de la lógica de normas a partir del no-cognoscitivismo; para el cognoscitivista la concepción paralelista no presenta interés alguno.

Ad (IIb). Las razones generales a favor de la tesis de que la lógica de normas es una condición de la lógica deóntica[6] se pueden presentar de la siguiente manera. Los enunciados deónticos son relativos en el sentido de que prescripciones, prohibiciones y permisos se predican en relación con un sistema normativo, i.e. un sistema conformado por normas. Entonces, las relaciones lógicas entre normas son primarias respecto de las relaciones lógicas entre enunciados deónticos, y la lógica deóntica supone a la lógica de normas. Esta mirada puede ser adoptada tanto por cognoscitivistas como por no-cognoscitivistas. Para el cognoscitivista, sin embargo, la distinción sería simplemente aquella entre lógica deóntica absoluta y lógica deóntica relativa. Por esta razón aquí solo es de interés la posición no-cognoscitivista. A (IIb) se aplica la misma observación que a (IIa): la lógica de normas debe ser justificada en términos semánticos.

Ad (IIa) y (IIb). En ambos casos el problema consiste en la legitimación semántica de la lógica de normas, la cual -de acuerdo a los postulados del no-cognoscitivismo- no puede referir a la clásica semántica modelo-teórica, ya que esta última se basa en el concepto de verdad.

Los argumentos a favor de (IIb) han sido presentados recientemente por Ota Weinberger,[7] él postula una semántica adecuada para el discurso prescriptivo. Esta es, sin embargo, una propuesta muy general que no muestra cómo conceptos semánticos tradicionales tales como satisfacción, verdad y modelo, pueden

6 Weinberger 1984: 426 ss; Kalinowski 1974: 39–63.

7 Weinberger 1984: 458 ss.

ser sustituidos en la "nueva" semántica, y sin los cuáles la propuesta no es posible. Más concretas son las observaciones de Weinberger acerca de la necesidad de trascender la concepción estándar de la lógica, denominada por él "conservadurismo conceptual".

3 WEINBERGER

Weinberger (1984: 459) escribe:

> Hay -así lo creo- serias razones para no identificar conceptualmente lógica y operaciones lógicas (principalmente la inferencia) con las definiciones veritativo-funcionales de esos términos. Parece ser que la tarea de analizar preguntas, oraciones de normas, operadores no extensionales (e.g. "porque"), relaciones formales teleológicas y la axiología formal sería extremadamente obstaculizada -si no imposibilitada- por la suposición de que la lógica no es más que análisis veritativo-funcional.

Además, trayendo a colación el principio de tolerancia de Rudolf Carnap, Weinberger postula la trascendencia de la lógica basada en el concepto de verdad.

Se debe remarcar que el "conservadurismo conceptual" solo es trazado en los citados trabajos de Weinberger. El principio de tolerancia de Carnap refiere a la elección de una sintaxis y fue formulado en el período en que la lógica era reducida a la sintaxis. Desde los años 30 dentro de la lógica estamos en el período de la semántica. En particular, cualquier sistema lógico debe ser investigado desde la perspectiva de la plenitud semántica y esta última ni siquiera puede ser formulada fuera de la teoría de modelos. Weinberger entonces debería extender el principio de Carnap a la semántica. Sin embargo, así surge el ya mencionado problema de una semántica para la lógica de normas. Hasta no ser resuelto dicho problema se pueden tener dudas justificadas acerca de la lógica de normas, y estas dudas no pueden ser tratadas como "conservadurismo conceptual". De nuestra parte consideramos poco probable el éxito de una "nueva" semántica, porque la definición de satisfacción conduce a la de verdad de forma natural y no es fácil ver cómo puede conducir a otro lugar.

Weinberger también ofrece algunos argumentos particulares en relación con la lógica de normas; algunos de ellos apuntan a la falta de idoneidad de la lógica deóntica y, por esta razón, son utilizados para justificar la necesidad de una lógica de normas separada. En la discusión de estos argumentos que prosigue, dejaremos de lado los problemas relativos a los permisos, con los que ya hemos lidiado en otros trabajos.[8]

8 Opałek & Woleński 1973: 169–185 y 1986: 83–88; Woleński 1980a: 507–510.

3.1. Weinberger afirma que la inconsistencia dentro de los sistemas normativos no puede ser reducida a la inconsistencia de enunciados deónticos. Asumamos que en el sistema normativo S tenemos dos normas OA y O¬A. Esta situación puede ser descrita por medio de los enunciados (a) y (b):

(a) "A es obligatorio en S".

(b) "A está prohibido en S".

Ambos enunciados son verdaderos, aunque las normas OA y O¬A son contradictorias. De todas formas, es evidente que dos enunciados verdaderos no pueden ser contradictorios. Pero la validez de este argumento aún depende de mostrar cómo esta situación puede ser manejada por la lógica de normas, ya que tenemos en el sistema S dos normas contradictorias, a las que debe adscribirse "valores lógicos" diferentes. ¿Cómo puede hacerse eso cuando las dos normas pertenecen al mismo sistema normativo? Por el momento, no es claro el condicionamiento de la lógica deóntica por la lógica de normas. No obstante no queremos dejar el argumento de Weinberger sin comentar. En nuestra opinión, la dificultad no está conectada con la lógica deóntica, sino con el concepto de sistema normativo. La lógica preceptúa una concepción según la cual el sistema normativo es consistente. Ello parece estar en contra de la frecuente situación de regulaciones inconsistentes en el interior de los sistemas normativos. Sin embargo, ¿estamos obligados a reconocer sistemas normativos inconsistentes? Asumamos que un juez tiene a su disposición un sistema jurídico con las normas OA y O¬A. Si aplica OA, y se le pregunta por qué no tomó en consideración O¬A, él seguramente responderá diciendo que O¬A es inválida; y viceversa, cuando él aplique O¬A, dirá que OA es inválida. Se podría decir que en esta instancia existen *de facto* dos sistemas normativos. Entonces, o bien (a) es verdadero, o bien (b) es verdadero, pero nunca ambos pueden ser verdaderos al mismo tiempo. Por otro lado, de la lógica deóntica se sigue que un conjunto contradictorio de enunciados deónticos implica cualquier enunciado, lo que muestra las consecuencias de reconocer como verdaderos a enunciados deónticos contradictorios.

3.2. El segundo argumento de Weinberger que deseamos discutir refiere a las denominadas normas sancionatorias. Asumamos (c) y (d):

(c) "A es obligatorio."

(d) "Si ¬A entonces debe ser *s*."

Aquí *s* representa una sanción. Pero, cuando se asume la denominada semántica de mundos perfectos, no existe un mundo tal en el que tanto A como ¬A sean verdaderos. Ahora, de (c) y (d) se sigue (e):

(e) "Debe ser *s*."

Sin embargo, esta consecuencia no puede ser verdadera en ningún mundo perfecto, porque ¬A es falso en cualquiera de tales mundos. Consecuentemente, las normas sancionatorias no tienen razón de ser en lógica deóntica. Es desconocido nuevamente cómo esta dificultad sería superada por la lógica de normas proyectada por Weinberger. Por nuestra parte, solo podemos intentar mostrar qué debería hacerse en lógica deóntica, sin afirmar que acá se brindan soluciones no problemáticas. El enunciado (e) es, de acuerdo con la semántica de mundos perfectos, verdadero en el denominado mundo real si y solo si el enunciado ¬A → *s* es verdadero en cualquier mundo perfecto. Observemos que ¬A es falso en cada uno de aquellos mundos, y que el enunciado ¬A → *s* es verdadero. Esa podría ser la respuesta al problema de Weinberger, si no fuese el caso que cualquier otro enunciado que adscriba a ¬A cualquier otra sanción sería verdadero, lo cual no es una buena consecuencia bajo ningún respecto. No obstante, podemos asumir que siempre está vigente la regla que prohíbe adscribir a acciones ya prohibidas sanciones diferentes de las ya previstas. Entonces, en ningún mundo perfecto podría ser el caso que *s* esté relacionada con ¬A y que cualquier otra *s* fuese verdadera. Además, no vemos fundamentos para deducir (e) de ninguna premisa; de hecho, (e) como norma considerada aisladamente no tiene ninguna justificación. Si no se aceptase este razonamiento, entonces se podría hacer uso de la extensión de la semántica deóntica sobre los denominados mundos subideales, propuestos -entre otros- para poder lidiar con la situación de los deberes incumplidos.[9]

Resumiendo, en primer lugar, no es fácil ver en qué sentido podría la lógica de normas condicionar a la lógica deóntica y, en segundo lugar, los argumentos de Weinberger contra la lógica deóntica pueden ser refutados desde el interior de esta. Entonces, no hay suficientes argumentos para justificar la existencia de la lógica de normas.

En conexión con la presente discusión acerca del aspecto lógico del problema entre el ser y el deber ser hay que tener en consideración el concepto de "deber técnico", introducido en esta discusión por Georg Henrik von Wright.[10]

4 VON WRIGHT

Los problemas del "deber técnico", bajo distintos nombres, han sido investigados por la filosofía práctica desde tiempos pretéritos. Para nuestros propósitos no es necesario discutir diferentes puntos de vistas ni matices de estás problemáticas. Será suficiente con señalar que, acorde a la visión predominante, compartida también por von Wright, los enunciados que expresan "deberes

9 Jones & Pörn 1985: 275–290.

10 Von Wright 1985.

técnicos" son enunciados fácticos que afirman la necesidad práctica de realizar una determinada conducta como medio para lograr determinado fin; ellos son, consecuentemente, enunciados declarativos.

El "deber técnico" en la concepción de von Wright, sirve, primero, al propósito de probar que los intentos de deducir el deber del ser con que nos encontramos en la literatura actual (J.R. Searle, M. Black) están equivocados (4.1), y segundo, para superar las dificultades vinculadas a las denominadas normas hipotéticas tanto en lógica deóntica como en lógica de normas (4.2).

4.1. Respecto a lo primero, von Wright analiza la ampliamente debatida inferencia de Searle, y luego la de Black.

La inferencia de Searle es reducida a la forma del siguiente razonamiento:

Premisa I. Quien promete se ubica a sí mismo bajo la obligación de cumplir dicha promesa.

Premisa II. A promete hacer *p*.

Conclusión: A debe hacer *p*.

Von Wright afirma que cuando se acepta la visión de Searle de que ambas premisas son enunciados fácticos, la conclusión no expresa el deber genuino, sino que el deber técnico de la necesidad práctica, i.e., que al menos que p sea hecho, la promesa no se materializará; entonces la conclusión también es un enunciado fáctico, lo que significa que la deducción del deber a partir del ser es solo aparente. Se debe observar que la distinción entre prescripción y descripción presente en el lenguaje natural, en el cual el razonamiento en cuestión es expresado, presenta dificultades.[11] Tanto la premisa I como la conclusión pueden ser interpretadas de forma distinta. De todas formas, en los contextos estándar la conclusión significaría: "A prometió hacer *p*, por lo que él debe hacer *p*" (un deber genuino), y no: "A prometió hacer *p*, por lo que hacer *p* por parte de A es un medio necesario para cumplir la promesa" (deber técnico). La solución de von Wright no se ajusta al significado estándar de la conclusión y, por lo tanto, no ofrece una oposición convincente a la argumentación de Searle.

Por otra parte, se podría considerar el carácter del razonamiento objeto de la discusión. Si está basado en la denominada lógica informal, entonces, de hecho, no es un razonamiento sino una manipulación verbal que toma ventaja de la vaguedad del lenguaje ordinario. Sin embargo, si es entendido como un razonamiento deductivo, entonces sabemos de antemano que el objetivo de Searle es inalcanzable, puesto que no podemos tener en la conclusión lo que no está contenido en las premisas. Se debería interpretar o bien "deber hacer *p*" en conformidad con la premisa I como "se ubica a sí mismo bajo la obligación de hacer *p*"

11 Stuhlmann-Laeisz 1983: 24.

(en sentido descriptivo), o bien interpretar esta última expresión en la premisa I como "deber hacer *p*" (en sentido prescriptivo). En el primer caso la deducción del deber a partir del ser se viene abajo, en el segundo caso se convierte en una deducción del deber a partir del deber y del ser (el así llamado razonamiento mixto, justificado sobre la base de intuiciones por algunos autores, pero controvertido debido a la falta de una bases teóricas para tal justificación). De forma similar, en la interpretación de von Wright habría que incluir el deber técnico tanto en la conclusión como en la premisa I; ciertamente ello nos desviaría del problema planteado por Searle, pero no sería una forma artificial de introducir el deber técnico.

Los autores que justifican los razonamientos mixtos objetan que el razonamiento de Searle contiene una norma escondida sobre el deber de cumplir las promesas. Esta refuta la deducción del deber a partir del ser y la reemplaza por la deducción del deber a partir del deber y del ser. Sería aún más simple poner en duda el estatus de enunciado fáctico de la premisa I, ya que -como se testifica en la formulación de algunas reglas jurídicas- bajo una estilización similar pueden ocultarse prescripciones (así, "se ubica a sí mismo bajo una obligación" puede significar "está obligado a..."). Sin embargo, se debe observar que el estatus de la conclusión, de la premisa I y de la premisa normativa supuestamente escondida, sigue sin estar claro, debido a que están todas formuladas en lenguaje natural. Aún cuando se adoptase la visión de que contienen un deber genuino, podrían ser interpretadas como normas o como enunciados deónticos (entendiendo el deber en sentido descriptivo). En este último caso, todo el razonamiento no sería una inferencia del deber a partir del ser (o del deber a partir del deber y del ser). Eso también es observado por von Wright.

Si se asume que el razonamiento emplea el deber prescriptivo, entonces, en una interpretación correcta de su totalidad, se tiene que reconocer como un razonamiento mixto de la forma del así llamado silogismo práctico. Si ambas premisas son interpretadas como enunciados declarativos, entonces la conclusión tendría el mismo carácter y no sería una deducción del deber a partir del ser (o del deber a partir del deber y del ser). Tal deducción tiene lugar cuando, en conformidad con la aceptación del carácter prescriptivo de la conclusión, también es interpretada prescriptivamente la premisa I. Ello no satisface a Searle, quien desea de premisas declarativas deducir solo deberes. Ello tampoco satisface a von Wright, debido al carácter lógicamente sospechoso del razonamiento mixto; de ahí, su introducción del deber técnico.

El razonamiento de Max Black, más sencillo que el de Searle, es el siguiente:[12] "A y B están jugando ajedrez. A intenta hacer un jaque mate a B. Por lo que ahora debe hacer el movimiento... La situación es tal que a no ser que él haga

12 Black 1964; repr. en Black 1970.

ese preciso movimiento no tendrá posibilidad de ganar el juego". En este caso la crítica de von Wright es pertinente: estamos hablando de un deber técnico y la deducción del deber (genuino) a partir del ser es aparente. Sin embargo, al mismo tiempo, no hay una similitud esencial entre ambos razonamientos (el de Searle y el de Black) y no puede haber una solución crítica común para ambos.

Si se desea tratar el ejemplo de Black en analogía estricta con el de Searle, entonces solo se podría decir que en la situación dada -tal como en cualquier otra- A tiene el deber de realizar uno de los movimientos permitidos según las reglas del ajedrez (un deber genuino). Lo que aquí se denomina "situación" tiene un estatus igualmente sospechoso que las premisas de Searle, porque debe ser interpretado como:

Premisa I. Quien decide jugar ajedrez se ubica a sí mismo bajo la obligación de obedecer las reglas del juego ajedrez.

Premisa II. A decide jugar ajedrez, con todas las dudas concernientes al carácter de la premisa I y de la conclusión. De este modo, el deber técnico no ofrece una solución para el razonamiento "corregido" de Black, tal como tampoco lo hacía en el caso de Searle.

El deber técnico falla como medio para "rectificar" los razonamientos mixtos a los que pueden ser reducidos finalmente tanto el argumento de Searle como el argumento "corregido" de Black y, en este respecto, la concepción de von Wright queda abierta a la duda. Posiblemente "rectificar" no es un término adecuado en esta instancia, ya que más bien se ha intentado mostrar que el carácter mixto de dichos razonamientos es aparente -lo que, no obstante, no ha sido probado.

4.2. Permanece el segundo problema del deber técnico como una categoría indispensable en lógica deóntica, en vista de las dificultades con que se encuentra esta lógica en la interpretación semántica de los formalismos de las denominadas normas hipotéticas. La posición que parece ser adoptada es que el deber técnico es un dispositivo que suplementa las modalidades deónticas, entendidas en sentido tradicional, de la obligación, la prohibición y la permisión; en este caso trataríamos con una lógica deóntica extendida mediante el operador del deber técnico. Sin embargo, la exposición en este punto no está desarrollada hasta el nivel de poder estar seguros de la corrección de tal interpretación y de poder evaluar tal versión extendida de la lógica deóntica.

El enriquecimiento del aparato conceptual hasta hora en uso por medio de la introducción del deber técnico no resuelve nuestro problema fundamental: el de la existencia de la lógica de normas; aún así están vigentes los puntos de vista I y II (en ambas interpretaciones).

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Permítasenos remarcar que, hasta ahora, la discusión en torno al objeto en cuestión revela un supuesto aceptado por ambas partes contendientes. El supuesto es el siguiente:[13]

(L) Las normas son enunciados lingüísticos.

El supuesto (L) puede ser considerado como una tesis característica de la teoría lingüística de las normas. De hecho, (L) vuelve al problema particularmente agudo, especialmente para el no-cognoscitivista. Este tiene que reconocer que existen normas compuestas por normas simples y conectivas idénticas a las constantes lógicas normales, y que existen razonamientos cuyos componentes son normas. Y cuando las normas existen como enunciados lingüísticos y algunas de sus relaciones parecen ser lógicas, se vuelve difícil explicar estos hechos. La situación es dramática para el punto de vista (I), ya que habría una "lógica sin lógica"; la situación es más fácil para ambas versiones de (II), pero -como hemos tratado de mostrar- estas se basan en supuestos dudosos. Ahora surge la pregunta de por qué no decidirse simplemente por el cognoscitivismo, ya que el argumento del abismo entre el deber ser y el ser no prueba demasiado. Sin embargo, tenemos la intención de poner en duda (L), que también es aceptado por el cognoscitivismo, mientras que el no-cognoscitivismo sin (L) parece ser un punto de vista esencialmente correcto. Volvamos por un rato al no-cognoscitivismo con (L). Este punto de vista permite considerar a las normas desde las perspectivas sintáctica y pragmática, pero niega características semánticas en las normas; ya que si las normas tuvieran su propia semántica también tendrían su propia lógica. Las normas concebidas como enunciados indudablemente tienen su sentido lingüístico y son comprendidas, lo que hace a la falta de una semántica de normas algo peculiarmente extraño. Pero esta falta no es algo fortuito en absoluto, como lo muestra el análisis de (II).

La refutación de (L), que nos dirige a una concepción no lingüística de las normas, es una medida radical que elimina el problema por completo, porque si las normas no son enunciados lingüísticos, entonces no hay nada extraño en el hecho de que no haya lógica de normas.

5 LA CONCEPCIÓN NO-LINGÜÍSTICA DE LAS NORMAS

Hay argumentos que hablan en favor de una concepción no-lingüística de las normas. Evidentemente la eliminación del problema de la lógica de normas no puede ser el único. Se necesita de una justificación independiente de este

13 Woleński 1980b: cap. III y 1982: 65–73; Opałek 1987.

efecto. Hemos presentado esta justificación en otros trabajos, aquí repetiremos y complementaremos algunos de nuestros argumentos.[14]

Por ejemplo, cuando los juristas analizan el lenguaje del derecho generalmente no están dispuestos a afirmar que las normas son un objeto directo de análisis. Estarían de acuerdo, más bien, en que los enunciados que analizan expresan normas. Sin embargo, este no es un punto de partida inequívoco, porque se puede afirmar que son los significados (normas en un sentido lógico como análogas a las proposiciones en sentido lógico) los que se expresan por medio de los enunciados respectivos. Por diversas razones que aquí no desarrollaremos, no queremos considerar a las normas como significados de enunciados de deber. Un mejor punto de partida es considerar aquellas situaciones en que alguien habla de establecer normas, de obedecerlas o de la validez de las mismas. Es claro que en esas situaciones no se quiere decir que enunciados o, siquiera, significados de algunos enunciados sean establecidos, obedecidos o que son válidos.[15] Decir que alguna gente obedece y otra incumple normas como enunciados es contradictorio con la gramática del lenguaje con el que hablamos de normas. Por otra parte, aceptamos sin dificultad que se diga que las órdenes o decisiones son establecidas, obedecidas y válidas. Y este es precisamente el motivo de tal construcción del concepto de norma, en el cual la norma no es un enunciado.

5.1. En este punto, la concepción no lingüística de las normas se tropieza con la teoría de los realizativos de John L. Austin. En esta teoría se distingue un tipo de enunciados, denominados realizativos, y se los estudia en conexión con los actos que los acompañan. Aún más lejos llega la teoría de los actos de habla de Austin, considerando a todos los enunciados oracionales como realizativos, i.e. enunciados con fuerza ilocucionaria. De todas formas, desde nuestro punto de vista, la solución de Austin es incompleta, ya que los realizativos son actos y enunciados al mismo tiempo, mientras que nosotros queremos distinguir explícitamente entre los realizativos como actos y los enunciados realizativos. Para nosotros los realizativos son siempre actos de alguien en el sentido de la psicología descriptiva de Brentano y, hablando más estrictamente, en el sentido de la distinción de Twardowski entre actos y los productos de dichos actos.[16] Tales actos son, entre otros, hacer preguntas, dar órdenes, decidir en una u otra forma y juzgar, y los productos de estos actos son preguntas, órdenes, decisiones y juicios, respectivamente. Diciéndolo explícitamente: la pregunta es lo preguntado, la orden es lo ordenado; la decisión es lo decidido y el juicio es lo juzgado; en este sentido preguntas, órdenes, decisiones y juicios no son enunciados.

14 Hay una similitud entre la concepción no-lingüística de las normas y la así llamada concepción expresiva de las normas presentada por Alchourrón & Bulygin (1981: 95–124).

15 Black 1962: 100 ss.

16 Twardowski 1977.

Ahora, cuando alguien desea expresar una pregunta, una orden, una decisión o un juicio, tiene que utilizar un enunciado específico. Es tema de un análisis posterior responder a la pregunta de si el enunciado utilizado para expresar el resultado de un determinado acto es también resultado de este último o es el resultado de otro acto; esta pregunta no será respondida acá. Como una pregunta es siempre la pregunta de alguien, la orden es la orden de alguien, la decisión es la decisión de alguien y el juicio es el juicio de alguien, no hay nada extraño en el hecho de que los enunciados que expresan preguntas, órdenes, decisiones y juicios tengan la forma que Austin consideró como característica de los realizativos (dentro de su concepción): Estoy preguntando (ordenando, decidiendo, juzgando, etc) tal y tal cosa. Nosotros afirmamos que normar es una especie de acto, norma es el producto de ese acto, y enunciado normativo es la expresión de la norma. No es necesaria acá una caracterización más precisa del acto de normar. Será suficiente con decir que la norma es siempre una decisión. Y así, como enunciado normativo reconocemos al enunciado de tipo: Estoy normando tal y tal cosa; este es el enunciado normativo básico. El enunciado normativo obviamente tiene un carácter realizativo. Ahora, la pregunta central es: ¿Es el enunciado realizativo un enunciado en el sentido lógico? Austin contesta negativamente y contrasta realizativos con constatativos. Solamente el último puede ser -en su opinión- considerado desde el punto de vista de la verdad y la falsedad, mientras que los realizativos son considerados desde el punto de vista de efectividad e inefectividad. Nuestra posición es diferente. Nosotros afirmamos que la efectividad y la inefectividad son cualificaciones de los realizativos dentro de nuestra concepción (i.e. actos), y que los enunciados realizativos son siempre verdaderos o falsos. Negar esto (como lo hace Austin) se debe, en nuestra opinión, al hecho de que no se hace una clara distinción entre enunciados declarativos y enunciados descriptivos. Cuando digo "Estoy ordenando que...", ciertamente no estoy describiendo qué es lo que estoy haciendo, declaro hacerlo. Se puede decir que el enunciado realizativo es verdadero si y solo si el realizativo respectivo es efectivo.

Consideremos ahora un enunciado de deber, i.e. una oración de deber. ¿Qué significa tal enunciado? Desde el punto de vista de una concepción no-lingüística de la teoría de las normas significa o que el hablante lo ha utilizado como enunciado normativo básico, o que ha indicado que él u otra persona ha realizado previamente el respectivo acto de normar; en este último caso podemos hablar de enunciados normativos secundarios. De todas formas, en cada uno de los casos el enunciado normativo es verdadero o falso, i.e. es un enunciado deóntico. Se sigue de esto que no hay una doble interpretación del deber -descriptiva y prescriptiva-, sino solo la descriptiva. También podemos asumir que el formalismo de la lógica deóntica es aplicable tanto a los enunciados normativos primarios como a los secundarios; no podemos dar un contraejemplo que

indique que alguna ley de la lógica deóntica es aplicable a enunciados normativos primarios y no a un enunciado normativo secundario, o viceversa.

5.2. ¿Cómo resuelve la concepción no-lingüística de las normas el problema discutido anteriormente relativo a los puntos de vista (I) y (II)? Podemos aceptar (I), ya que cuando las normas no son enunciados, la lógica de normas no existe. Cualquier "razonamiento normativo" es ahora interpretado como un razonamiento sobre enunciados deónticos; los razonamientos mixtos, a su vez, están compuestos de enunciados deónticos y de enunciados no-deónticos. La lógica deóntica está condicionada por normas porque los enunciados deónticos son verdaderos o falsos dependiendo de la existencia de los respectivos actos de normar; en la semántica de lógica deóntica este hecho es expresado por medio de la suposición de que los valores lógicos de los enunciados deónticos dependen de la denominada relación de alternatividad deóntica. La lógica deóntica está condicionada por normas (y no por la lógica de normas) porque si no existiesen normas como productos de actos de normar, entonces la lógica deóntica sería innecesaria, dado que todo sería indiferente y probablemente nadie concebiría la idea de considerar el problema del ser y el deber ser.

La interpretación dualista del formalismo deóntico, propuesta por algunos autores, también tiene su contraparte en la teoría no-lingüística de las normas, dado que este formalismo puede ser aplicado tanto a enunciados normativos primarios como secundarios. De este modo, la concepción no-lingüística es capaz de resolver los problemas que necesitan resolución.

Consideremos ahora un problema de naturaleza general. La concepción antes presentada se basa en el supuesto de que en el lenguaje solo se pueden encontrar enunciados en el sentido lógico[17]. ¿Qué se debe hacer entonces con enunciados interrogativos e imperativos? En nuestra opinión, estos son abreviaciones de los enunciados realizativos respectivos. No se sigue de esto que no hay necesidad de introducir distinciones lógicas dentro de la única categoría general de los enunciados declarativos.

Es opinión común que cualquier enunciado en un sentido lógico expresa un proposición, i.e. un juicio en un sentido lógico. Ello parece contradecir nuestra distinción de juzgar como una categoría de actos. Reivindicamos que juzgar como acto tiene como producto el juicio en sentido psicológico. Consecuentemente, no se presenta una inconsistencia con la tesis de que cualquier enunciado expresa un juicio en el sentido lógico, ya que simplemente el término "juicio" aquí tiene un doble sentido.

Por último, la cuestión de la relación entre la concepción no-lingüística de las normas con el cognoscitivismo y el no-cognoscitivismo. A primera vista podría parecer que es una concepción cognoscitivista, ya que los enunciados nor-

17 Alchourrón & Bulygin 1983.

mativos se consideran verdaderos o falsos, y el deber es interpretado solo descriptivamente. Sin embargo, debemos observar que el cognoscitivismo consiste en adscribir valores de verdad a normas como enunciados. En consecuencia, la concepción no-lingüística de las normas no puede caer bajo tal definición de cognoscitivismo. La concepción en cuestión es no-cognoscitivista porque supone que normar es un tipo de acto distinto que juzgar. Diremos: las normas no son productos de actos de juzgar. Esta es, en nuestra opinión, una formulación adecuada de lo que es el abismo entre el ser y el deber ser.[18]

Una observación adicional. Después de terminar este trabajo tuvimos la oportunidad de conocer el reciente trabajo de Ota Weinberger (1986) que contiene una crítica detallada de algunas posturas que ponen en duda a la lógica de normas (Jørg Jørgensen, Karl Engiš, Hans Kelsen, Carlos E. Alchourrón y Eugenio Bulygin, Georg H. von Wright). El análisis de dicha crítica excede al objeto del presente artículo. En cuanto a las sugerencias positivas de Weinberger (1986: 77–79) se puede decir que el autor se limita, como antes, a presentar postulados muy generales advirtiendo la necesidad de una nueva semántica especial de normas. Parece ser, además, que Weinberger (1986: 58) ha cambiado levemente su posición respecto a la relación entre lógica deóntica y lógica de normas. Él ahora sostiene que la primera es, en principio, superflua porque solo sería una repetición de la lógica de normas genuina. Sin embargo, esta postura sería plausible solo si la lógica de normas tuviera una base semántica suficiente, lo cual, como hemos señalado, no resulta ser el caso. Por esta razón mantenemos nuestro "escepticismo lógico-normativo".

Traducido del ingles por
Sebastián Figueroa Rubio.[**]

18 Hay cierta similitud entre nuestra distinción entre los actos de normar y juzgar y la distinción de Kelsen entre *Denk-* y *Willensakte*, comp. Kelsen 1979: Cap I, VIII, XLII, XLIV.

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Kenneth Einar Himma*

Logika dokazivanja mogućnosnih tvrdnji

Pozitivan argument u korist uključnog pravnog pozitivizma i moralnih temelja prava

U ovome radu zagovaram stajalište koje uključni pozitivisti dijele s Ronaldom Dworkinom. Prema tezi o uključenosti morala (TUM), logički je moguće da pravni sustav uključuje moralne kriterije pravnosti (ili, kao što to Dworkin kaže, „temelje prava"). Do ovoga trenutka rasprava je uvijek imala oblik napada na koherentnost TUM-a, pri čemu su branitelji TUM-a samo pokušavali osporiti napadajući argument. Ja u prilog TUM-u iznosim pozitivan argument, koji započinjem objašnjenjem logike dokazivanja mogućnosnih tvrdnji kao što je to TUM. Pritome na samom početku vrijedi istaknuti da se logika dokazivanja mogućnosnih tvrdnji umnogome razlikuje od logike dokazivanja kontingentnih deskriptivnih tvrdnji ili nužnih tvrdnji. Zbog toga će ovdje biti potrebno dati neka pojašnjenja važnih obilježja semantike modalne logike. Nakon prikladne razrade strukturnog okvira, argument u prilog TUM-a bit će zasnovan na iznenađujuće jednostavnom mislenom eksperimentu. Zapravo, argument pronalazi svoje nadahnuće u Razovom argumentu u prilog mogućnosti postojanja pravnog sustava koji se ne temelji na prisilnoj mašineriji izvršavanja prava; prema njemu, društvo anđela i dalje bi imalo sustav prava, iako u tom sustavu ne bi postojala prisilna mašinerija. Moj argument sadržavat će dvije teorijski važne značajke koje sadrži i Razov snažno jednostavan, ali u konačnici neuspješan argument.

Ključne riječi: moral, pravo, temelji prava, kriteriji valjanosti, uključni pozitivizam, isključni pozitivizam, Dworkin, prirodno pravo

1 UVOD

U ovome radu zalažem se za stajalište koje uključni pozitivisti dijele s Ronaldom Dworkinom i zagovornicima jake prirodnopravne struje:

Teza o uključenosti morala (TUM): Logički je moguće da pravni sustav uključuje moralne kriterije pravnosti[1] (ili, kao što to Dworkin kaže, „temelja prava").[2]

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1 Kriterije pravnosti nazivat ću i „kriterijima prava". Nekoć su kriterije pravnosti pozitivisti obično nazivali „kriterijima valjanosti".

2 Naravno, Dworkin i prirodnopravni teoretičari iznose snažniju tvrdnju o odnosu između temelja/kriterija prava, odnosno da je logički nemoguće da postoji pravni sustav *bez* moralnih temelja/kriterija prava.

Ovdje vrijedi istaknuti da se TUM-om iznosi vrlo slaba tvrdnja. TUM-om se ne stvara čak niti dojam da se išta želi izreći o *zbiljskim* (ili postojećim) pravnim sustavima. Prvo, TUM-om se ne ustvrđuje niti sugerira da u *zbiljskome* svijetu (tj. logički mogućem svijetu koji nastanjujemo, a koji je jedan od neprebrojivo beskonačno mnogo logički mogućih svjetova[3]) pravni sustavi postoje, postojali su ili će ikada postojati. Drugo, TUM-om se ne ustvrđuje niti sugerira išta o vjerojatnosti postojanja takvih sustava – izuzev tvrdnje da ta vjerojatnost nije jednaka nuli. Njime se tvrdi tek sljedeće: među neprebrojivo beskonačnim brojem logički mogućih svjetova barem je jedan logički moguć svijet u kojemu postoji nešto što se smatra „pravnim sustavom" s moralnim temeljima prava. Odnosno, TUM-om se ustvrđuje ono što ću nazvati „mogućnosnom tvrdnjom".

Započet ću s objašnjenjem logike dokazivanja mogućnosnih tvrdnji, poput TUM-a. Na samome početku vrijedi istaknuti da se logika dokazivanja mogućnosnih tvrdnji uvelike razlikuje od logike dokazivanja kontingentnih opisnih tvrdnji ili nužnih tvrdnji. Zbog toga će ovdje biti nužno dati neko objašnjenje važnih obilježja semantike modalne logike. Jednom kad se strukturni okvir na odgovarajući način razradi, argument u prilog TUM-u zasnivat će se na iznenađujuće jednostavnom mislenom eksperimentu. Zapravo, argument crpi nadahnuće iz Razova argumenta u korist mogućnosti postojanja pravnog sustava bez prisilne izvršne mašinerije; prema njemu, društvo anđela moglo bi imati sustav prava iako ne postoji nikakva prisilna mašinerija. Moj argument sadržavat će dvije teorijski važne značajke koje obilježavaju i Razov snažno jednostavan, ali u konačnici neuspješan argument.[4]

2 VRSTE TEORIJE PRAVA I TEZA O UKLJUČENOSTI MORALA

Postoji nekoliko različitih vrsta teorije prava. Empirijska teorija prava u pravilu se bavi utvrđivanjem ili objašnjavanjem određenih obilježja ili značajki postojećih pravnih sustava; takva je teorija barem po svojoj naravi opisna te se usredotočuje na kontingentne značajke pravnih sustava koji se istražuju. Primjerice, empirijska teorija prava mogla bi se baviti utvrđivanjem ili objašnjavanjem sadržaja pravnih normi kojima se u SAD-u navodno uređuje privatnost

3 Skup je *prebrojivo beskonačan* ako i samo ako se njegovi elementi mogu jednoznačno preslikati u prirodne brojeve. Skup je *neprebrojivo beskonačan* ako i samo ako je beskonačan, ali ne prebrojivo beskonačan. Intuitivna je zamisao da se svi elementi prebrojivo beskonačnog skupa mogu nabrojati (iako bi to moglo potrajati čitavu vječnost), dok je neprebrojivo beskonačan skup prevelik da bi se njegovi elementi mogli nabrojati (ili izbrojati). Čak ni svemoguće vječno biće ne može nabrojati elemente neprebrojivo beskonačnog skupa. Vidjeti, primjerice, Hrbacek & Karen 1999.

4 Za raspravu o tome zašto je Razov argument neuspješan vidi u nastavku na str. 28–29.

informacija. Slično tomu, takva bi se teorija mogla baviti objašnjavanjem funkcije kojoj navodno služi neki skup pravnih praksi u Kolumbiji. Nasuprot tomu, normativna teorija prava uglavnom se bavi određivanjem značajki koje pravne norme ili institucije moraju imati da bi bile moralno legitimne. Primjerice, normativni teoretičar prava mogao bi tvrditi da pravo, kao stvar supstantivne moralne teorije, treba zaštititi privatnost informacija na niz određenih načina ili da redarstvene snage države opravdano provode samo određene vrste zaštite privatnosti informacija.

Međutim, pojmovnim teorijama prava pokušava se pristupiti temeljnom pitanju koje normativne i opisne teorije prihvaćaju zdravo za gotovo – a to je pitanje utvrđivanja naravi prava kao takvog – te se njima stoga pokušava odgovoriti na pitanje „Što je to pravo?" Pojmovne teorije pokušavaju identificirati ona obilježja i značajke koji prema *našem* pojmu prava čine narav prava kao takvog pa tako razlikuju entitete koji se valjano mogu okarakterizirati kao „pravo" od entiteta koji se ne mogu valjano okarakterizirati kao „pravo". Te teorije u pravilu izražavaju ili podrazumijevaju pojmovno nužne uvjete glede toga što se smatra pravom te se općenito mogu podvesti pod sljedeću shemu:

> U bilo kojem društvu s pravnim sustavom *S* nužno postoji skup uvjeta *c1*, *c2*, …, *cj*, takvih da za bilo koju normu *N*, *N* je pravo u društvu *S* ako i samo ako *N* ispunjava uvjete *c1*, *c2*, …, *cj*.

Pozitivisti i prirodnopravni teoretičari uvjetima *c1*, …, *cj* (gdje *j* predstavlja arbitrarni prirodni broj) pridaju različite nazive, od „kriterija pravnosti", „kriterija pravne valjanosti" do „kriterija valjanosti". Ronald Dworkin naziva ih „temeljima prava". Ja ću te izraze koristiti naizmjence, pod pretpostavkom da razlike koje među njima postoje, ma kakve one bile, nisu od važnosti za argument ovoga rada.

U svezi s tim temeljnim problemom redovito postoje tri glavna problema. Prvo, potrebno je objasniti imaju li temelji prava nužno status prava; pozitivizam, primjerice, smatra da temelji prava jesu pravo, ali nisu pravno valjani. Drugo, ako je tomu tako, potrebno je objasniti zašto temelji prava imaju status prava; pozitivist tvrdi da konvencionalno pravilo priznanja kojim se definiraju temelji prava ili kriteriji pravne valjanosti ima status prava na temelju toga što ga u praksi primjenjuju oni koji u pravnom sustavu izvršavaju funkciju nositelja pravne vlasti. Treće, potrebno je objasniti uvjete postojanja za pravni sustav; pozitivizam smatra da pravni sustav postoji kad postoji konvencionalno pravilo priznanja koje u praksi primjenjuju nositelji pravne vlasti te kada se građani uglavnom pokoravaju zakonima pravno valjanima na temelju pravila priznanja.

Neki od najvažnijih sporova u području pojmovne teorije prava tiču se pitanja postoji li pojmovni odnos između temelja prava i moralnih načela – spor koji je započeo prije mnogo godina između pozitivista Jeremyja Benthama i klasičnog prirodnopravnog teoretičara Tome Akvinskoga i koji se i danas vodi

između neoprirodnopravnih teorija, Dworkinova konstruktivizma, uključnog pozitivizma i isključnog pozitivizma. Pravni pozitivizam zapravo je nastao kao odgovor na prirodnopravno stajalište prema kojem nepravedni zakoni ne mogu postojati zato što postoje nužni moralni kriteriji pravne valjanosti – nužni u smislu da vrijede za sve moguće pravne sustave, ograničavajući u svakome od njih sadržaj prava. Pravni pozitivisti, počevši s Johnom Austinom i Jeremyjem Benthamom, tu su snažnu tezu osporavali, prihvativši kao dio temelja svoje teorije tezu o odvojivosti: prema tezi o odvojivosti ne postoje pojmovno nužni moralni temelji prava (ili kriteriji valjanosti). Prema pozitivistima, pravo i pravni sustavi društveni su artefakti koje stvaraju ljudi – a artefaktno svojstvo institucija i normi proteže se takoreći do najniže razine, do temelja prava. Kako je to iznio H. L. A. Hart, „to da zakoni reproduciraju ili zadovoljavaju određene zahtjeve morala, iako su to zapravo često činili, nije ni u kojem smislu nužna istina."[5]

I dok i dalje postoje nesuglasice glede pitanja uključuju li *nužno* temelji prava moralna načela, znatan dio nedavne rasprave u pojmovnoj filozofiji prava o teorijski istaknutim odnosima između prava i morala bio je usredotočen na to je li *moguće* da temelji prava uključuju moralna načela. Korijeni te rasprave, koja je postala središnjim pitanjem među pravnim pozitivistima tijekom posljednjih petnaest godina, mogu se pronaći u Dworkinovim utjecajnim ranim kritikama pravnoga pozitivizma. U razdoblju od sredine do konca 1970-ih, Dworkin je tvrdio da pravnom pozitivizmu nedostaju sredstva kojima bi objasnio ulogu koju u sudskom rasuđivanju i odlučivanju imaju moralni standardi i rasuđivanje. Kako on to (ponešto zavaravajuće) kaže u „Modelu pravila II":

> Njihovo podrijetlo kao pravna načela ne leži u određenoj odluci nekog zakonodavnog tijela ili suda, nego u osjećaju prikladnosti koji se s vremenom razvio u struci i javnosti. Njihova kontinuirana snaga ovisi o održavanju tog osjećaja prikladnosti. Kada se više ne bi činilo nepravičnim ljudima dopustiti da ostvare korist od protupravnih djela koja počine ili pravičnim oligopolima koji proizvode potencijalno opasne strojeve nametnuti posebne terete, ta načela, čak i ako od njih nikada nije bilo odstupljeno ili nikada nisu bila ukinuta, u novim predmetima više ne bi bila od neke važnosti.[6]

Prema Dworkinu, pravnici i suci svoje argumente redovito temelje na moralnim načelima koja status prava imaju ne zato što su bila formalno ili službeno proglašena nego zbog svojeg *moralnog* sadržaja.

U pogledu toga kako odgovoriti na Dworkinov argument pozitivisti su se podijelili. Isključni pozitivisti, poput Josepha Raza, Scotta Shapira, Andreia

5 Hart (1996: 185–186).

6 Dworkin (1977: 40–41). Ovdje kažem „zavaravajuć" zbog toga što kaže da ta moralna načela imaju status prava jer praktičari *vjeruju* da sadržaj odražava objektivne zahtjeve morala. U svojim kasnijim radovima Dworkin, čini se, smatra da ta moralna načela imaju status prava na temelju svojeg logičkog odnosa sa zahtjevima objektivnog morala.

Marmora i Briana Leitera, odbacili su dworkinijansku tvrdnju da ta moralna načela imaju status prava na temelju svojega sadržaja. Isključni su pozitivisti tako prihvatili i branili tezu o izvorima kojom se osporava mogućnost postojanja pravnih sustava s moralnim kriterijima pravne valjanosti. Uključni pozitivisti, poput Julesa Colemana, Matthewa Kramera, Wilfrida Waluchowa i mene, prihvaćaju ono što ću nazvati tezom o uključenosti morala, a koju ću ponoviti u ponešto izmijenjenom izričaju:

> **Teza o uključenosti morala (TUM)**: Postoji logički moguć pravni sustav u kojemu temelji/kriteriji prava (ili kriteriji pravne valjanosti) uključuju neke moralne norme.

Iako taj izričaj redovito koriste uključni pozitivisti, njega prihvaća i stanovit broj drugih teoretičara: isto stajalište dijele i istaknuti prirodnopravni teoretičari poput Tome Akvinskoga i Blackstonea (ako je logički nužna istina da temelji/kriteriji prava uključuju moralne norme, logično slijedi TUM), neki neoprirodnopravni teoretičari i Ronald Dworkin. Istina je da svaki od tih teoretičara ponešto snažnije zagovara tvrdnju o pojmovnom odnosu između morala i temelja/kriterija prava; međutim, ta snažnija stajališta logički podrazumijevaju slabiju tvrdnju uobličenu kao TUM.

Važnosti rasprave dodatno je pridonijela pojava stajališta koja se smještaju između pravnog pozitivizma i najsnažnijeg oblika prirodnopravne teorije, koji se tradicionalno tumači kao osporavanje teze o odvojivosti. Ta važna nova stajališta uključuju Dworkinovu zrelu „treću teoriju prava" i neoprirodnopravna stajališta poput onoga Marka Murphyja, prema kojemu je logički nužno da su zakoni moralno problematičnog sadržaja manjkavi *qua* pravo. Razvoj tih suparničkih stajališta potiče trajnu raspravu o tome je li TUM istinit.

Naravno, TUM je pojmovna tvrdnja – i k tome vrlo slaba. Ona se ne tiče onoga što je nužno ili čak zbiljsko, a što bi je učinilo djelomično empirijskim pitanjem; ona se tiče onoga što je *moguće*. Njome se samo tvrdi da je za pravni sustav logički *moguće* da ima moralne temelje prava; drugim riječima, tvrdi se da su naši pravni pojmovi konzistentni s postojanjem moralnih temelja valjanosti – a ta je tvrdnja na meti, primjerice, Razova argumenta o vlasti (autoritetu) kojim se osporava logička kompatibilnost moralnih temelja prava s pojmom pravne vlasti (autoriteta). Tvrdnje o tome što je samo logički, metafizički ili pojmovno moguće posebno je teško braniti. Kako bi se ta vrsta tvrdnje dokazala, treba dokazati da je moguće smisleno zamisliti pravni sustav s moralnim temeljima prava. To uključuje dokazivanje da postojanje pravnoga sustava s moralnim temeljima prava nije protuslovno ni samome sebi ni drugim ključnim doktrinama teorije prava. Mogućnosne ili koherentnosne tvrdnje poput ovih teško nalaze potporu u pozitivnim argumentima. Stoga se vodi rasprava u kojoj zagovornik stajališta da je moralno utemeljenje prava nemoguće daje argumente kojima želi dokazati da je postojanje takvih temelja logički nekonzistentno s nekom drugom vjerojatnom pojmovnom istinom o pravu.

U tom pogledu rasprava nalikuje raspravi o logičkoj koherentnosti samoga pojma svesavršenoga Boga. Netko tko odbacuje stajalište da je taj pojam koherentan obično iznosi argumente u prilog navodnoj pojmu implicitnoj nekonzistentnosti: primjerice, tvrdilo se da biće ne može istodobno biti savršeno milosrdno i savršeno pravično: savršena pravednost uvijek zahtijeva (kako po prilici glasi argument) da se prema osobi postupi onako kako ona to zaslužuje, dok savršeno milosrđe zahtijeva da se prema osobi ponekad postupi manje strogo nego što to ona zaslužuje. Prema mojem saznanju, teistima nedostaje pozitivan argument u prilog konzistentnosti svih relevantnih pojmova sadržanih u složenom pojmu bića koje oprimjeruje takvo savršenstvo te se stoga usredotočuju na pobijanje argumenata kojima se ustvrđuje nekonzistentnost pojma svesavršenoga Boga. Razlog tomu jest činjenica da je vrlo teško iznijeti pozitivan argument u prilog tvrdnji da su te ideje konzistentne; nedostaje nam neposredan osjećaj glede toga koje su to tvrdnje koherentne jer se nekonzistentnost može pritajiti duboko ispod površine. Zato se struktura ovoga spora između onih koji prihvaćaju TUM i onih koji ga osporavaju obično podudara sa strukturom rasprave o koherentnosti pojma svesavršenoga Boga.

Kao što bi i trebalo biti očitim, mogućnosne se tvrdnje teško podupiru pozitivnim argumentima. Tvrditi da je stanje stvari *S* moguće jest tvrditi ništa jače od sljedećega: skup propozicija koje iscrpno opisuju *S* logički je konzistentan ili, drugim riječima, nije sebi protuslovan. Tvrdnja, dakle, da je neko stanje stvari moguće izražava, u biti, logičku tvrdnju o skupu rečenica koje iscrpljuju opis svih teoretski istaknutih obilježja *S*-a – odnosno da taj skup rečenica ne sadrži rečenice koje podrazumijevaju logičko proturječje.

To ne bi smjelo biti uzrokom nikakve zabune: riječ je o jednostavnoj primjeni načela u temeljima semantike mogućega svijeta koju pretpostavljaju standardni sustavi modalne logike. Zapravo, mogući svijet redovito se definira kao maksimalno konzistentan skup rečenica.[7] Skup rečenica *S* je *maksimalan* u odgovarajućem smislu ako i samo ako, za svaku propoziciju *p*, *S* sadrži jednu rečenicu koja je ili *p* ili ne-*p*. Skup rečenica *S* je konzistentan ako i samo ako nije slučaj da *S* logički implicira proturječje. Stoga, mogući je svijet skup rečenica koji sadrži jednu koja je ili *p* ili ne-*p*, za svaku propoziciju *p*, i koji logički ne implicira proturječje. Pozitivan argument u prilog tvrdnji da je moguće da *p* – shematski oblik mogućnosne tvrdnje – zahtijeva dokazivanje postojanja maksimalno konzistentnog skupa rečenica koji sadrži *p*.

Prema tome, uspješan pozitivan argument u prilog TUM-a mora biti uobličen tako da dokazuje postojanje maksimalno konzistentnog skupa rečenica koji uključuje propoziciju da za neki institucionalni sustav *L*, *L* je pravni sustav koji ima moralne temelje prava. To zahtijeva dokazivanje da ne postoji nikakvo logičko proturječje između (1) tvrdnje da je *L* sustav prava (sa svime što to pret-

7 Za klasičan i još uvijek koristan tekst o modalnoj logici vidi, npr., Chellas 1980.

postavlja u smislu pojmovno povezanih tvrdnji, primjerice, o vlasti (autoritetu), obvezi itd.) i (2) tvrdnje da *L* ima moralne temelje prava.

3 USTROJ RASPRAVE IZMEĐU UKLJUČNOG I ISKLJUČNOG POZITIVIZMA

Do sada je ponuđeno malo pozitivnih argumenata u prilog TUM-u – a svaki od njih bio je neuspješan. Rasprava bi uglavnom, prisjetit ćemo se, poprimala oblik argumenata u smislu da ne postoji nikakav konzistentan skup propozicija koji bi sadržavao sljedeće propozicije: (1) skup propozicija koji ispravno opisuje uvjete postojanja prava; (2) propoziciju da je, za neki entitet *L*, *L* pravni sustav; i (3) propoziciju da *L* ima moralne temelje/kriterije prava. Razov se argument temelji na tvrdnji da skup definiran pod (1) uključuje propoziciju da pravo pretendira na legitimnu vlast (autoritet) kao i propozicije koje izražavaju njegovo uslužno shvaćanje vlasti (autoriteta). Njegov argument glasi da je institucionalan sustav normi koji bi uključivao, takoreći, moralne temelje za članstvo u sustavu, *logički nekonzistentan* s ispunjenjem, od strane toga sustava, skupa definiranog pod (1). Prema Razu, problem je u tome što je postojanje moralnih temelja prava nekonzistentno s pojmovnom pretenzijom prava na vlast (autoritet). Slično tomu, Shapirov argument glasi da skup definiran pod (1) sadrži takozvanu tezu o praktičnoj važnosti.[8] Struktura njegova argumenta posve je identična Razovoj: ideja je da se pokaže da je institucionalan sustav normi koji uključuje moralne temelje/kriterije za članstvo *nekonzistentan* sa skupom definiranim pod (1). Prema Shapiru, problem je u tome što su moralni temelji/kriteriji prava logički nekonzistentni s tvrdnjom da je pravo sposobno biti od praktične važnosti.

Uključni pozitivisti uglavnom su branili TUM pokušavajući na pojedinačnoj osnovi pokazati da je svaki takav „argument o nekonzistentnosti" neuspješan jer se argument u pitanju oslanja na lažnu premisu, bila ona izričita ili prešutna. Uključni pozitivisti, a među njima i ja, branili su TUM od Raza dokazujući da se Razov argument oslanja na lažne tvrdnje o naravi prava ili naravi vlasti (autoriteta).[9] Naime, obrana od Raza temelji se na pokušaju pobijanja jedne ili više od sljedećih triju ideja: (1) pravo nužno pretendira na vlast (autoritet); (2) autoritativne smjernice pružaju prednosne (preemptivne) razloge za djelovanje; ili (3) vlast (autoritet) je opravdana samo ukoliko njezine smjernice točnije identificiraju što bi subjekt trebao učiniti u skladu s pravim razlogom od subjektove vlastite ocjene razloga.[10] Isto tako, uključni pozitivisti branili su TUM

8 Shapiro (1998: 469–507).

9 Vidi Raz 1994.

10 Raza sam kritizirao u pogledu određenog broja tih pretpostavki. Vidi, primjerice, Himma 2001a, Himma 2007a, Himma 2007b i Himma (2001b: 61–79).

od Shapirova argumenta osporavajući ili (1) to da pozitivizam uključuje tezu o praktičnoj važnosti; ili (2) to da teza o praktičnoj važnosti implicira da se u svojim razmatranjima suci vode i pravilom priznanja i relevantnim prvorazinskim normama koje uređuju ponašanje građana.[11]

Od ključne je važnosti primijetiti da su u oba slučaja te obrane uključnih pozitivista „negativne" u smislu da se njima pokušava dokazati da su ti argumenti o nekonzistentnosti neuspješni – odnosno, ti negativni argumenti ograničavaju se na dokazivanje da određeni argumenti protiv TUM-a ne stoje. To vrijedi primijetiti jer, strogo govoreći, takvi argumenti ne pružaju apsolutno *ništa* u smislu pozitivne potpore TUM-u. Razlog tomu jednostavno su osnove logike: tvrdnja da je neki argument pogrešan ne pruža nikakav razlog za smatranje zaključka argumenta pogrešnim. Ono što to znači jest da se tim argumentima uspijeva dokazati tek da TUM nije dokazan pogrešnim. Nijedan od tih argumenata sam po sebi ne daje ikakav razlog smatrati da je TUM istinit jednostavno zato što to *ne može* po pravilima osnova logike.[12] Dokazati, primjerice, da nije istina da pravo nužno pretendira na legitimnu vlast (autoritet) samo po sebi ne pruža nikakav razlog smatrati da bi mogli postojati moralni temelji prava. Pregled literature navodi na zaključak da je golema većina radova objavljenih tijekom posljednjih petnaest godina koji brane TUM uključivala iznošenje ove vrste negativnih argumenata. U prilog TUM-u ponuđeno je vrlo malo pozitivnih argumenata.

4 IZNOŠENJE POZITIVNOG ARGUMENTA U PRILOG MOGUĆNOSNOJ TVRDNJI

Isključivo obrambeni stav uključnih pozitivista mogao bi se na prvi pogled doimati zbunjujućim; međutim, razlog zašto je rasprava poprimila ovaj oblik jednostavno je shvatiti jednom kada postane jasno što bi uključivalo osmišljavanje uspješnog pozitivnog argumenta. Kao što se ispostavilo, stvarni je problem, u biti, u shvaćanju logike relevantnih modaliteta koje nije dovoljno dobro da bi se učinilo ono što je potrebno za osmišljavanje pozitivnog argumenta u prilog TUM-u. Pretpostavljam da je ljudima kojima nedostaje obuke u metafizici prilično teško posve shvatiti narav raznih metafizičkih tvrdnji kao i koja bi

11 Vidi Himma (2000: 1–43).

12 Time se ne želi navesti na pomisao da ti negativni argumenti ne mogu tvoriti osnovu pozitivne obrane TUM-a; ako bi se uspjelo dokazati da je svaki od tih argumenata pogrešan i da ti argumenti iscrpljuju sve moguće logičke sukobe između naravi prava i postojanja moralnih temelja prava, tada bi se moglo zaključiti da je TUM istinit. No ovdje je ključno istaknuti da ova pozitivna obrana zahtijeva nešto više od samih zaključaka negativnih argumenata. Ona osim toga zahtijeva i novu premisu u smislu da postojeći argumenti obuhvaćaju sve moguće napetosti – a to bi, naravno, zahtijevalo *pozitivnu* obranu te nove premise.

to metodologija bila ispravna, što je, naravno, tema o kojoj se i vodi spor. Kada se jednom u razgovor uvedu modaliteti kao što su nužnosni operator (odnosno, nužno je da *p* ili, simbolički, □*p*) i mogućnosni operator (odnosno, moguće je da *p* ili, simbolički, ◊*p*), logički standardi na kojima se temelji deduktivni argument postaju znatno kompliciraniji – a ta složenost odražava analognu složenost metafizike kao zasebne discipline. A ovdje možda treba shvatiti – što se često, možda baš zato što je ta misao tako očita ili nepotrebna, previđa – da je pojmovna filozofija prava ništa doli metafizika prava.

Ovdje je korisno ponovno razmotriti pitanje koherentnosti pojma svesavršenoga bića – što je, treba primijetiti, i metafizičko pitanje. Relevantna ateistička tvrdnja je da ne postoji (da zapravo *ne bi mogla postojati*) stvar koja ispunjava uvjete postojanja za savršenstvo jer su neki od tih uvjeta logički nekonzistentni s drugim uvjetima. Kao što je, primjerice, prethodno istaknuto, tvrdilo se da savršeno milosrđe i savršena pravednost ne mogu biti istodobno oprimjereni u jednome biću jer su kriteriji za bivanje savršeno pravednim logički nekonzistentni s kriterijima za bivanje savršeno milosrdnim. Kao što sam, međutim, također prethodno istaknuo, teistima nedostaje pozitivan argument kojim bi se neposredno osvrnuli na pitanje konzistentnosti tako što bi dokazali da su sva savršenstva takoreći logički kompatibilna. Iako, naravno, postoje argumenti u prilog postojanju Boga (primjerice, takozvani argument inteligentnog dizajna), oni nisu neposredno usmjereni na koherentnost pojma svesavršenoga bića. Naravno, ukoliko je jedan od tih argumenata uspješan u dokazivanju postojanja svesavršenoga Boga, logično proizlazi da je pojam koherentan. Međutim, tim se drugim argumentim čak ni ne pokušava neposredno upustiti u osporavanje ateističkih argumenata o nekonzistentnosti.

Razlog razmjernom nedostatku pozitivnih argumenata u prilog koherentnosti pojma svesavršenoga Boga jest taj da su uz neposredno zagoravanje mogućnosnih tvrdnji (odnosno, u ovome slučaju, da je moguće da biće oprimjeruje obje savršenosti) vezane posebne poteškoće. Teško je uvidjeti kako bi se to točno mogao iznijeti pozitivan argument u prilog relevantnoj mogućnosnoj tvrdnji. Kako bi se to, primjerice, uopće počelo dokazivati da je moguće da neko biće istodobno bude i svemoguće i sveznajuće? Iako bi se moglo činiti očitim da je barem to moguće, tomu je tako zato što ne možemo uvidjeti kako bi ta dva svojstva mogla postati nekonzistentna. Ako bi nas to, posve razumno, moglo navesti da posumnjamo u postojanje bilo kakve takve konzistentnosti, naša nemogućnost da zamislimo kako bi ta dva svojstva mogla doći u sukob ne pruža nikakvu znatnu pozitivnu potporu tvrdnji da ona *ne* dolaze u sukob.[13] Ako promislimo o tome kako pristupiti davanju pozitivnog argumenta kojim bi se

13 Ta je tvrdnja poduprta brojnim primjerima. Nismo mogli shvatiti kako bi, primjerice, Euklidov postulat o paralelama mogao biti suprotan Einsteinovoj teoriji relativnosti koja pretpostavlja neeuklidijanski postulat o paralelama.

dokazalo da su navedena dva svojstva konzistentna, vjerojatno ćemo ostati bez odgovora – što objašnjava zašto se struktura rasprave o tome je li moguće da neko biće oprimjeruje sva savršenstva (odnosno, je li pojam svesavršenoga bića koherentan) podudara sa strukturom rasprave o tome je li moguće da pravni sustav ima moralne temelje prava. Problem je taj što može biti, a često i jest, vrlo teško uvidjeti kako dokazati da su dvije apstraktne propozicije konzistentne.

Ako se filozofima to čini iznenađujućim, u drugim akademskim disciplinama to se prihvaća zdravo za gotovo. Općepoznato je da dokazivanje mogućnosne tvrdnje predstavlja posebne teškoće u čistoj matematici. Jedno pitanje koje se u kontekstu proučavanja određenog formalnog aksiomatskog sustava u matematici, kao što je to teorija skupova, redovito javlja, jest je li skup aksioma konzistentan; i ako jest, može li se konzistentnost toga skupa dokazati. Postoje dva moguća teorema o konzistentnosti – jedan jači i stoga poželjniji od drugoga. Najpoželjniji ishod bio bi dokaz da je skup aksioma *apsolutno konzistentan*, a to je ono što redovito imamo na umu kada kažemo da je neki skup propozicija konzistentan. Ono što je potrebno da bi se dokazala apsolutna konzistentnost skupa aksioma jest tumačenje svih simbola formalnog jezika aksiomatskog sustava u kojemu su aksiomi isitiniti; takvo je tumačenje poznato kao *model* za skup aksioma.

Od presudne je važnosti primijetiti odnos između pronalaska modela za skup aksioma i davanja pozitivnog argumenta u prilog TUM-u. Intuitivno, ideja koja stoji iza matematičkog projekta jest protumačiti simbole jezika tako da se može stvoriti koherentna priča u kojoj su svi protumačeni aksiomi očito istiniti. To je analogno onome što moramo učiniti kod davanja uspješnog pozitivnog argumenta u prilog TUM-u. Ako se može proizvesti model za aksiome odgovarajućeg matematičkog sustava, tada slijedi da su aksiomi konzistentni – odnosno, da *postoji neki mogući svijet u kojemu su svi aksiomi istiniti*. Ako zagovornik TUM-a može proizvesti koherentnu priču u kojoj nešto što je očito pravni sustav (prema odgovarajućoj teoriji) također očito sadrži moralne temelje prava, tada je to dovoljan dokaz toga da je postojanje moralnih temelja prava konzistentno s odgovarajućom teorijom prava – odnosno, da *postoji neki mogući svijet u kojemu postoji pravni sustav s moralnim temeljima prava*. Drugim riječima, ako zagovornik TUM-a može proizvesti takav „model", tada je to dovoljno za dokazivanje TUM-a na temelju, kako sam to nazvao, pozitivnog argumenta.

Intrigantno je da se u matematici ishodi koji predstavljaju apsolutnu konzistentnost vrlo teško ostvaruju zato što se pokazalo odvraćajuće teškim izgraditi nešto što očito služi kao model za odgovarajuću matematičku teoriju.[14] Razlozi tomu djelomično se tiču činjenice da se pojam „konzistentnosti" koristi u svim

14 Vidi, primjerice, „Equiconsistency," na: <http://en.wikipedia.org/wiki/Equiconsistency>. Ovdje je dostatno citirati Wikipediju zato što ništa od navedenoga nije ni izdaleka sporno.

matematičkim teorijama. U matematici ne postoji neko arhimedsko stajalište prema kojemu je moguće proizvesti analizu toga je li neki skup konzistentan, a kojom se ne pretpostavlja neki element sustava u pitanju: standardi kojima se definira pojam konzistentnosti (namjerna igra riječima) konzistentno se primjenjuju u svakoj standardnoj matematičkoj teoriji. Međutim, drugi se razlog zasigurno tiče poteškoća vezanih uz pokušaj da se *ni iz čega* izgradi tumačenje simboličkog jezika i model kojim bi se jasno dokazala konzistentnost sustava (čak i kad bismo mogli formulirati test konzistentnosti izvan razmatranoga sustava). Ova je priča mnogo složenija i spornija nego što bi se iz navedenoga dalo naslutiti, no dovoljno je vjerojatno da ukazuje na problem s kojim su suočeni teoretičari svake discipline koji (dokazivanjem ishoda koji predstavljaju apsolutnu konzistentnost) nastoje dokazati mogućnosnu tvrdnju.

Stoga je mnogo češće slučaj da se matematičari moraju zadovoljiti dokazivanjem onoga što se naziva *relativnom konzistentnošću*. Zamisao je da se uzme skup aksioma, S, koji se, intuitivno gledajući, čini jasnije konzistentnim i pokuša dokazati da su aksiomi razmatranog sustava, T, teoremi S-a. Dokaz da su aksiomi T-a aksiomi S-a dokazuje da je T u sljedećem smislu *konzistentan s obzirom* na S: ako je S konzistentan, tada je T konzistentan. U golemoj većini slučajeva relativna konzistentnost je ono najbolje što se može postići; štoviše, nije moguće dokazati čak ni da je matematika apsolutno konzistentna.

Kao što se iz prethodnoga da naslutiti, vjerojatno ne postoji nikakvo sveobuhvatno, pristupačno teorijsko objašnjenje, koje bi osim toga osiguralo i konsenzus, glede toga zašto se ishodi koji predstavljaju apsolutnu konzistentnost u matematici postižu tako teško; ali, kao što smo već vidjeli, moguće je steći grubu sliku zašto bi to moglo biti točno. Možda nije moguće doći do preciznog teorijskog objašnjenja zašto se u filozofiji prava ishodi koji predstavljaju konzistentnost teško podupiru pozitivnim argumentima. Ali možemo donekle shvatiti složenost koja obilježava izradu modela kojim bi se potvrdio TUM.

5 PRVI POKUŠAJ PRUŽANJA POZITIVNOG ARGUMENTA U PRILOG TUM-U

Jedna primamljiva pomisao je da postoji mnogo lako dostupnih modela postojećih pravnih sustava i da se bilo koji od tih postojećih pravnih sustava može koristiti za dokazivanje da su moralni temelji prava mogući. Na kraju krajeva, trivijalna je istina – barem prema svakom standardnom sustavu modalne logike koji je neposredno primjenljiv na filozofsku analizu – da za sve propozicije *p, p* logički implicira $\Diamond p$. Ako se može dokazati da neki postojeći pravni sustav ima moralne temelje prava, tada *a fortiori* slijedi da je moguće da pravni sustav ima moralne temelje prava, što je upravo ono što se izražava TUM-om.

Ta strategija pokazala se mnogo manje privlačnom nego što se to čini zbog razloga koji, kao što će biti pokazano, objašnjavaju zašto sam prihvatio povezani, ali izravniji pristup pronalasku modela za TUM. Ovdje vrijedi istaknuti da će me taj pristup dovesti do izrade modela koji bi se mnoge čitatelje, nevične modalnoj logici, mogao dojmiti kao neprihvatljivo pojednostavljen, nevjerojatan i inače problematičan i neobećavajuć. Međutim, kao što ćemo u nastavku vidjeti, taj je dojam netočan i utemeljen na pogrešnom shvaćanju logike i metodologije one vrste izrade modela koja je ponuđena u ovome radu.

U svojoj opravdano utjecajnoj knjizi *Inclusive Legal Positivism* Wil Waluchow prihvaća tu strategiju u onome što je možda jedini postojan pokušaj davanja pozitivnog argumenta u prilog TUM-u. Waluchow je pronašao ono što je pretpostavio da je jasan model za TUM u pravnim praksama povezanima sa supstantivnim jamstvima kanadske Povelje. Tvrdio je, primjerice, da se suci, odlučujući o pitanjima koja proizlaze iz tih jamstava, redovito utječu moralnim načelima te da su ta moralna načela pravno obvezni primjenjivati. Na temelju tih praksi zaključuje da je kanadski pravni sustav pravni sustav s moralnim kriterijima valjanosti i da je stoga TUM istinit.

Problem s Waluchowovom analizom je u tome što ona pretpostavlja sporno tumačenje tih pravnih praksa. Moralna načela na koja se suci pozivaju u slučaju teških poveljnih predmeta Waluchow – neargumentirano – tumači kao prethodno postojeća načela koja imaju status prava; sudac u takvim poveljnim predmetima *otkriva* sadržaj prava definiranog Poveljom. Suprotno tomu, isključni pozitivist tumači takvo pozivanje kao sudsko izvršavanje kvazipravotvorbene diskrecije da se zađe onkraj prava pri *izumljivanju* (ili stvaranju) novoga prava. Kao što to Stephen Perry ustvrđuje:

> Nakon što je podosta iskomplicirao prilično očitu stvar da sudska mišljenja u poveljnim predmetima uključuju moralno rasuđivanje, Waluchow pokušava dokazati da moralni standardi korišteni u poveljnim predmetima, izvedeni iz, primjerice, odjeljka 7. Kanadske Povelje o pravima i slobodama (pravo na život, slobodu i osobnu sigurnost) ili prvog amandmana na američki Ustav (sloboda govora i okupljanja), barem ponekad imaju ulogu testova za postojanje ili sadržaj valjanih zakona. Kad bi se to moglo dokazati, uključni bi se pozitivizam pokazao istinitim, a isključnom bi se pružio protuprimjer. Waluchow tvrdi da isključni pozitivizam raspolaže „samo jednom očitom mogućnošću" da objasni poveljne izazove, to jest idejom da se u odredbi kao što je odjeljak 7. Kanadske povelje ne izlažu pravni kriteriji valjanosti, nego se jednostavno upućuje na izvanpravne, moralne kriterije „kojima su se suci dužni ili slobodni uteći" (157). No isključni bi pozitivist zapravo mogao reći više od toga jer bi se mogao pozvati na Waluchowov pojam presuđivačke vlasti ili dužnosti na određene načine odlučivati o poveljnim predmetima. Iako Waluchow to ne spominje, Raz na uglavnom sličan način karakterizira slučajeve kontrole ustavnosti pri tome se koristeći svojim pojmom usmjerene vlasti.[15]

15 Perry (1996: 367).

Iako je Perry nedvojbeno u pravu što to smatra problemom, on s ovdje iznesenim Waluchowovim argumentom ne razotkriva posve i narav problema.

Perry, čini se, vjeruje da je problem samo onaj spornoga tumačenja – a to je problem koji Waluchow pokušava otkloniti tvrdnjom da je uključno tumačenje poveljnih praksa nadmoćnije pristupu isključnih pozitivista. Kao što Perry opisuje Waluchowove sljedeće korake u argumentu:

> Waluchow kritizira ono što smatra najboljim mogućim objašnjenjem isključnih pozitivista po tri glavne osnove: (i) ono odbacuje opće shvaćanje poveljnih odredaba kao ukorijenjenih temeljnih prava koja su po svojoj naravi pravna, a ne samo moralna; (ii) ono je protivno jeziku koji se često koristi u samim ustavima, poput odredbe u čl. 52. st. 1. kanadskog Ustavnog zakona prema kojoj je svaki zakon koji nije u skladu s Ustavom bez pravne snage ili učinka; i (iii) ono ne može objasniti tako lako kao što to može objašnjenje uključnih pozitivista retroaktivni učinak poveljnih izazova. Zbog tih razloga Waluchow zaključuje da povelje i zakoni o pravima stvaraju „subjektivna prava čiji sadržaj djelomično ovisi o moralnim razmatranjima" (162).[16]

Onako kako Perry objašnjava problem, Waluchowov postupak čini se jedinim razumnim postupkom. Waluchow treba dokazati da je tumačenje uključnih pozitivista sukladnije odgovarajućim poveljnim praksama nego tumačenje isključnih pozitivista; a to je upravo onaj postupak opisan u gore citiranome tekstu.

Perry ne dovodi u pitanje legitimnost te strategije; odnosno, on ne daje nikakav dodatan odgovor na Waluchowovu tvrdnju da će tumačenje poveljnih praksa isključnih pozitivista biti obilježeno problemima opisanima pod (i), (ii) i (iii) u gornjem odlomku.

Umjesto toga, Perry odgovara na druge Waluchowove kritike tumačenja isključnih pozitivista za koje Waluchow vjeruje da dokazuju da je tumačenje uključnih pozitivista sukladnije poveljnim praksama nego tumačenja isključnih pozitivista. Kao što to Perry ustvrđuje:

> Jedan od Waluchowovih argumenata u prilog tumačenju uključnih pozitivista je da objašnjenje isključnih pozitivista odbacuje opće shvaćanje prema kojemu su poveljna prava po svojoj naravi pravna, a ne samo moralna (158-59). Međutim, isključni pozitivist može prisvojiti Waluchowov pojam presuđivačkih subjektivnih prava, koji je ovaj razvio u sklopu svoje na izvorima temeljene koncepcije *common lawa* u 3. poglavlju, i tvrditi da, iako poveljna subjektivna prava možda nisu strogo govoreći pravna subjektivna prava, ona nisu ni samo moralna; ona su presuđivačka subjektivna prava koja građani imaju u odnosu na sudove. (Kao što je ranije istaknuto, Raz zapravo čini upravo taj korak, koristeći svoj vrlo sličan pojam usmjerene vlasti.) Drugi Waluchowov argument u prilog objašnjenja sudske kontrole ustavnosti uključnih pozitivista jest da se njime retroaktivni učinak poveljnih predmeta objašnjava bolje nego objašnjenjem isključnih pozitivista (160-62). Međutim, i predmeti kojima se ukidaju precedenti *common lawa* obično imaju retroaktivni učinak pa bi ono što bi Waluchow poželio reći o

16 Perry (1996: 367).

retroaktivnosti u tom kontekstu, u sklopu na izvorima temeljene koncepcije *common lawa* koju razvija u 3. poglavlju, vjerojatno moglo poslužiti isključnim pozitivistima u obrani na izvorima temeljenog tumačenja sudske kontrole ustavnosti.[17]

To ostavlja dojam da se spor između isključnih i uključnih pozitivista može riješiti jednostavno usredotočimo li se na određeni pravni sustav i u okviru njega sagledamo koja vrsta tumačenja bolje odgovara praksama. Time se, čini se, pretpostavlja da bi takvo što, da je Waluchow uspio dokazati da je tumačenje uključnih pozitivista usklađenije s poveljnim praksama od tumačenja isključnih pozitivista, bilo dovoljan dokaz u prilog TUM-u.

To možda i jest opće stajalište, no ono se temelji na pogrešnom shvaćanju same biti modalne naravi TUM-a i onoga što ta narav zahtijeva u smislu pozitivne potpore. Čak i ako je TUM, kao što to isključni pozitivisti vjeruju, netočan, svejedno bi se mogla proizvesti koherentna tumačenja koja se u nekom smislu logički temelje na TUM-u – i vjerojatna (pod pretpostavkom da ne znate da je TUM netočan).

Što to omogućava? Razlog tomu nužno nije očita stvar da iz kontradikcije proizlazi bilo koja propozicija, što bi bilo točno u pogledu tvrdnje da neki pravni sustavi moralne temelje valjanosti imaju ako je TUM netočan. Niti je razlog nužno taj da TUM sadrži toliko proturječnih načela da se može odabrati neki preferirani skup skrojen usko kako bi podupro svaku propoziciju – to je, naravno, osnova za tvrdnju kritičke pravne škole da je pravo tako globalno neodređeno da suci u teškim predmetima uz pomoć naoko racionalnih argumenata mogu doći do bilo koje od dviju proturječnih presuda. Razlog je uži: taj što se i dalje mogu iznaći prihvatljiva tumačenja koja proizlaze iz TUM-a, a koja ne proizlaze niti (1) *iz same kontradikcije ako je TUM netočan* niti (2) iz one vrste neodređenosti za koju teoretičari kritičke pravne škole vjeruju da rezultira gotovo posve nesputanom diskrecijom donošenja odluka jer je s obzirom na to da postoje mnogobrojne sukobljene vrijednosti koje objašnjavaju globalnu neodređenost prava moguće opravdati svaku odluku.

Na prvi bi se pogled to moglo učiniti neprihvatljivim, no upravo je iznalaženje prihvatljivog tumačenja utemeljenoga na TUM-u ono što je Waluchow učinio s poveljnim praksama. Perry nije čak ni pokušao dokazati da je Waluchowovo uključno tumačenje poveljnih praksa nekonzistentno ili nekoherentno. Umjesto toga, Perry je identificirao relevantnu poveljnu praksu i dao isključno tumačenje čija je koherentnost s tim praksama, tvrdilo se, podjednako dobra kao Waluchowovo uključno tumačenje. Međutim, čak i kad bi Perry iznašao isključno tumačenje koje je s odgovarajućim praksama koherentnije, iz toga ne bi slijedilo da uključni pozitivisti ne mogu iznaći koherentno tumačenje ni jedne određene poveljne prakse. Činjenica da je jedno tumačenje koheren-

17 Perry (1996: 379).

tnije s odgovarajućom pojavom ne implicira da je neko drugo nekoherentno. Koherentnost je stvar stupnja. Niti činjenica da je jedno tumačenje prihvatljivije implicira da je neko drugo neprihvatljivo. Jedna teorija jednostavno bi mogla biti prihvatljivija od druge. Prihvatljivost je, kao i koherentnost, stvar stupnja.

Međutim, to je također obilježje mogućnosnih tvrdnji u matematici; uvijek je moguće da ono što se *čini* modelom kojim se dokazuje mogućnost svijeta u kojemu su relevantni aksiomi svi točni zapravo uopće nije model za aksiome. Podsjetimo se, za aksiomatske sustave u matematici, uključujući one koji tvore temelj svog deduktivnog rasuđivanja – to jest, matematičku logiku – gotovo je nemoguće proizvesti ishode apsolutne konzistentnosti. Razlog je epistemološki: nemamo nikakvu arhimedsku točku iz koje bismo ocijenili uspijeva li putativno i prihvatljivo tumačenje modelirati relevantne aksiome. Činjenica da se tumačenje čini prihvatljivim i koherentnim konzistentna je s njegovom netočnošću. Osim toga, to je konzistentno s nekonzistentnošću tumačenja *pod uvjetom da se nekonzistentnost teško uočava.*

Štoviše, mi možemo znati da je teorija nekonzistentna, ali imati opravdanje za primjenu različitih elemenata te teorije na određene pojave u svijetu. Primjerice, fizika je podijeljena na dvije analitički zasebne teorije: (1) teoriju vrlo velikoga (to jest, teoriju relativnosti) i (2) teoriju vrlo maloga (to jest, kvantnu mehaniku). S obzirom na njihovu sposobnost predviđanja, ni jednoj ni drugoj u povijesti fizike nema premca. Međutim, općepoznato je da su te dvije teorije međusobno *nekonzistentne* u uobičajenome smislu da obje ne mogu biti istinite. Doista, to je ono što motivira neprestanu potragu za „jedinstvenom teorijom svega," potragu koja se neko vrijeme bila usredotočila na teoriju struna. No unatoč svemu tome, teorija relativnosti i teorija kvantne mehanike koriste se za tumačenje, objašnjenje i predviđanje fizičkih pojavaVratimo li se na spor između uključnog i isključnog pozitivizma, rezultat je sljedeći: pretpostavka Stephena Perryja da se spor između uključnog i isključnog pozitivizma može riješiti pronalaskom nekog pravnog sustava, poput onoga Kanade, s praksama koje se najbolje tumače kao uključne – što bi dokazalo postojanje uključnog pravnog sustava i tako dokazalo TUM – previđa činjenicu da bi TUM, čak i kad bi se pokazao netočnim, i dalje mogao biti izvorom prihvatljivih tumačenja. I opet, čisti matematičari i dalje izvode korisne, prihvatljive teoreme iz skupova aksioma koji bi se lako moguće mogli pokazati nekonzistentnima; doista, kao što smo vidjeli, malo je, ako uopće, modela za bilo koji skup aksioma koji bi dokazali apsolutnu konzistentnost tih aksioma. Osim toga, unatoč dokazima da su kvantna mehanika i teorija relativnosti međusobno nekonzistentne i da na ovome svijetu obje ne mogu biti istinite, fizičari i dalje izvode uobičajene rezultate i iz jedne i iz druge teorije.

Pravi problem s Waluchowovom strategijom argumentiranja seže dublje od Perryjeve tvrdnje da Waluchow nije iznašao uključno tumačenje koje bi bilo

koherentnije s postojećom poveljnom praksom od onoga koje bi mogli iznaći isključni pozitivisti. U biti, ono zbog čega je Waluchowov argument u konačnici pogrešan jest da njegovo tumačenje odgovarajućih pravnih praksi predstavlja *petitio principii*. Waluchowovo tumačenje tih praksi u konačnici počiva na pretpostavci da su moralni kriteriji valjanosti mogući; bez toga on nema čak ni *prima facie* opravdanje za takovrsno tumačenje kanadske prakse. Tumačenje je promašaj zato što isključni pozitivisti osporavaju samu koherentnost uključnih tumačenja. Kad bi postojao snažan razlog vjerovati da je TUM netočan, tada ne bi bilo ni najmanje važno koliko je privlačno neko tumačenje poveljnih praksa koje su predložili uključni pozitivisti. To bi tumačenje odmah bilo diskvalificirano kao ono koje se temelji na proturječnoj tvrdnji.

Evo još jednog načina sagledavanja toga važnog pitanja: ako već znamo da su uključni sustavi mogući, postavit će se pitanje je li ijedan postojeći pravni sustav uključni – uključujući kanadski pravni sustav. Argument koji Waluchow nudi u prilog TUM-u pružio bi prihvatljiv razlog za vjerovanje da je najbolje tumačenje kanadske pravne prakse ono koje uključuje moralne kriterije valjanosti – *ako već znamo da su moralni temelji prava mogući*. To bi se stajalište, naravno, moglo pobijati, no ono ne bi bilo osporeno Perryjevom primjedbom da isključni pozitivisti te iste prakse tumače drukčije. Ako pak već znamo da su uključni pravni sustavi mogući, tada se postavlja pitanje koje je tumačenje kanadske pravne prakse bolje. Ako je Waluchowovo tumačenje bolje (u smislu da je koherentnije s odgovarajućim pravnim varijablama), tada je to dobar razlog smatrati da Kanada ima uključni sustav s moralnim temeljima prava. Ako je u relevantnom smislu razijansko tumačenje bolje, tada je to dobar razlog smatrati da Kanada *nema* uključni sustav. Međutim, bez obzira na to koje je tumačenje bolje, zaključak ne seže ništa dalje od toga kako okarakterizirati određene prakse kanadskog pravnog sustava. Ako nemamo prethodno opravdanje smatrati da su moralni temelji prava mogući, jednostavno ne postoji nikakav razlog (a koji se ne bi sveo na *petitio principii*) smatrati da je Waluchowovo tumačenje bolje.

Iznenađujuće, ono što je s Waluchowovom strategijom zapravo pogrešno jest to da je u te prakse kanadskog pravnog sustava ugrađeno previše složenosti da bi one činile osnovu nekontroverznog modela TUM-a. TUM-om se iznosi vrlo jednostavna tvrdnja – čak i ako je to ona vrsta tvrdnje koju se, kao što sam primijetio, zbog njezine modalne naravi čini teško poduprijeti pozitivnim argumentom. Tom se tvrdnjom ustvrđuje postojanje nekog mogućeg svijeta u kojemu postoji nešto što se smatra „pravnim sustavom" s nečime što se smatra „moralnim temeljima/kriterijima prava". Pokazalo se, međutim, da slabost te tvrdnje na neki način upućuje na to kako prionuti izgradnji pozitivnog argumenta u obliku modela. Sve što je potrebno učiniti jest osmisliti *koherentnu* priču kojom se pokazuje (1) da bi mogao postojati pravni sustav (2) s moralnim temeljima prava: to su obilježja kojim se treba voditi.

6 POZITIVAN ARGUMENT U PRILOG TUM-U

To nam jasno ukazuje na to da moramo odabrati vrlo različito polazište od onoga kojega je odabrao Waluchow. Problem ne proizlazi samo iz činjenice da je Waluchow odabrao postojeći pravni sustav; problem je u tome što su poveljne prakse izrazito složene – toliko složene da uključuju previše značajki koje su kompatibilne i s uključnim i s isključnim pozitivizmom. U kanadskome pravnom sustavu jednostavno postoji previše materijala koji zamagljuju pitanja, zahtijevajući tumačenja toliko složena da sadrže mnogo ulaznih točaka za međusobno suprotstavljena tumačenja.

Potrebno je nešto daleko jednostavnije – a to od nas zahtijeva izgradnju modela od dna naviše, vodeći pritome računa da u sustav koji želimo izgraditi ne ugradimo ništa više od onoga što je razumno nužno za pružanje modela za TUM. Svaka dodatna informacija otvara logički prostor za nesuglasice i stoga međusobno suprotstavljena tumačenja. Kao što ćemo vidjeti, prihvaćanje ovoga pristupa rezultirat će modelom koji bi, barem na početku, mogao (1) djelovati pretjerano pojednostavljenim i (2) sadržavati pripisivanje subjektima svojstava koja se ne mogu prihvatljivo pripisati ljudima na ovome svijetu. U stvari, doći ćete u iskušenje da model odbacite samo zbog njegove jednostavnosti i nesličnosti sa složenostima pravnoga sustava u zbiljskome svijetu – odnosno, samo zbog oprimjerenja (1) i (2).

Međutim, u ovome trenutku trebalo bi biti jasno da bi, budući da se TUM-om iznosi tako upadljivo slaba tvrdnja – odnosno da se njime ustvrđuje samo da je pravni sustav s moralnim temeljima/kriterijima prava *moguć* – bilo pogrešno odbacivanje modela zato što oprimjeruje (1) i (2). Samom tom tvrdnjom ništa se ne kaže o tome kako bi takav pravni sustav trebao izgledati. Štoviše, njome se čak ne implicira postojanje, u nekome svijetu, uključnog pravnog sustava kojemu su podređena bića s posve istim skupom sposobnosti i svojstava koja imamo i mi. Sve što je potrebno u smislu pretpostavki o subjektima dvije su tvrdnje: (1*) subjekti su racionalni; i (2*) subjekti su sposobni da u svojemu ponašanju budu usmjeravani normama. Nije potrebno da, primjerice, bića u tom modelu (ili tim modelom opisanom mogućem svijetu) imaju iste kognitivne sposobnosti i psihološke karakteristike kao i ljudi na ovome svijetu. Štoviše, TUM-om se niti implicira niti ustvrđuje niti čak insinuira da subjekti prava moraju pripadati kategoriji ljudskih bića.[18]

18 Razlog tomu je što odgovarajućim mogućnosnim tvrdnjama, po svojoj naravi, jednostavno nedostaje ona vrsta objašnjujuće snage koja se vezuje uz, recimo, psihološke teorije. To su u konačnici metafizičke tvrdnje i teorije, a takve teorije ne mogu objasniti kontingentne događaje ni na kojem svijetu zato što su metafizičke tvrdnje navodno nužno istinite – pa su stoga istinite i na svjetovima na kojima se odgovarajući kontingentni događaji odigravaju kao i na svjetovima na kojima se ti događaji ne odigravaju. Jedini način da se problem izbjegne jest da se ustroji misleni eksperiment na način da se uklone sve sporne pretpostavke. Ukoliko se rezultirajući model čini prejednostavnim da bi bio uspješan, to će vjerojatno imati neke

Vrlo koristan primjer onoga što mnogi smatraju uspješnim modelom za mogućnosne tvrdnje, unatoč tomu što Razov model oprimjeruje (1) i (2), može se pronaći u radu Josepha Raza. Raz razmatra pitanje je li prisila nužna značajka prava; on to pitanje postavlja kako slijedi, „Je li *moguće* da postoji pravni sustav koji ne predviđa sankcije ili ne ovlašćuje na njihovo prisilno izvršenje?"[19] Indikativno je da Raz pitanje uobličuje kao njegovu negaciju: umjesto da izravno pita je li poduprtost pravnoga sustava prisilom stvar pojmovne nužnosti, on pita je li *pojmovno moguće* da se nešto čemu nedostaju mehanizmi prisilnoga izvršenja smatra pravnim sustavom.

Razlog zašto Raz pitanje uobličuje u vidu mogućnosti zamišljanja pravnoga sustava bez prisilnoga izvršenja jest da tako postavlja argument u kojemu koristi *upravo prethodno opisanu metodologiju*. Zapravo, to je gotovo pa i izrijekom rekao:

> Odgovor je, čini se, da je to ljudski nemoguće, ali logički moguće. Ljudski je to nemoguće zato što je za ljudska bića, onakva kakva ona jesu, potrebna potpora u obliku sankcija koje se, ako treba, izvršavaju prisilno, da bi se osigurao razuman stupanj usklađenosti s pravom i spriječilo njegovo potpuno urušavanje. A ipak, možemo zamisliti druga racionalna bića koja podliježu pravu, koja imaju i koja bi priznala da imaju više nego dovoljno razloga poštovati pravo bez obzira na sankcije. Raz (1999: 158–159).

Raz ovdje pretpostavlja da je jedan od valjanih načina dokazivanja da prisila nije nužna značajka prava taj da se dokaže da je moguće – koherentno – *zamisliti* pravni sustav bez mehanizama prisilnoga izvršenja. On priznaje da to, zbog nekih naših psiholoških obilježja, možda ne možemo učiniti s ljudskim bićima; međutim, to takvo što čini samo *nomološki* nemogućim (tj., nemogućim s obzirom na zakone uzročnosti u našemu univerzumu). Raz iznosi slabiju tvrdnju da je *logički moguće* imati pravni sustav. On tvrdi da je moguće zamisliti logički moguć pravni sustav bez prisilnih mehanizama, ali ne i onaj koji je nomološki moguć.

Ovdje treba iznijeti dvije primjedbe. Prvo, Raz jasno daje do znanja da će model koji gradi kao pravne subjekte sadržavati racionalna bića i da on, stoga, zadovoljava (1*); isto tako, Raz jasno naznačuje da su subjekti modela sposobni biti usmjeravani normama (odnosno, da ta bića „bez obzira na sankcije, imaju više nego dovoljno razloga da poštuju pravo") te da stoga model zadovoljava (2*). Drugo, Razovo objašnjenje njegove metodologije izrijekom naznačuje da će model oprimjeriti (2) jer će uključivati bića s psihološkim značajkama koje nedostaju ljudskim bićima – a to je jedan od dva problema koja bi se mogla

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veze s dojmom da je model koji sam proizveo prejednostavan da bi imao ikakvu objašnjujuću snagu u svjetovima kao što je naš. Međutim, to jednostavno predstavlja pogrešno shvaćanje modalne naravi TUM-a kao i logičke sposobnosti pojmovnih i metafizičkih tvrdnji da objasne značajke pravnog sustava koje su očito kontingentne.

19 Raz (1999: 158; isticanje dodano).

pojaviti u svezi s modelom uključnog pravnog sustava koji gradim u nastavku.[20] Budući da ljudskim bićima nedostaju ključna psihološka svojstva koja bi osigurala učinkovitost sustava normi u smislu usmjeravanja ponašanja, *nomološki* je nemoguće, tvrdi Raz, da postoji pravni sustav bez mehanizama prisilnoga izvršenja. Ali moguće je logički, što znači – s obzirom na njegovo stajalište da je takav pravni sustav nomološki nemoguć – da će relevantni pravni subjekti imati znatno drukčija svojstva od onih koja imaju ljudska bića. Stoga nije neobično da se argumenti u prilog mogućnosnim tvrdnjama oslanjaju na pretpostavke koje ne vrijede za ljudska bića ili druge važne pojave u zbiljskome svijetu. Raz očito priznaje da je (2) legitimno svojstvo modela kojima se u pojmovnoj filozofiji prava uspostavljaju mogućnosne tvrdnje.

Istina je, naravno, da se intuitivno utemeljenje hartijanske analize može pronaći u ovdje danim primjerima onoga što smatramo paradigmama. TUM-om se ne kaže ništa što bi ikoga trebalo navesti na pomisao da ijedan pravni sustav s moralnim temeljima ili kriterijima prava mora imati ijednu od značajki koje smatramo paradigmatskim značajkama pravnoga sustava. Pojmovni filozofi prava promatraju paradigmatske značajke pravnoga sustava zato što nam one doista ukazuju na nešto bitno o pravu: to su paradigmatske značajke jer su – za razliku od više bliskograničnog ili čak graničnog primjera – središnji primjer neke bitne značajke. Ako postoji pravni sustav koji utjelovljuje moralne temelje ili kriterije prava, on mora imati sve bitne značajke prava. Međutim, jednostavno nema razloga smatrati da ijedna od njegovih značajki mora biti paradigmatska značajka; što se pojmovne analize tiče, svaka bitna značajka takvoga pravnog sustava mogla bi, ako je to moguće, biti bliskogranična ili granična. Istina je da ih možda ne bismo prepoznali kao sustave prava zato što značajke koje su granične pripadaju značenjskoj otvorenosti pojma te su stoga epistemički neodređene. Međutim, činjenica da ne možemo utvrditi je li granična značajka zapravo bitna značajka ne implicira da granična značajka nije bitna značajka. Neki granični slučajevi pojma podpadaju pod pojam, a neki ne.

Drugi problem koji bi netko mogao postaviti u svezi s modelom koji gradim u nastavku – naime, problem glede obilježja pod (1), odnosno da je model jednostavan – javlja se i u svezi s Razovim modelom pravnoga sustava koji nema mehanizme prisilnog izvršenja. Njegov argument iskazan je u obliku modela koji zadovoljava gore razmatrana ograničenja modalne logike:

> Čak i društvo anđela može imati potrebu za zakonodavnim tijelima vlasti da bi osiguralo koordinaciju. Anđeli mogu biti sporazumni i u pogledu svojih vrijednosti i u pogledu najboljih politika za njihovu provedbu. Međutim, ona vrsta društva koje je prethodno opisano ne pretpostavlja takvu mjeru sporazumnosti. Njegovi članovi mogu nastojati ostvariti mnogo različitih i međusobno suprotstavljenih ciljeva i mogu kao i mi imati poteškoće pri rješavanju sporova i sukoba interesa uzajamnim dogovorom.

20 U nastavku ćemo vidjeti da i on zadovoljava (1).

> Od nas se razlikuju samo po tome što osjećaju univerzalno i duboko ukorijenjeno poštovanje prema svojim pravnim institucijama i što nemaju nikakvu želju kršiti njihove odluke. Stoga imaju sve one razloge koje i mi imamo za imanje tijela zakonodavne i izvršne vlasti.[21]

Sada se, kao što je prethodno spomenuto, može vidjeti da Raz stvara model koji uključuje bića sa svojstvima koja ljudskim bićima nedostaju pa stoga njegov model oprimjeruje gore navedeni pod (2). Međutim, za naše je svrhe važnija jednostavnost modela. Razov se model u cijelosti temelji na pretpostavci da je društvo anđela *logički moguće*; on jednostavno pretpostavlja postojanje koherentnog skupa koji sadrži sve druge propozicije potrebne da bi se u potpunosti opisao svijet koji je konzistentan s postojanjem društva anđela. Argument je, dakle, samo taj da će društvo anđela imati potrebu za presuđivanjem određenih sporova i rješavanjem određenih koordinacijskih problema.

Dojam jednostavnosti prilično je zavaravajuć. Mogući svijet sastoji se od koherentnog skupa koji sadrži neprebrojivo beskonačan broj propozicija: to je koherentan maksimalan skup propozicija u smislu da je za svaku moguću rečenicu *A* u svijetu istinito ili *A* ili *ne-A*. Razlog za jednostavnost modela je taj da nitko ne može navesti beskonačan broj propozicija. Stoga će se definicija modela, kao stvar *nomološke nužnosti*, sastojati od specifikacije konačnog broja propozicija i pretpostavke da postoji ostatak koherentnoga modela. Razov se model čini jednostavnim zato što on skiciranju modela posvećuje samo dva odlomka, a izričitima čini samo ključne ideje. Prihvatljiva je pretpostavka da postoji maksimalno koherentan skup propozicija (koje definiraju logički moguć svijet) koji sadrži neprebrojivo beskonačan broj propozicija. A opet, nitko ne bi mogao specificirati svaku propoziciju u beskonačnome skupu. Pitanje glede jednostavnosti je neutemeljeno jer se zasniva na pogrešnom shvaćanju logike mogućnosnog operatora.

Imajući na umu ta prethodna opažanja, model pravnoga sustava kojim se utjelovljuju moralni kriteriji pravnosti može biti oblikovan kako slijedi – pod sljedećim uvjetima i pretpostavkama. Prvo, odmah na početku pretpostavit ću da nijedan od argumenata isključnih pozitivista protiv uključnog pravnog pozitivizma nije uspio osporiti uključni pravni pozitivizam – a to je pretpostavka koja bi trebala biti prilično prihvatljiva. Takve daleko najbolje argumente dali su Joseph Raz i Scott Shapiro: dok Raz tvrdi da su moralni temelji/kriteriji prava inkompatibilni s pojmom pravne vlasti (autoriteta), Shapiro tvrdi da su moralni temelji/kriteriji prava inkompatibilni s tezom o praktičnoj važnosti. Iz oba argumenta iznikao je stanovit broj odgovora koji – u najmanju ruku – dovode u pitanje njihovu prikladnost. Iako smatram da određeni broj argumenata uspješno pobija ta dva argumenata, može se slobodno ustvrditi da je spor zašao u sli-

21 Raz (1999: 159).

jepu ulicu. Stoga je razumno pretpostaviti da TUM nije opovrgnut. Argument, naravno, ovisi o toj pretpostavci.

Drugo, taj ću argument pokušati izgraditi na način koji je kompatibilan i s (1) temeljnim tezama pravnog pozitivizma i s (2) temeljnim pretpostavkama o pravu koje su zajedničke kako pravnim pozitivistima tako i antipozitivistima. Prvi korak u argumentu usmjeren je na (1). Na temelju pozitivističke pretpostavke da su temelji prava u cijelosti određeni konvencionalnim praksama u smislu da su kriteriji pravnosti potpuno definirani društvenim pravilom priznanja, zagovaram *mogućnost* pravnoga sustava s moralnim temeljima prava pružajući model koji se zasniva na nekim vrlo neobičnim pretpostavkama.

Treće, argumentom će se specificirati samo nekoliko propozicija kojima se namjerava definirati logički moguć svijet. S tim u svezi, korisno je prisjetiti se da se mogući svijet sastoji od neprebrojivo beskonačnog broja propozicija; svemoćno biće može specificirati prebrojivo beskonačan broj propozicija, no čak ni ono ne može specificirati neprebrojivo beskonačan broj propozicija. Ljudska bića nisu sposobna specificirati čak ni prebrojivo beskonačan broj propozicija – pa čak ni dovoljno velik konačan broj propozicija. Modeli su, kako u filozofskoj tako i u matematičkoj praksi, definirani relativno malim brojem propozicija, što će i ovdje biti slučaj. To da su prejednostavni u smislu da je model specificiran malim brojem propozicija nije, kao što smo vidjeli, općenita kritika argumenata kojima se definiraju modeli.

Četvrto, i vezano uz gorenavedenu prvu točku, argument tako ovisi o pretpostavci da se specificirane propozicije konzistentno mogu spojiti s neprebrojivo beskonačnim skupom propozicija kako bi se oblikovao *maksimalno konzistentan skup* i stoga moguć svijet. Ako pretpostavka koju sam iznio u prvoj od ovih točaka nije istinita (odnosno, da nijedan od isključnih argumenata protiv TUM-a nije uspio), tada ni ova četvrta pretpostavka ne stoji. Isključnim bi se argumentima bilo pokazalo da ne postoji skup propozicija, uključujući druge propozicije o pravnom sustavu, koje se mogu spojiti s propozicijama kojima se model definira kako bi se oblikovao maksimalno konzistentan skup.

Nakon svega navedenog, slijede propozicije kojima se definira model. Za početak, postoji pojmovno moguć svijet u kojemu svi nepogrešivo razabiru zahtjeve morala, ali, u cilju promicanja vlastitih sebičnih interesa, često postupaju na načine koji su suprotni tim zahtjevima. Nadalje, u jednom takvom svijetu uspostavljen je institucionalni sustav pravila čiji je cilj urediti ponašanje građana koji postupaju tako da svoje sebične interese pretpostavljaju zahtjevima morala. Također, osnove za članstvo u tom institucionalnom sustavu pravila iscrpljene su u normi da pravni sustav sadrži sve moralne norme i samo njih. Činjenica da su svi moralno nepogrešivi znači da svatko uvijek zna što pravo nalaže u pogledu svakog pojedinog čina.

Vrijedi obratiti pozornost na odnos između tih propozicija i propozicija kojima se specificira Razov model. Oba modela pretpostavljaju da su u pogledu moralnih zahtjeva pravni subjekti *nepogrešivi*; razlika je u tome što su u Razovu modelu pravni subjekti moralno *besprijekorni* i nikada ne griješe, budući da su anđeli, dok su u mojemu modelu subjekti zainteresirani za promicanje isključivo vlastitih interesa i često griješe. Međutim, a to je osobito važno istaknuti, u oba modela pravni subjekti imaju svojstvo koje ljudska bića nemaju – naime, nepogrešivi su u pogledu zahtjeva morala. Kao što sam već ustvrdio, kad je riječ o dokazivanju mogućnosnih tvrdnji, to jednostavno nije problem.

Kao dio mojega modela potrebno je specificirati i neke dodatne propozicije. Prvo, da bi red bio održan, sustav koristi mehanizme prisilnog izvršenja koji su i sami u skladu sa zahtjevima političkog morala, što pomaže osigurati da oni koji su dovoljno pametni svoje ponašanje usklađuju s prvorazinskim moralnim normama kojima se uređuje njihovo ponašanje, čime institucionalni sustav normi biva učinkovitim usmjeravateljem ponašanja. Drugo, sporove koji proizlaze iz tih institucionalnih normi suci uvijek rješavaju ispravno.

Ključni koraci u argumentu mogu se skicirati na sljedeći način. Budući da sustav uključuje minimalan sadržaj prirodnog prava, a prvorazinske norme potvrđene temeljima toga sustava u pravilu se poštuju, sustav se smatra *pravnim sustavom*. U mjeri u kojoj suci nepogrešivo odlučuju što moral od građana zahtijeva i moralno opravdanim prisilnim mehanizmima uspješno uvjeravaju građane da se u skladu s tim normama i ponašaju, norme su, u najmanju ruku, sposobne pružiti razloge za djelovanje – a to, prema svakom razumnom objašnjenju i čine; čak i ako sadržaj prava ne daje nikakve razloge za djelovanje, neupitno je da to čine mehanizmi prisilnog izvršenja. Očito je da imamo razloga izbjeći mehanizme prisilnog izvršenja. Naposljetku, ukoliko moral tvori bešavnu mrežu, kao što se to obično pretpostavlja, ispravan je uvijek jedan odgovor do kojega uvijek dolaze te ga izvršavaju suci i čini se jasnim da temelji prava uključuju moralna načela – štoviše, da su njima iscrpljeni. Ako je to točno, tada je moguće da pravni sustav ima moralne temelje prava te da je stoga TUM istinit.

Ovdje trebam naglasiti da se ovim konkretnim argumentom ne dokazuje ništa više od mogućeg postojanja moralnih temelja prava s obzirom na određene pretpostavke o pravu i pozitivizmu. Tim se pretpostavkama definira tek vrlo uzak skup okolnosti (uključujući neke epistemičke okolnosti) pod kojima se moral može ugraditi u temelje prava.

Pa ipak, s obzirom na ono što smo spoznali o implikacijama održivog sustava modalne logike u pogledu mogućnosnih tvrdnji, argument koji sam skicirao i više je nego dovoljno jak za potrebnu svrhu. Zapravo, vrijedi podsjetiti na odnos između ovdje definiranog modela i Razovog modela kojim se želi dokazati da sankcije nisu nužna značajka prava. Za početak, Raz pretpostavlja da je

društvo anđela pojmovno moguće u svijetu koji je dovoljno sličan našemu da bi bio osnovom za argument o *našem* pojmu prava i vlasti (autoriteta). Valja, međutim, primijetiti da je nomološki nemoguće da ijedno ljudsko biće na ovome svijetu bude anđeo. Nadalje, u svoj model pravnoga sustava bez prisile Raz ne ugrađuje mnogo izričitijih pretpostavki. Pretpostavka je, a to je na prvi pogled sigurno dovoljno prihvatljivo, da sve ostalo što u pogledu toga mogućeg svijeta treba biti istinito kako bismo izveli zaključak o zbiljskome svijetu *zapravo jest istinito!* Nijedan se argument u pogledu toga čak ni ne pokušava dati – i to je dopušteno. Malo je razloga smatrati da nisu zadovoljeni drugi elementi koji su nam potrebni da bi taj moguć svijet bio na odgovarajući način srodan ovome našem.

Problem s razijanskim argumentom ne leži u metodologiji; njegova je pogreška zapravo pojmovne naravi. Problem je u tome što sustav normi koji bi bio potreban da se u društvu anđela izvrše određene koordinacijske funkcije ne bi bio sustav *prava* zbog toga što se sporovi, ma koja vlast (autoritet) bila potrebna za njihovo rješavanje, neće ticati „minimalnog sadržaja prirodnog prava"; društvo anđela ta će pravila znati i bez njihova objavljivanja, a anđeli će im prilagoditi svoje ponašanje bez potrebe da ih smatraju prednosnim (preemptivnim) razlozima. Na kraju krajeva, anđeli su, pretpostavlja se, i moralno nepogrešivi i moralno besprijekorni (odnosno uvijek postupaju ispravno).

Zbog toga, dakle, prema Razovoj vlastitoj teoriji prava i vlasti (autoriteta), „vlast" („autoritet") takvoga sustava jednostavno ne bi mogla biti pravna vlast (autoritet). Doista, teško je uvidjeti u kojem bi relevantnom smislu moglo biti istinito da „pravo" takvoga društva, ako se njime rješavaju jedino koordinacijski problemi (koji bi bili jedina vrsta problema za koju je vjerojatno da bi prouzročila sporove među anđelima), sadrži minimalan sadržaj prava. Ako je, prema tome, ta analiza razijanske tvrdnje točna, tada se model TUM-a ne bi mogao temeljiti na društvu anđela kako ga Raz opisuje – *jer bez obzira na to koji sustav normi društvo anđela imalo za rješavanje koordinacijskih problema, taj sustav ne bi bio sustav prava*. To, međutim, ovdje nije jedini problem: utemeljenje modela TUM-a na društvu anđela bilo bi problematično jedino zbog supstantivnih razloga; ono ne bi bilo problematično zbog metodoloških razloga. Jednostavna činjenica da pravni subjekti ne sliče dovoljno ljudskim bićima ne predstavlja metodološki problem za razijanski model, kao ni za model koji ja nastojim oblikovati.[22]

22 Iako se čini da Hart smatra da je ugradnja minimalnog sadržaja prirodnog prava u pravo tek stvar prirodne nužnosti, postoje neki vrlo dobri razlozi za shvaćanje da pravo mora uključivati takav sadržaj. Prvo, problem legitimnosti prava javlja se djelomično zato što je pravo prisilno, kao i zato što se njime uređuje široki raspon radnji koji uključuje kako radnje kojima se drugima nanosi šteta tako i radnje za koje se čini da su čisto privatne naravi. Dio je to same naravi prava da njegova vlast (autoritet) (ma što ona pojmovno predstavljala) obuhvaća i uređuje radnje obuhvaćene minimalnim sadržajem prirodnog prava. Drugo, ako se porekne tvrdnja

Upravo kako bih takve probleme izbjegao, ja zagovaram TUM oslanjajući se na općenitije temeljne pretpostavke koje su zajedničke raznim teorijama. S time u svezi vrijedi napomenuti da bi se argument koji ovdje iznosim pozitivistima mogao učiniti kao izricanje nekih neprihvatljivo snažnih pretpostavki o tome kako službene prakse određuju temelje prava. Međutim, ako se prihvati da nositelji pravne vlasti u pravo mogu ugraditi neodređena načela utvrđujući njihov sadržaj kroz iskaz norme, kao što na to upućuje Jules Coleman, tada je to lakše iznijeti pozitivne argumente u prilog TUM-u upravo zbog toga što se tom tezom dopušta mogućnost da nositelji pravne vlasti tipično čine pogreške u svezi s društvenim pravilom priznanja, a da se time ne promijeni status toga pravila kao onoga kojim se postavljaju temelji prava.[23] Ovdje je osobito značajno i to da bi argument koji se može iznijeti na temelju Colemanove pretpostavke TUM-u pružio potporu na način koji je konzistentan s Dworkinovim stajalištem o odnosu između rečenica kojima se izriču pravila i sadržaja tim rečenicama izraženih propozicija.

7 OGRANIČENA OBJAŠNJUJUĆA SNAGA MOGUĆNOSNIH TVRDNJI

Tvrdnje o tome što je samo moguće imaju ograničenu objašnjujuću snagu u pogledu onoga što doista postoji zato što mogući svijet koji tvrdnju potvrđuje, a to je nedvojbeno istina kad je riječ o mojim argumentima, možda nimalo ne nalikuje zbiljskome svijetu. U zbiljskome svijetu ljudi nisu moralno nepogrešivi – iako su skloni činiti ono što smatraju pogrešnim kako bi ostvarili vlastite sebične interese. Što se tiče one vrste koherentnosnih argumenata koje ovdje iznosim, njima se samo čini razumljivom ideja o moralnim temeljima prava (tj., kao ona kojom se ne proturječi drugim očitim pojmovnim istinama o pravu). Iako Colemanova pretpostavka omogućava tumačenje pravne prakse u Sjedinjenim Američkim Državama na način da ona uključuje moralne temelje prava, u skladu s načinom na koji je Waluchow tumačio pravnu praksu u Kanadi kroz vizuru TUM-a, njome se, tvrdim, ne postiže ništa više od toga. Isključni pozitivist i dalje može tumačiti takovrsni pravni sustav kao onaj koji ne uključuje moralne temelje prava – iako bi se time, u nedostatku uvjerljivog protuargumenta (za koji sam prethodno ustvrdio da nedostaje), počinio *petitio principii*.

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da pozitivno pravo uključuje prirodno pravo, tada postaje to teže razlikovati pravo od drugih vrsta pravila, poput pravila koja se odnose na šahovski klub. Ta bi se pravila prihvatljivo mogla nazvati „pravom", no to nisu „sustavi državnoga prava", što je vrsta prava kojim se bavi pojmovna filozofija prava.

23 Coleman (2001: 77–81). Ovdje se pretpostavlja da bi se normom mogao utvrditi sadržaj prava a da sudac nužno ne zna kako se u svim slučajevima taj iskaz primjenjuje, no da ipak prihvaća ideju da postoje ispravni odgovori u teškim pravnim slučajevima koji uključuju tumačenje norme.

Kako bi se uvidjela prihvatljivost ideje da se TUM-om ne nudi mnogo u smislu objašnjujućeg potencijala, korisno je razmotriti pitanje iz filozofije religije. Neki su filozofi tvrdili da je sam pojam svesavršenoga Boga nekoherentan; ako je to istina, tada nije moguće da postoji nešto što oprimjeruje sva obilježja koja podrazumijeva izričaj „svesavršen". Dakle, uspješan argument u smislu da je pojam svesavršenoga Boga nekoherentan podrazumijeva nepostojanje *svesavršenoga* Boga. To nam ponešto govori o tome kako objasniti događaje u svijetu; govori nam da ih nije moguće objasniti kao radnje *svesavršenoga* Boga. Valja, međutim, primijetiti da je objašnjujuća snaga toga minimalna jer se time ništa ne kaže o tome što objašnjava događaje u svijetu; kaže se tek što te događaje ne objašnjava.

Objašnjujuća snaga uspješnog argumenta u drugome smjeru još je manja. Ako izostavimo upitnu ideju da savršenstvo podrazumijeva nužno postojanje, tada dokazivanje koherentnosti pojma svesavršenoga Boga ne pruža *ništa* u smislu objašnjujuće vrijednosti. Razlog tomu je da ono što se time dokazuje nije da Bog *stvarno* postoji (tj., postoji u ovome svijetu), nego da postoji logički moguć svijet u kojem Bog postoji. Budući da ne znamo je li taj mogući svijet zbiljski svijet, tvrdnja da Bog postoji u nekom svijetu ništa nam ne govori u smislu objašnjenja događaja u ovome svijetu.[24] Ono što bi u najmanju ruku bilo potrebno jest dokazati da Bog postoji u ovome svijetu; barem bi tada imali razloga smatrati da bi se neki od događaja u ovome svijetu *mogli* objasniti kao Božjih ruku djelo. Međutim, takav dokaz nije sam po sebi dostatno opravdanje tvrdnji da Božja djela objašnjavaju bilo koji pojedini događaj u svijetu.

Posve isto rasuđivanje vrijedi i u pogledu TUM-a. Budući da se TUM-om ne ustvrđuje postojanje *zbiljskih* pravnih sustava koji sadrže moralne temelje, a još manje specificiraju oni koji ih imaju, njime se ne mogu objasniti nikakve postojeće pravne prakse jer ne pruža nikakvu podlogu za utvrđenje koje od njih imaju moralne temelje prava. Njime se ne ustvrđuje ništa doli ideja da su moralni temelji prava koherentni i da stoga postoji pojmovno moguć pravni sustav koji uključuje moralne temelje prava. Argument koji iznosim u prilog tvrdnji upućuje nas, istina je, u smjeru karakteristika koje predstavljaju nužne uvjete da bi pravni sustav to činio – u ovome slučaju, društvo u kojemu su ljudi moralno nepogrešivi, ali nisu skloni postupati ispravno. Međutim, budući da očito nismo moralno nepogrešivi, ne možemo izabrati svjetove u kojima ljudi jesu jer da bismo odredili imaju li ljudi u nekom mogućem pravnom sustavu tu sposobnost, trebali bismo moći nepogrešivo utvrditi sva ispravna moralna načela. Zbog toga je, tvrdim, objašnjujuća snaga TUM-a od neznatne teorijske važnosti. Zapravo, djelomičan razlog za privremeno utihnuće rasprave jest taj

24 Neki filozofi tvrde da ako je Božje postojanje moguće, tada je ono nužno. Ti su argumenti, međutim, prijeporni.

da se mnogim pojmovnim filozofima prava pitanje počelo činiti u znatnoj mjeri nevažni. Čini se da ono nema nikakvu praktičnu vrijednost.

U stvari, mnogi pravni teoretičari izvan okvira pojmovne filozofije prava prilično su kritični o čitavom pothvatu pojmovne analize. Razmotrite, primjerice, prihvatljiv argument Richarda Posnera prema kojemu pojmovna filozofija prava nema nikakvu praktičnu vrijednost. On kaže:

> Dopuštam da se o *pojmu* prava može raspravljati čak i ako se *riječ* „pravo" ne može definirati; a to je na kraju krajeva i Hartov naslov, iako on često koristi riječ „definicija". Filozofsko promišljanje pojma pravde koristan je pothvat još od Platona; o tome postoji pravodobna filozofska literatura. Nemam ništa protiv filozofske spekulacije. Ali željelo bi se da od nje bude i neke koristi; *nešto* bi trebalo ovisiti o odgovoru na pitanje „Što je to pravo?" da bi to pitanje bilo vrijedno postavljanja od strane ljudi koji bi svoje vrijeme mogli koristiti na druge društveno vrijedne načine. Međutim, o tom pitanju ništa ne ovisi. Ja idem i dalje: središnja je zadaća analitičke filozofije prava, ili bi barem trebala biti, ne dati odgovor na pitanje „Što je to pravo?", nego pokazati da se to pitanje ne bi trebalo postaviti jer samo unosi zbrku.[25]

Na ovome mjestu o tome ne mogu podrobno raspravljati, ali mislim da je Posner (1) uvelike u pravu u pogledu praktičnih implikacija pojmovne filozofije prava, ali da (2) ne prepoznaje intelektualno (i moralno – budući da se njegova kritika čini *moralnom*) legitimne razloge za bavljenje pojmovnom filozofijom prava. Što se tiče onoga pod (1), odabir pojmovne teorije, koliko to mogu reći (a to je tema za neki drugi rad) ničime ne doprinosi rješavanju pojedinih supstantivnih problema u svezi s pravom i paradigmatskim pravnim praksama. Istina je, naravno, da se može učiniti da pojedini problemi prema jednoj pojmovnoj teoriji nestaju, a prema drugim njoj suprotstavljenim pojmovnim teorijama nastaju; međutim, taj je dojam varljiv. Da navedem samo jedan relevantan primjer, Dworkin tvrdi da se idejom da suci imaju kvazizakonodavnu diskrecijsku vlast implicira da predmeti u kojima se ta diskrecija izvršava kako bi se stvorilo novo pravo koje se primjenjuje na predmet u tijeku podrazumijeva da suci nelegitimno primjenjuju pravo *ex post facto*. Međutim, Dworkinova teorija suočena je s analognom poteškoćom. Pod pretpostavkom da na svako pravno pitanje postoji jedan ispravan odgovor, ništa ne jamči da će sudac donijeti ispravnu odluku. U tom slučaju, možda nije riječ o „pravu" koje se primjenjuje na *ex post facto* način, nego o prisilnim mehanizmima prava koji se tako primjenjuju u cilju izvršenja pravila – a to uzrokuje iste moralne probleme. No, čak i kada sudac donese ispravnu odluku u teškom predmetu, pravo u teškom predmetu ne djeluje kao razumno upozorenje i stoga ne usmjerava ponašanje na moralno legitiman način. Zapravo, moglo bi se ustvrditi da je razlog zašto su *ex post facto* pravna pravila nelegitimna upravo taj što građani nisu razumno upozoreni o načinu na koji će protiv njih biti nepovoljno primijenjeni prisilni mehanizmi

25 Posner (1997: 4).

države. Da se izrazim metaforički, promjena pojmovnoga okvira u cilju rješavanja problema analogna je pokušaju izravnavanja tepiha koji je na jednome mjestu, zbog zračnoga džepa, izdignut. Jednostavnim pritiskom na to izbočenje ne postiže se ništa drugo nego njegovo pomicanje na drugo mjesto na tepihu.

Zapravo, čini se da to vrijedi za mnoge, ako već ne za sve, probleme pojmovne analize. Razmotrite trivijalnu pojmovnu istinu da su neženje neoženjeni. Teško je uvidjeti koje bi to događaje u svijetu ova istina mogla uopće i početi objašnjavati. Razlog tomu je taj što prema tradicionalnoj metodologiji, poznatoj većini filozofa, ideja da su pojmovne istine nužne istine podrazumijeva da istina pojmovne tvrdnje ne ovisi o nekoj kontingentnoj značajci nekoga svijeta. U mjeri u kojoj je to točno, ona se može znati, a da se o nekom svijetu ne zna ništa drugo osim pojmovnog sadržaja izraženog pojmom-terminom (tj., osim značenja odgovarajućih termina). Teško je shvatiti kako bi pojmovne tvrdnje istinite u svakom mogućem svijetu mogle objasniti kontingentne događaje u bilo kojem pojedinom svijetu, uključujući našemu.[26]

Međutim, nepostojanje praktične koristi ne implicira, suprotno Posneru, da je izučavanje pojmovne filozofije prava bezrazložno. Posnerova je kritika, u konačnici, moralna kritika u smislu da bavljenje teorijama koje su lišene korisnosne vrijednosti predstavlja trošenje vrijednih resursa koji se mogu upotrijebiti za rješavanje praktičnih problema. To jednostavno nije u skladu s općenito prihvaćenim stajalištima o vrijednosti znanja *per se*; prema uobičajenom shvaćanju znanje vrijedi stjecati radi njega samoga. Štoviše, nije neprihvatljivo smatrati da se mnoga područja čiste matematike izučavaju bez obzira na to jesu li potencijalno vrijedna u smislu njihove korisnosti. Nadalje, za neka od najpoznatijih postignuća u matematici ne čini se, u ovome trenutku, da će biti od neke praktične koristi. Doista, za sada se ne čini da će dokaz Fermatova posljednjeg teorema koji je izveo Andrew Wiley biti od ikakve praktične koristi, pa ipak su stotine matematičara potrošile tisuće sati pokušavajući dokazati teoriju.[27] Neke su tvrdnje vrijedne spoznaje radi njih samih – odnosno, zato što su njima izražene istine intrinzično, a ne samo korisnosno vrijedne.

S engleskoga jezika preveli
Ana Burazin i Luka Burazin.

26 Već sam razmatrao kako se taj problem tiče drugih važnijih pojmovnih pitanja iz drugih područja filozofije. Konkretno, iznio sam sličan argument prema kojemu odabir teorije prirode uma ničime ne doprinosi rješenju problema um-tijelo ili srodnih problema poput problema mentalne uzročnosti. Ponovnim opojmovljenjem uma samo se mijenja način na koji je problem izražen, a da se pritom ni na koji način ne ublažava ozbiljnost problema. Vidi Himma 2005.

27 Ovdje trebam navesti da, iako nisam ni matematičar ni filozof matematike, imam veliko iskustvo izučavanja čiste matematike na poslijediplomskoj razini dok sam bio student filozofije.

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Kenneth Einar Himma*

The Logic of Showing Possibility Claims

A Positive Argument for Inclusive Legal Positivism and Moral Grounds of Law

In this essay, I argue for a view that inclusive positivists share with Ronald Dworkin. According to the Moral Incorporation Thesis (MIT), it is logically possible for a legal system to incorporate moral criteria of legality (or "grounds of law," as Dworkin puts it). Up to this point, the debate has taken the shape of attacks on the coherence of MIT with the defender of MIT merely attempting to refute the attacking argument. I give a positive argument for MIT. I begin with an explanation of the logic of establishing possibility claims, such as MIT. At the outset, it is worth noting that the logic of establishing possibility claims is very different from the logic of establishing contingent descriptive claims or necessary claims. For this reason, some explication of the relevant features of the semantics of modal logic will be necessary here. Once the structural framework is adequately developed, the argument for MIT will be grounded on the strength of a thought experiment of a surprisingly simple kind. Indeed, the argument is inspired by a Razian argument for the possibility of a legal system without coercive enforcement machinery; on his view, a society of angels could still have a system of law without any coercive machinery. My argument will possess two theoretically important qualities that are also possessed by Raz's powerfully simple, but ultimately unsuccessful, argument.

Keywords: morality, law, grounds of law, criteria of validity, inclusive positivism, exclusive positivism, Dworkin, natural law

1 INTRODUCTION

In this essay, I argue for a view that inclusive positivists share with Ronald Dworkin and strong natural lawyers:

> **The Moral Incorporation Thesis (MIT):** It is logically possible for a legal system to incorporate moral criteria of legality[1] (or "grounds of law," as Dworkin puts it).[2]

It is worth noting here that MIT makes a very weak claim. MIT does not even purport to say anything about *actual* (or existing) legal systems. First, MIT

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1 I will also refer to criteria of legality as "criteria of law." The criteria of legality were once more commonly referred to among positivists as "criteria of validity."

2 Dworkin and natural lawyers, of course, make a stronger claim about the relationship between the grounds/criteria of law, namely that it is not logically possible for there to be a legal system *without* moral grounds/criteria of law.

does not assert or imply that there are, have been, or ever will be legal systems in the *actual* world (i.e., the logically possible world that we inhabit, which is one among an uncountably infinite number of logically possible worlds[3]). Second, MIT does not assert or imply anything about the probability that such systems exist – beyond the claim that this probability is non-zero. It claims no more than this: among the uncountably infinite logically possible worlds, there is at least one logically possible world in which there is something that counts as a "legal system" with moral grounds of law. That is, MIT asserts what I will call a "possibility claim."

I begin with an explanation of the logic of establishing possibility claims, such as MIT. At the outset, it is worth noting that the logic of establishing possibility claims is very different from the logic of establishing contingent descriptive claims or necessary claims. For this reason, some explication of the relevant features of the semantics of modal logic will be necessary here. Once the structural framework is adequately developed, the argument for MIT will be grounded on the strength of a thought experiment of a surprisingly simple kind. Indeed, the argument is inspired by a Razian argument for the possibility of a legal system without coercive enforcement machinery; on his view, a society of angels could still have a system of law without any coercive machinery. My argument will possess two theoretically important qualities that are also possessed by Raz's powerfully simple, but ultimately unsuccessful, argument.[4]

2 TYPES OF LEGAL THEORY AND THE MORALITY INCORPORATION THESIS

There are a number of different types of legal theory. Empirical legal theory is usually concerned with identifying or explaining certain features or properties of existing legal systems; such theory is, at least, descriptive in character and focuses on contingent properties of the legal systems under study. An empirical legal theory, for example, might be concerned with identifying or explaining the content of legal norms that purport to govern information privacy in the U.S. Similarly, such a theory might be concerned with explaining the function that some set of legal practices in Colombia purports to serve. In contrast, normative legal theory is largely concerned with determining the properties that

3 A set is *countably infinite* if and only if its members can be placed in one-to-one correspondence with the natural numbers. A set is *uncountably infinite* if and only if it is infinite but not countably infinite. The intuitive idea is that the members of a countably infinite set can be listed completely (though it might take an eternity to do it), while the members of an uncountably infinite set is too large to be listed (or counted). Not even an omnipotent eternal being can list the members of an uncountably infinite set. See, e.g., Hrbacek & Karen 1999.

4 See, below, for a discussion of why Raz's argument is unsuccessful, p. 99.

legal norms or institutions must have to be morally legitimate. A normative legal theorist, for example, might argue that law, as a matter of substantive moral theory, should protect information privacy in a number of specified ways or that only certain protections of information privacy are justifiably enforced by the police power of the state.

Conceptual theories of law, however, attempt to address an underlying foundational issue taken for granted by normative and descriptive theories – namely, identifying the nature of law as such – and hence attempt to answer the question "What is law?" Conceptual theories attempt to identify those features and properties that constitute the nature of law as such, according to *our* concept of law, and hence distinguish entities properly characterized as "law" from entities not properly characterized as "law." These theories usually express or imply conceptually necessary conditions on what counts as law and generally conform to the following schema:

> Necessarily, in any society with a legal system *S*, there is a set of conditions *c1, c2, …, cj* such that, for any norm *N, N* is a law in a society *S* if and only if *N* satisfies the conditions *c1, c2, …, cj.*

The conditions *c1, …, cj* (where *j* represents an arbitrary natural number) have variously been called by positivists and natural law theorists "the criteria of legality," "the criteria of legal validity," or "the criteria of validity." Ronald Dworkin refers to them as the "grounds of law." I shall use the terms interchangeably, the assumption being that whatever differences there are between them are of no significance with respect to the argument of this essay.

There are generally three major problems connected with this foundational problem. First, one must explain whether the grounds of law necessarily have the status of law; positivism, for example, holds that the grounds of law are law but not legally valid. Second, if so, one must explain why the grounds of law have the status of law; a positivist states that a conventional rule of recognition that defines the grounds of law or criteria of legal validity has the status of law in virtue of being practiced by those who serve as officials in the legal system. Third, one must explain the existence conditions for a legal system; positivism holds that a legal system exists when there is a conventional rule of recognition practiced by officials and where citizens generally obey the laws validated by the rule of recognition.

Some of the most important disputes in conceptual jurisprudence involve the issue of whether there is a conceptual relationship between the grounds of law and moral principles – a dispute that started many years ago between the positivist Jeremy Bentham and the classical natural law theorist Thomas Aquinas and continues today among neo-natural law theories, Dworkin's constructivism, inclusive positivism, and exclusive positivism. Indeed, legal positivism arose in response to the natural law view that there could not be unjust

laws because there are necessary moral criteria of legal validity – necessary in the sense that they apply to all possible legal systems, constraining the content of law in each. Beginning with John Austin and Jeremy Bentham, legal positivists denied this strong thesis, adopting the Separability Thesis as part of its foundation: according to the Separability Thesis, there are no conceptually necessary moral grounds of law (or criteria of legality). On the positivist view, law and legal systems are social artifacts manufactured by people – and the artifactual quality of the institution and norms extends all the way down, so to speak, to the grounds of law. As H.L.A. Hart puts the thesis, "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[5]

While disagreement continues on the issue of whether the grounds of law *necessarily* include moral principles, the focus of much recent discussion in conceptual jurisprudence on theoretically salient relationships between law and morality has been on whether it is *possible* for the grounds of law to include moral principles. The roots of this debate, which became a central concern among legal positivists during the last fifteen years, can be found in Ronald Dworkin's influential early criticisms of legal positivism. In the mid- to late-70s, Dworkin argued that legal positivism lacked the resources to explain the role that moral standards and reasoning play in judicial reasoning and decision-making. As he (somewhat misleadingly) puts the point in "The Model of Rules II":

> The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained. If it no longer seemed unfair to allow people to profit by their wrongs, or fair to place special burdens upon oligopolies that manufacture potentially dangerous machines, these principles would no longer play much of a role in new cases, even if they had never been overruled or repealed.[6]

According to Dworkin, lawyers and judges routinely ground their arguments in moral principles that have the status of law not because they have been formally or officially promulgated but rather because of the *moral* content of these principles.

Positivists became divided over how to respond to Dworkin's argument. Exclusive positivists, like Joseph Raz, Scott Shapiro, Andrei Marmor, and Brian Leiter, rejected the Dworkinian claim that these moral principles had the status of law in virtue of content. Exclusive positivists thus adopted and defended the

5 Hart (1996: 185–186).

6 Dworkin (1977: 40–41). I say "misleading" here because the suggestion is that these moral principles have the status of law because practitioners *believe* that the content reflects objective requirements of morality. In Dworkin's later work, he seems to think that these moral principles have the status of law in virtue of the logical relationship they bear to the requirements of objective morality.

Sources Thesis, which denies there can be legal systems with moral criteria of legal validity. Inclusive positivists, like Jules Coleman, Matthew Kramer, Wilfrid Waluchow, and myself, hold what will be called the Moral Incorporation Thesis, which I reiterate in slightly different language as follows:

> **Moral Incorporation Thesis (MIT)**: There is a logically possible legal system in which the grounds/criteria of law (or criteria of legal validity) include some moral norms.

Although this language is typically used by inclusive positivists, it is held by a number of other theorists: strong natural law theorists, such as Aquinas and Blackstone (if it is a logically necessary truth that the ground/criteria of law include moral norms, MIT logically follows), some neo-natural law theorists, and Ronald Dworkin hold this view. It is true that each of these theorists holds a somewhat stronger claim about the conceptual relation between morality and the grounds/criteria of law; but the weaker claim expressed by MIT is logically implied by these stronger views.

Further contributing to the importance of the debate was the emergence of positions that fall between legal positivism and the strongest form of natural law theory, which is traditionally interpreted as denying the separability thesis. These important new positions include Dworkin's mature "third theory of law" and neo-natural law positions like Mark Murphy's view that, as a matter of logical necessity, laws with morally problematic content are defective *qua* law. The development of these competing views has fueled the continuing debate over whether MIT is true.

Of course, MIT is a conceptual claim – and a very weak one at that. The claim is not about what is necessary or even actual, which would make it a partly empirical issue; it is about what is *possible*. The claim is just that it is logically *possible* for a legal system to have moral grounds of law; otherwise put, the claim is that our legal concepts are consistent with there being moral grounds of validity – a claim that is the target of, for example, Raz's authority argument, which denies that moral grounds of law are logically compatible with the concept of legal authority. Claims about what is merely logically, metaphysically, or conceptually possible present special difficulties in defending them. In order to make an affirmative case for this kind of claim, one has to show that one can coherently conceive of a legal system with moral grounds of law. This involves showing that the existence of a legal system with moral grounds of law is neither self-contradictory nor contradicts other core doctrines of a theory of law. Possibility or coherence claims like this are difficult to support by positive argument. In consequence, the debate has taken place with the proponent of the view that moral grounds of law are impossible giving an argument to show that the existence of such grounds is logically inconsistent with some other plausible conceptual truth about law.

In this respect, the debate resembles a debate about the logical coherence of the very notion of an all-perfect God. Usually, someone who rejects the view that this notion is coherent will argue for an alleged inconsistency implicit in the notion: it has been argued, for example, that a being cannot be perfectly merciful and perfectly just at the same time: perfect justice requires always (or so the argument goes) giving a person what she deserves while perfect mercifulness requires sometimes giving a person less harsh treatment than she deserves. To my knowledge, theists lack a positive argument for the consistency of all the relevant notions comprising the complex concept of a being that instantiates such perfection, focusing instead on rebutting arguments asserting the inconsistency of the concept of an all-perfect God. The reason for this is that it is very difficult to make a positive argument for the claim that these ideas are consistent; we lack a very direct sense of what claims are coherent because inconsistency can lurk deep beneath the surface. For this reason, the structure of this dispute between those who affirm MIT and those who deny it generally parallels the structure of the debate concerning the coherence of the notion of an all-perfect God.

As should be evident, possibility claims are difficult to support with positive arguments. To claim that a state of affairs *S* is possible is to claim nothing stronger than this: a set of propositions that exhaustively describe *S* is logically consistent or, alternatively put, is not self-contradictory. The claim, then, that a state of affairs is possible expresses, in essence, a logical claim about the set of sentences that exhaust the description of all theoretically salient features of *S* – namely that this set of sentences does not contain sentences that entail a logical contradiction.

There should not be any confusion about this: it is a straightforward application of principles at the foundation of the possible-world semantics presupposed by standard systems of modal logic. Indeed, a possible world is typically defined as a maximally consistent set of sentences.[7] A set of sentences *S* is *maximal* in the relevant sense if and only if, for every proposition *p*, *S* contains one of either *p* or not-*p*. A set of sentences *S* is consistent if and only if it is not the case that *S* logically implies a contradiction. Thus, a possible world is a set of sentences that contains one of either *p* or not-*p*, for every proposition *p*, and does not logically imply a contradiction. A positive argument for a claim that it is possible that *p* – the schematic form of a possibility claim – requires showing that there is a maximally consistent set of sentences containing *p*.

Accordingly, a successful positive argument for MIT must be constructed to show that there is a maximally consistent set of sentences that includes the proposition that, for some institutional system *L*, *L* is a legal system that has moral grounds of law. This requires showing that there is no logical contradic-

7 For a classic and still useful text on modal logic, see, e.g., Chellas 1980.

tion between (1) the claim that *L* is a system of law (with all that this presupposes by way of conceptually related claims, for example, about authority, obligation, etc.) and (2) the claim that *L* has moral grounds of law.

3 THE STRUCTURE OF THE DEBATE BETWEEN INCLUSIVE AND EXCLUSIVE POSITIVISM

Up to this point, there have been few positive arguments offered in support of MIT – and none successful. The debate has largely taken the shape, as will be recalled, of arguments to the effect that there is no consistent set of propositions containing the following propositions: (1) the set of propositions correctly describing the existence conditions for law; (2) the proposition that, for some entity *L*, *L* is a legal system; and (3) the proposition that *L* has moral grounds/criteria of law. Raz's argument is grounded in the claim that the set defined by (1) includes the proposition that law claims legitimate authority, as well as the propositions expressing his service conception of authority. His argument is that an institutional system of norms including, so to speak, moral grounds for membership in the system is *logically inconsistent* with its satisfying the set defined by (1). The problem, on Raz's view, is that the existence of moral grounds of law is inconsistent with law's conceptual claim to authority. Similarly, Shapiro's argument is that the set defined by (1) contains the so-called Practical Difference Thesis.[8] His argument has exactly the same structure as Raz's: the idea is to show that an institutional system of norms that includes moral grounds/criteria for membership is *inconsistent* with the set defined by (1). On Shapiro's view, the problem is that moral grounds/criteria of law are logically inconsistent with the claim that law is capable of making a practical difference.

Inclusive positivists have largely defended MIT by attempting to show, on a piecemeal basis, that each such "inconsistency argument" is unsuccessful by showing that the argument in question relies on a false premise, whether explicit or implicit. Inclusive positivists, including myself, have defended MIT against Raz by showing that the Razian argument relies on false claims about the nature of law or the nature of authority.[9] In particular, the defense against Raz is grounded in an attempt to rebut one or more of the following three ideas: (1) law necessarily claims authority; (2) authoritative directives provide preemptive reasons for action; or (3) authority is justified only insofar as its directives more accurately identify what a subject should do according to right reason than the subject's own assessment of the reasons.[10] Likewise, inclusive

8 Shapiro (1998: 469–507).

9 See, Raz 1994.

10 I have challenged Raz on a number of these assumptions. See, e.g., Himma 2001a; Himma 2007a; Himma 2007b; and Himma (2001b: 61–79).

positivists have defended MIT from Shapiro's argument by denying either (1) that positivism includes the Practical Difference Thesis; or (2) that the Practical Difference Thesis implies that judges must be guided in their deliberations both by the rule of recognition and the relevant first-order norms regulating the acts of citizens.[11]

It is of critical importance to note that, either way, these defenses of inclusive positivists are "negative" in the sense that they attempt to show that these inconsistency arguments are unsuccessful – that is to say, these negative arguments are limited to showing that certain arguments against MIT fail. This is noteworthy because, strictly speaking, such arguments provide absolutely *nothing* by way of positive support for MIT. The reason for this is a simple matter of basic logic: the claim that an argument is unsound does not provide any reason for thinking that the conclusion of the argument is false. What this means is that these arguments succeed in doing no more than showing that MIT has not been shown false. By itself, none of these counterarguments give any reason to think that MIT is true simply because, as a matter of elementary logic, they *cannot*.[12] To show, for example, that it is not true that law necessarily claims legitimate authority does not, by itself, give any reason to think there could be moral grounds of law. A review of the literature suggests that the vast majority of content defending MIT published over the last fifteen years has involved making negative arguments of this sort. Very few positive arguments have been offered in support of MIT.

4 GIVING A POSITIVE ARGUMENT FOR A POSSIBILITY CLAIM

At first glance, the exclusively defensive posture of the inclusivist might seem puzzling; however, it is easy to understand why the debate has taken this shape once it becomes clear what would be involved in crafting a successful positive argument. As it turns out, the real problem is, at bottom, that the logic of the relevant modalities has not been understood well enough to do what is needed to make a positive argument in support of MIT. It is difficult enough, I would surmise, for people who lack training in metaphysics to fully under-

11 See, Himma (2000: 1–43).

12 This is not to suggest that these negative arguments cannot form the basis of a positive defense of MIT; if one could succeed in showing that each of these arguments fail and that these arguments exhaust all the possible logical conflicts between the nature of law and the existence of moral grounds of law, then one could infer that MIT is true. But here it is crucial to note that this positive defense requires more than just the conclusions of the negative arguments. In addition, it requires a new premise to the effect that the existing arguments encompass all of the possible tensions – and this, of course, would require a *positive* defense of that new premise.

stand the character of various metaphysical claims as well as what the proper methodology might be, which is, of course, a topic under dispute. Once modalities like the necessity operator (i.e., it is necessary that p or, symbolically, $\Box p$) and the possibility operator (i.e., it is possible that p or, symbolically, $\Diamond p$) are introduced into the conversation, the logical standards governing deductive argument become considerably more complicated – a complexity that reflects the corresponding complexity of metaphysics as a separate discipline. And it is important to realize here, as is frequently overlooked, perhaps because thought obvious or unnecessary, that conceptual jurisprudence is nothing more than the metaphysics of law.

Here it is helpful to consider again the issue of whether the concept of an all-perfect being is coherent – which, it should be noted, is also a metaphysical issue. The relevant atheistic claim is that there is not (indeed, *could not be*) a thing that satisfies the existence conditions for perfection because some of these conditions are logically inconsistent with other conditions. As noted above, for example, it has been argued that being perfectly merciful and perfectly just cannot be simultaneously instantiated by a being because the criteria for being perfectly just are logically inconsistent with the criteria for being perfectly merciful. As I also noted above, though, theists lack a positive argument that directly addresses the consistency issue by showing that, so to speak, all the perfections are logically compatible. While there are, of course, arguments for the existence of God (e.g., the so-called intelligent design argument), they do not directly address the coherence of the concept of an all-perfect being. Of course, insofar as one of these arguments is successful in showing that an all-perfect God exists, it follows as a corollary that the concept is coherent. But these other arguments do not even attempt to directly engage with the inconsistency arguments of atheism.

The reason for the comparative lack of positive arguments for the coherence of the concept of an all-perfect God is that there are special difficulties associated with arguing directly for possibility claims (i.e., in this case, it is possible for a being to instantiate each of the perfections). It is hard to see exactly how one could make a positive argument for the relevant possibility claim. How, for example, would one even begin to show that it is possible for a being to be omnipotent and omniscient at the same time? While it might seem obvious that at least that much is possible, this is because we cannot think of how an inconsistency might arise between those two qualities. If that might lead us, reasonably enough, to doubt that there is any such consistency, our inability to imagine how those two qualities might conflict does not provide any significant positive support for the claim that they *do not* conflict.[13] When one reflects on how one

13 There are many examples that secure the point. We could not, for example, see how Euclid's Parallel Postulate might conflict with Einstein's theory of relativity, which presupposes a non-Euclidean Parallel Postulate.

might go about providing a positive argument that shows that the two qualities are consistent, one will likely come up blank – which explains why the structure of the debate as to whether it is possible for a being to instantiate all the perfections (i.e., whether the concept of an all-perfect being is coherent) parallels the structure of the debate as to whether it is possible for a legal system to have moral grounds of law. The problem is that it can be, and frequently is, exceedingly difficult to see how to show that two abstract propositions are consistent.

If this seems surprising to philosophers, it is taken for granted in other academic subjects. Establishing possibility claims in pure mathematics is well known to present special difficulties. One issue that commonly arises in the context of studying a particular formal axiomatic system in mathematics, such as set theory, is whether the set of axioms is consistent; and whether, if so, the consistency of that set can be proved. There are two possible consistency theorems – one stronger and hence more desirable than the other. The most desirable result would be a showing that a set of axioms is *absolutely consistent*, which is what we usually have in mind when we say that some set of propositions is consistent. What is needed to show that a set of axioms is absolutely consistent is an interpretation of all of the symbols of the formal language of the axiomatic system in which the axioms are true; such an interpretation is known as a *model* for the set of axioms.

It is absolutely crucial to note the relationship between finding a model for a set of axioms and giving a positive argument for MIT. Intuitively, the idea behind the mathematical project is to interpret the symbols of the language in such a way that we can create a coherent story in which all the interpreted axioms are clearly true. This is analogous to what must be done by way of giving a successful positive argument for MIT. If one can produce a model for the axioms of the relevant mathematical system, then it follows that the axioms are consistent – which is to say that *there is some possible world in which all the axioms are true.* If the proponent of MIT can produce a coherent story in which something that is clearly a legal system (under the relevant theory) also clearly contains moral grounds of law, then that is sufficient to show that the existence of moral grounds of law is consistent with the relevant theory of law – which is to say that *there is some possible world where there is a legal system with moral grounds of law*. In other words, if the proponent of MIT can produce such a "model," that suffices to establish MIT by what I have been calling a positive argument.

Intriguingly, absolute consistency results are very difficult to achieve in mathematics because it turns out to be prohibitively difficult to construct something that clearly serves as a model for the relevant mathematical theory.[14] The

14 See, e.g., "Equiconsistency," at: <http://en.wikipedia.org/wiki/Equiconsistency>. It suffices here to cite Wikipedia because none of this is even remotely controversial.

reasons for this have, in part, to do with the fact that the notion of "consistency" is also deployed within every mathematical theory. It is not as if there is some Archimedean point of view in mathematics in which one can produce an analysis of whether some set is consistent that does not presuppose some element of the system under question: standards defining the notion of consistency are (pun intended) consistently applied throughout every standard mathematical theory. But a second reason surely has to do with the difficulty of trying to construct an interpretation of the symbolic language and model *from scratch* that would clearly establish the consistency of the system (even if we could formulate a test for consistency from outside the system being studied). The story here is much more complicated and contentious than this might suggest but it is plausible enough that it gestures in the direction of a problem faced by theorists of any discipline attempting to establish a possibility claim (by way of proving an absolute consistency result).

In consequence, mathematicians must, much more often than not, settle for showing what is called *relative consistency*. The idea is to take a set of axioms, S, that seems more perspicuously consistent from an intuitive point of view and attempt to show that the axioms of the system under study, T, are theorems of S. A proof that the axioms of T are axioms of S shows that T is *consistent relative* to S in the following sense: if S is consistent, then T is consistent. In the vast majority of cases, relative consistency is the best that can be done; indeed, it cannot be shown even that arithmetic is absolutely consistent.

As intimated above, there is probably no comprehensive, accessible theoretical account, and one that commands a consensus, of why absolute consistency results are so difficult to obtain in mathematics; but, as we also saw, we can get a rough sense for why this might be true. It might not be possible to produce a rigorous theoretical explanation as to why consistency results are difficult to support with positive arguments in philosophy of law. But we can get a sense for the complexity involved in producing a model that would validate MIT.

5 A FIRST STAB AT A POSITIVE ARGUMENT FOR MIT

One tempting thought is that there are many readily available models of existing legal systems and that any one of these existing legal systems can be used to show moral grounds of law are possible. After all, it is a trivial truth – at least, under any standard system of modal logic that has direct application to philosophical analysis – that, for all propositions *p, p* logically implies ◊p. If one can show that some existing legal system has moral grounds of law, then it follows *a fortiori* that it is possible for a legal system to have moral grounds of law, which is precisely what is expressed by MIT.

This strategy turns out to be much less attractive than it appears for reasons that, as will be shown, explain my adoption of a related but more direct approach to finding a model for MIT. It is worth noting here that this approach will lead me to construct a model that might strike many readers, untrained in modal logic, as implausibly simplistic, improbable, and otherwise problematic and unpromising. But, as we will see below, this impression is incorrect, and grounded in misconceptions about the logic and methodology of model construction of the sort offered in this essay.

In his justifiably influential book, *Inclusive Legal Positivism,* Wil Waluchow adopts this strategy in what is perhaps the only sustained attempt to give a positive argument in support of MIT. Waluchow saw what he took to be a clear model for MIT in the legal practices associated with the substantive guarantees of the Canadian Charter. He argued, for example, that judges routinely have recourse to moral principles in deciding issues arising under these guarantees and are legally bound to apply these moral principles. On the strength of these practices, he concluded that the Canadian legal system is a legal system with moral criteria of validity and hence that MIT is true.

The problem with Waluchow's analysis is that it presupposes a contentious interpretation of those legal practices. Waluchow interprets – without argument – the moral principles to which judges turn in hard Charter cases as pre-existing principles that have the status of law; the judge in such Charter cases *discovers* the content of the law defined by the Charter. In contrast, the exclusive positivist interprets such recourse as the judicial exercise of a quasi-lawmaking discretion to reach beyond the law in *inventing* (or making) new law. As Stephen Perry puts the point:

> After making rather heavy weather of the fairly obvious point that judicial opinions in charter cases involve moral reasoning, Waluchow attempts to show that the moral standards employed in charter cases, drawn from e.g. section 7 of the Canadian Charter of Rights and Freedoms (right to life, liberty and security of the person), or the First Amendment of the American Constitution (freedoms of speech and assembly), function at least sometimes as tests for the existence or content of valid laws. If this could be shown, it would establish the truth of inclusive positivism and provide a counterexample to exclusive positivism. Waluchow maintains that exclusive positivism has available to it "only one obvious possibility" to explain charter challenges, namely, the idea that provisions such as section 7 of the Canadian Charter do not set out legal criteria for validity, but simply make reference to extra-legal, moral criteria "to which judges are required or at liberty to appeal" (157). But in fact an exclusive positivist could say more than this, since he could appeal to Waluchow's own notion of a legal-adjudicative power or duty to decide charter cases in certain ways. Although Waluchow does not mention it, Raz employs his notion of a directed power to characterize judicial review cases along very much these lines.[15]

15 Perry (1996: 367).

Although Perry is certainly correct in thinking this is a problem, he does not fully appreciate the character of the problem with Waluchow's argument here.

Perry seems to believe that the problem is just that the interpretation is contentious – a problem that Waluchow attempts to address by arguing that the inclusivist interpretation of Charter practices is superior to an exclusivist approach. As Perry describes Waluchow's next steps in the argument:

> Waluchow criticizes what he takes to be the exclusionary positivist's best possible account on three main grounds: (i) it flouts the common understanding of charter provisions as entrenched fundamental rights that are legal, not just moral, in character; (ii) it runs counter to language often found in constitutions themselves, such as the provision in section 52(1) of the Canadian Constitution Act that any law inconsistent with the Constitution is of no force or effect; and (iii) it cannot explain as easily as the inclusive account the retroactive effect of charter challenges. For these reasons, Waluchow concludes that charters and bills of rights create "legal rights whose content is partly dependent on moral considerations" (162).[16]

As Perry explains the problem, Waluchow's move seems to be the only sensible move. Waluchow needs to show that the inclusivist interpretation better coheres with the relevant Charter practices than the exclusivist interpretation; and this is exactly the move described in the text quoted above.

Perry does not question the legitimacy of this strategy; that is to say, he does not provide any further response to Waluchow's claim that any exclusivist interpretation of Charter practices will be marred by the problems described by (i), (ii), and (iii) in the passage above.

Instead, Perry responds to another of Waluchow's criticisms of exclusivist interpretations that Waluchow believes show that an inclusivist interpretation better coheres with Charter practices than exclusivist interpretations. As Perry argues:

> One of Waluchow's arguments in favour of the inclusive-positivist interpretation is that the exclusive-positivist account flouts the common understanding that charter rights are legal and not just moral in character (158-59). Yet the exclusive positivist can borrow Waluchow's own notion of legal-adjudicative rights, developed as part of the latter's source-based conception of the common law in chapter 3, and argue that while charter rights might not be legal rights in the strict sense, they are not just moral either; they are legal-adjudicative rights that citizens hold against the courts. (As noted earlier, Raz makes essentially just this move, employing his very similar notion of a directed power.) Another of Waluchow's arguments in support of the inclusive-positivist account of judicial review is that it explains the retroactive effect of charter cases better than the exclusive-positivist account (160-62). But cases overruling common law precedents likewise generally have retroactive effect, so whatever Waluchow would wish to say about retroactivity in that context, as part of the source-based conception of the common law he develops in chapter 3, can presumably be relied upon by the exclusive positivist in defending a source-based interpretation of constitutional judicial review.[17]

16 Perry (1996: 367).

17 Perry (1996: 379).

This makes it seem as though the dispute between the exclusive positivist and the inclusive positivist can simply be settled by looking at a particular legal system to see which type of interpretation better conforms to the practices. The idea here seems to be that had Waluchow succeeded in showing that the inclusivist interpretation better coheres with Charter practices than an exclusivist interpretation, this would be enough to show MIT.

This might be a common view but it is grounded in a fundamental misunderstanding of the modal character of MIT and what that character requires by way of positive support. Even if MIT is false, as exclusive positivists believe, one might still be able to produce coherent interpretations that are, in some sense, logically grounded in MIT – and plausible ones (assuming you do not know that MIT is false).

What makes this possible? The reason here is not necessarily the obvious point that any proposition follows from a contradiction, which would be true of the claim that some legal systems have moral grounds of validity if MIT is false. Nor is the reason necessarily that MIT contains so many conflicting principles that one can select some favored set narrowly tailored to support any proposition – this, of course, being the basis for the Critical Legal Studies claim that law is so globally indeterminate that judges can reach either of two conflicting holdings in hard cases with an ostensibly rational argument. The reason is more narrow: it is that one can still produce plausible interpretations that come out of MIT that derive neither (1) *from the contradiction itself if MIT is false* nor (2) from the kind of indeterminacy that the Critical Legal Theorists believe results in nearly unfettered discretion to reach any decision because any decision can be justified because of the multiplicity of conflicting values that explain the global indeterminacy of law.

This might seem implausible at first blush, but producing a plausible interpretation grounded in MIT is exactly what Waluchow did with Charter practices. Perry did not even attempt to show that Waluchow's inclusivist interpretation of Charter practices was inconsistent or incoherent. Rather, Perry identified the relevant Charter practice and provided an exclusivist interpretation that was claimed to cohere as well with these practices as Waluchow's inclusivist interpretation. But even if Perry produced an exclusivist interpretation that was more coherent with the relevant practices, it would not follow that inclusivists could not produce a coherent interpretation of any particular Charter practice. That one interpretation better coheres with the relevant phenomenon does not imply that another is incoherent. Coherence is a matter of degree. Nor does the fact that one interpretation is more plausible imply that another is implausible. One theory might simply be more plausible than another. Like coherence, plausibility is a matter of degree.

But this is also a feature of possibility claims in mathematics; it is always possible that what *seems* to be a model showing the possibility of a world in which the relevant axioms are all true is not really a model at all for the axioms. As will be recalled, it is nearly impossible to produce absolute consistency results for axiomatic systems in mathematics, including those that form the foundation for all deductive reasoning – i.e., mathematical logic. The reason is epistemological: we have no Archimedean point from which to assess whether a putative and plausible interpretation succeeds in modeling the relevant axioms. The fact that it seems plausible and coherent is consistent with its being false. Further, it is consistent with the interpretation being inconsistent *provided that the inconsistency is difficult to see*.

Indeed, we might know a theory is inconsistent but be justified in applying various elements of that theory to certain phenomena in the world. For example, physics is divided into two analytically distinct theories: (1) the theory of the very big (i.e., the theory of relativity) and (2) the theory of the very small (i.e., quantum mechanics). Both are unparalleled in the history of physics with respect to the results they predict. However, it is well known that the two theories are *inconsistent* with each other in the standard sense that they cannot both be true. Indeed, this is what motivates a continuing search for a "unified theory of everything," a search that focused for a time on string theory. But despite all this, the theory of relativity and the theory of quantum mechanics are used to interpret, explain, and predict physical phenomena.

Returning to the dispute between inclusive and exclusive positivism, the upshot is this: Stephen Perry's assumption that the dispute between inclusive positivism and exclusive positivism can be settled by finding some legal system with practices, like Canada, that are best interpreted as inclusive – which would show the existence of an inclusive legal system and thereby prove MIT – overlooks the fact that MIT could still be the source of plausible interpretations even if it turned out to be false. Again, pure mathematicians continue to derive useful, plausible theorems from sets of axioms that might very well turn out to be inconsistent; indeed, as we have seen, there are few, if any, models for any set of axioms that would show the absolute consistency of these axioms. Further, physicists continue to derive usual results from both quantum mechanics and the theory of relativity, despite proofs that the two theories are inconsistent and cannot both be true in this world.

The real problem with Waluchow's argument strategy goes deeper than Perry's claim that Waluchow has not produced an inclusivist interpretation that better coheres with existing Charter practice than the exclusivist can produce. At bottom, what ultimately goes wrong with Waluchow's argument is that his interpretation of the relevant legal practices *begs the question*. Waluchow's interpretation of these practices ultimately rests on an assumption that moral criteria of validity are possible; without that, he lacks even a *prima facie* justification

for interpreting Canadian practice that way. The interpretation is a non-starter because the very coherence of inclusivist interpretations is challenged by the exclusive positivist. If we had compelling reason to think MIT were false, then it would not matter in the least how attractive some proposed inclusivist interpretation of Charter practices might be. That interpretation is immediately disqualified as grounded in a contradictory claim.

Here's another way to see this important point: if we already know that inclusive systems are possible, there will be an issue as to whether any particular legal system is inclusive – including the Canadian legal system. The argument Waluchow offers in support of MIT would provide a plausible reason for thinking that the best interpretation of Canadian legal practice is as incorporating moral criteria of validity – *if we already know that moral grounds of law are possible*. That view could be countered, of course, but it would not be refuted by Perry's observation that exclusivists interpret those same practices differently. If, again, we already know inclusive legal systems are possible, then the issue becomes which is the better interpretation of Canadian legal practice. If Waluchow's interpretation is better (in the sense that it better coheres with the relevant legal data points), then that is good reason to think Canada has an inclusive system with moral grounds of law. If the Razian interpretation is better in the relevant sense, then that is a good reason to think Canada does *not* have an inclusive system. But, regardless of which one is the better interpretation, the conclusion reaches no further than to how the particular practices of the Canadian legal system should be characterized. If we are not antecedently justified in thinking that moral grounds of law are possible, there is simply no non-question begging reason to think Waluchow's interpretation is better.

Surprisingly, what goes wrong, at bottom, with Waluchow's strategy is that there is too much complexity built into these practices of the Canadian legal system to form the basis of an uncontroversial model of MIT. MIT asserts a very simple claim – even if it is the kind of claim that seems, as I have remarked, difficult to support with a positive argument in virtue of its modal quality. The claim is that there is some possible world in which there is something that counts as a "legal system" with something that counts as "moral grounds/criteria of law." As it turns out, the weakness of this claim provides some guidance as to how to go about producing a positive argument in the form of a model. All one has to do is cook up a *coherent* story that shows (1) how there could be a legal system (2) with moral grounds of law: those are the guiding features.

6 A POSITIVE ARGUMENT FOR MIT

This makes it clear that we must adopt a very different starting point from the one Waluchow adopts. It is not just that Waluchow chooses an existing le-

gal system that causes the problem; it is that Charter practices are enormously complex – so complex that they include too many features that are compatible with both inclusivism and exclusivism. There is simply too much material in the Canadian legal system that obscures the issues by requiring interpretations so complex that they contain many entry points for contesting interpretations.

What is needed is something far simpler – and this requires that we construct a model from the ground up, taking care to ensure that we build no more into the system we wish to construct than what is reasonably necessary to provide a model for MIT. Every piece of additional information creates a logical opening for disagreement and hence for opposing interpretations. As we will see, adopting this approach will result in a model that might, at least initially, (1) seem overly simplistic, and (2) contain attributions of properties to subjects that cannot plausibly be attributed to people in this world. Indeed, one will be tempted to reject the model just on the strength of its simplicity and dissimilarities with the complexities of legal system in the actual world – that is, just on the strength of instantiating (1) and (2).

But, at this point, it should be clear that rejecting a model because it instantiates (1) and (2) would be a mistake because MIT makes such a strikingly weak claim: it asserts merely that a legal system with moral grounds/criteria of law is *possible*. That, by itself, says nothing about what such a legal system should look like. Indeed, it does not even imply that there is an inclusive legal system in some world that governs beings with exactly the same set of capacities and qualities we have. All that is needed by way of assumptions about the subjects is two claims: (1*) the subjects are rational; and (2*) the subjects are capable of being guided in their behavior by norms. It need not be the case, for example, that the beings in that model (or the possible world it describes) share the same cognitive abilities and psychological characteristics that people have in this world. Indeed, MIT does not imply, assert, or even insinuate that the law subjects must belong to the class of human beings.[18]

A very helpful example of what many consider to be a successful model for a possibility claim, despite the fact that Raz's model instantiates (1) and (2), can be found in the work of Joseph Raz. Raz considers the question of whether coercion

18 The reason is that the relevant possibility claims simply, by nature, lack the kind of explanatory power associated with, say, psychological theories. These are ultimately metaphysical claims and theories, and such theories cannot explain contingent events at any world because metaphysical claims purport to be necessarily true – and are hence true at worlds where the relevant contingent events occur as well as true at worlds where these events do not occur. The only way to avoid the problem is to structure a thought experiment in such a way as to eliminate all the contentious presuppositions. Insofar as the resulting model seems too simple to be successful, it will likely have something to do with a sense that the model I produce is too simple to have any explanatory power whatsoever in worlds like ours. But that simply misunderstands the modal character of MIT, as well as the logical capacity of conceptual and metaphysical claims to explain features of a legal system that are clearly contingent.

is a necessary feature of law; as he puts the matter, "Is it *possible* for there to be a legal system in force which does not provide for sanctions or which does not authorize their enforcement by force?"[19] It is telling that Raz frames the question in terms of its negation: instead of asking directly whether it is a matter of conceptual necessity that a legal system be backed by coercion, he asks whether it is *conceptually possible* for something lacking coercive enforcement mechanisms to count as a legal system.

The reason Raz expresses the question in terms of whether it is possible to imagine a legal system without coercive enforcement is that he is setting up an argument that uses *exactly the methodology explained above.* Indeed, he all but makes this explicit:

> The answer seems to be that it is humanly impossible but logically possible. It is humanly impossible because for human beings as they are the support of sanctions, to be enforced by force if necessary, is required to assure a reasonable degree of conformity to law and prevent its complete breakdown. And yet we can imagine other rational beings who may be subject to law, who have, and who would acknowledge that they have, more than enough reasons to obey the law regardless of sanctions. Raz (1999: 158–159).

Raz is presupposing here that one proper way of showing coercion is not a necessary feature of law is to show that one can – coherently – *imagine* a legal system without coercive enforcement mechanisms. He concedes that we might not be able to do it with human beings because of certain psychological qualities we have; however, that only makes it *nomologically* impossible (i.e., impossible given the causal laws in our universe). Raz stakes out the weaker claim that it is *logically possible* to have a legal system. He claims we can imagine a logically possible legal system without enforcement mechanisms but not nomologically possible.

Two observations should be made here. First, Raz makes clear that the model he constructs will contain rational beings as law subjects and, thus, satisfies (1*); likewise, Raz makes clear that the subjects of the model are capable of being guided by norms (i.e., these beings have "more than enough reason to obey the law regardless of sanctions"), and thus that the model satisfies (2*). Second, Raz's explanation of his methodology is explicit in indicating that the model will instantiate (2), since it will involve beings with psychological features that human beings lack – one of the two concerns that might arise about the model I construct below of an inclusive legal system.[20] It is not *nomologically* possible, Raz maintains, for there to be a legal system without coercive enforcement mechanisms because human beings lack crucial psychological attributes that would ensure the efficacy of the system of norms in guiding behavior. Rather, it

19 Raz (1999: 158; emphasis added).

20 We will see below that it also satisfies (1).

is logically possible, which means – given his view that such a legal system is not nomologically possible – that the relevant law subjects will have very different properties than human beings possess. It is, thus, not unusual for arguments for possibility claims to rely on assumptions that do not apply to human beings or other relevant phenomena in the actual world. It is clear that he acknowledges (2) is a legitimate property of models that establish possibility claims in conceptual jurisprudence.

It is, of course, true that the intuitive foundation for the Hartian analysis can be found in these instances of what we regard as paradigms. MIT says nothing that should lead anyone to think that any legal system with moral grounds or criteria of law must possess any of the features that we regard as paradigmatic features of a legal system. Conceptual jurisprudes look at paradigmatic features of a legal system because they do tell us something essential about law: they are paradigmatic features because they are a core – as opposed to more nearly borderline or even borderline – instance of some essential property. If there is a legal system incorporating moral grounds or criteria of law, it must have all the essential features of law. However, there is simply no reason to think that any of its features must be paradigmatic features; as far as conceptual analysis is concerned, every essential feature of such a legal system, if possible, could be near-borderline or borderline. It is true we might not recognize them as systems of law because features that are borderline fall within the open texture of a concept and thus are epistemically indeterminate. But the fact we cannot identify whether a borderline feature is actually an essential feature does not imply that the borderline feature is not an essential feature. Some borderline cases of a concept fall within the concept; some do not.

The second concern one might have about the model I construct below – namely, property (1), which is that the model is simplistic – also arises in connection with the model Raz constructs of a legal system that lacks coercive enforcement mechanisms. His argument is in the form of a model that satisfies the constraints of modal logic discussed above:

> Even a society of angels may have a need for legislative authorities to ensure co-ordination. Angels may be in agreement about both their values and the best policies for implementing them. But the sort of society described above does not presuppose such a measure of agreement. Its members may pursue many different and conflicting goals and they may share our difficulties in settling disputes and resolving conflicts of interests by mutual agreement. They differ from us only in having universal and deep-rooted respect towards their legal institutions and in lacking all desire to disobey their rulings. They have, therefore, all the reasons that we have for having legislative authorities and an executive.[21]

21 Raz (1999: 159).

It can now be seen, as mentioned above, that Raz creates a model with beings that have attributes that human beings lack, and his model, thus, instantiates (2) above. More importantly, for our purposes, is the simplicity of the model. Raz's model is grounded wholly in the assumption that a society of angels is *logically possible*; he simply assumes that there is a coherent set containing all the other propositions needed to fully describe a world that is consistent with there being a society of angels. The argument is, then, just that a society of angels will need certain disputes adjudicated, and certain coordination problems solved.

The simplistic appearance is quite misleading. A possible world consists of a coherent set containing an uncountably infinite number of propositions: it is a coherent maximal set of propositions in the sense that for every possible sentence *A*, either *A* is true in the world or *not-A* is true. The reason for the simplicity of the model is that no one can list an infinite number of propositions, so the definition of a model will, as a matter of *nomological necessity*, consist in the specification of a finite number of propositions and the assumption that the rest of a coherent model exists. Raz's model seems simplistic because he devotes just a couple of paragraphs to sketching the model, and he makes explicit only the key ideas. The assumption that there is a maximally coherent set of propositions (defining a logically possible world) containing an uncountably infinite number of propositions is a plausible one. And, again, no one could specify every proposition in an infinite set. The simplistic concern is unfounded because based on a misunderstanding of the logic of the possibility operator.

With these preliminaries in mind, the model of a legal system incorporating moral criteria of legality can be developed as follows – subject to the following conditions and assumptions. First, I assume at the outset that none of the exclusivist arguments against inclusive legal positivism succeed in refuting the latter – an assumption that should be quite plausible. By far, the best such arguments have been made by Joseph Raz and Scott Shapiro: Raz argues that moral grounds/criteria of law are incompatible with the concept of legal authority, while Shapiro argues that moral grounds/criteria of law are incompatible with the Practical Difference Thesis. Both arguments have generated a number of responses, which – at the very least – call into question the adequacy of the arguments. While I think a number of the arguments successfully refute these two arguments, it is safe to say that the dispute is at an impasse. Thus, it is reasonable to assume that MIT has not been refuted. The argument, of course, depends on that assumption.

Second, I will attempt to construct this model in a way that is compatible with both (1) the fundamental theses of legal positivism and (2) fundamental assumptions about law that are shared by legal positivists and anti-positivists alike. The first step in the argument is to address (1). On the positivist assumption that the grounds of law are completely determined by conventional practices in the sense that the criteria of legality are fully defined by a social rule of

recognition, I argue for the *possibility* of a legal system with moral grounds of law by providing a model that is grounded in some highly unusual assumptions.

Third, the argument will specify only a few propositions that are intended to define the logically possible world. In this connection, it is helpful to recall that a possible world consists of an uncountably infinite number of propositions; an omnipotent being can specify a countably infinite number of propositions, but even an omnipotent being cannot specify an uncountably infinite number of propositions. Human beings lack the ability to specify even a countably infinite number of propositions – or even a sufficiently large finite number of propositions. Models are, in both philosophical and mathematical practice, defined by a comparatively small number of propositions, as will be the case here. It is, as we have seen, not a general criticism of arguments defining models that they are too simplistic in the sense that the model is specified through a small number of propositions.

Fourth, and related to the first point above, the argument thus depends on the assumption that the specified propositions can consistently be joined with an uncountably infinite set of propositions to form a *maximally consistent set* and hence a possible world. If the assumption I made in the first of these points is not true (i.e., that none of the exclusivist arguments against MIT succeed), then this fourth assumption also fails. The exclusivist arguments would have shown that there is no set of propositions, including other propositions about the legal system, that can be joined to the propositions that define the model to form a maximally consistent set.

Having said all this, here are the propositions defining the model. To begin, there is a conceptually possible world in which everyone is infallible in discerning the requirements of morality but frequently acts in ways contravening those requirements in order to further his or her own selfish interests. Further, in one such world, an institutional system of rules is set up to regulate the behavior of citizens who act out of selfish interest when it conflicts with morality. Moreover, the grounds for membership in this institutional system of rules are exhausted by the norm all and only moral norms constitute a rule of the system. The fact that everyone is morally infallible means that everyone always knows what the law requires with respect to any particular act.

It is worth noting the relationship of these propositions to the propositions specifying Raz's model. Both models assume that law subjects are *infallible* with respect to moral requirements; the difference is that in Raz's model, law subjects are morally *impeccable* and never do wrong, as they are angels, while the subjects in my model are self-interested and frequently do wrong. But, and this is especially important to note, the law subjects of both models have a property that human beings lack – namely, infallibility with respect to the requirements of morality. As I have argued, this is simply not a problem when it comes to establishing possibility claims.

Some further propositions must be specified as part of my model. First, to keep order, the system employs coercive enforcement mechanisms that also conform to the requirements of political morality, which helps to ensure that people who know better conform their behavior to the first-order moral norms governing their behavior thereby making the institutional system of norms efficacious in guiding behavior. Second, judges always decide disputes arising under these institutional norms correctly.

The key steps in the argument can be sketched as follows. Since the system includes the minimum content of the natural law and the first-order norms validated by the grounds of this system are generally obeyed, the system counts *as a legal system*. Insofar as judges infallibly decide what morality requires of citizens and successfully persuade citizens to behave in accordance with those norms through morally justified coercive mechanisms, the norms are, at the very least, capable of providing reasons for action – and, on any sensible account do; even if the content of the law provides no reasons for action, there is no question that the coercive enforcement mechanisms do. Clearly, we have a reason to avoid coercive enforcement mechanisms. Finally, insofar as morality forms a seamless web, as is commonly assumed, there is always one correct answer and that answer is always reached and enforced by the judges, the grounds of law seem clearly to include – indeed, are exhausted by – moral principles. If that is correct, then it is possible for a legal system to have moral grounds of law and hence that MIT is true.

I should emphasize here that this particular argument shows no more than the possibility of moral grounds of law given certain assumptions about law and about positivism. These assumptions define no more than a very narrow set of circumstances (including some epistemic circumstances) in which morality can be incorporated into the grounds of law.

Even so, the argument I have sketched is more than strong enough to do the needed work, given what we have come to understand about the implications of a viable system of modal logic with respect to possibility claims. Indeed, it is worth recalling the relationship between the model I define here and Raz's model that purports to show sanctions are not a necessary feature of law. To begin, he assumes that a society of angels is conceptually possible in a world that bears sufficient resemblance to ours to ground an argument about *our* concepts of law and authority. But notice that it is not nomologically possible for any human being in this world to be an angel. Further, Raz does not build many more explicit assumptions into the model he is constructing of a legal system free of coercion. The assumption is, and this is surely plausible enough at first blush, that everything else we need to be true of this possible world to draw a conclusion about the actual world *is, in fact, true!* No argument is even attempted here – and that's fair game. There is little reason to think that the

other elements we need for that possible world to be properly related to this one are not satisfied.

The problem with Razian argument is not with its methodology; rather, he makes a conceptual mistake. The problem is that whatever system of norms would be necessary to perform these coordination functions in a society of angels, it would not be a system of *law* because whatever authority is needed to settle disputes, those disputes will not concern the "minimum content of the natural law"; a society of angels will know those rules without promulgation, and the angels will conform their behavior without needing to treat them as pre-emptive reasons. Angels, after all, are presumed to be both morally infallible and morally impeccable (i.e., always do what is the right thing to do).

Accordingly, the "authority" of such a system, for that reason, simply could not be a legal authority, on Raz's own theory of law and authority. Indeed, it is hard to see in what meaningful sense it could be true that the "law" of such a society, if concerned only to solve coordination problems (which would be the only kind of problem likely to give rise to disputes among angels), contains the minimum content of the law. Now if that is a correct analysis of the Razian claim, then a society of angels as Raz describes it could not ground a model of MIT *because whatever system of norms it has to solve coordination problems does not constitute a system of law.* But that is not the only problem here: grounding a model of MIT in a society of angels would be problematic only because of substantive concerns; it would not be problematic because of methodological concerns. A Razian model, like the model I attempt, would not be methodologically problematic simply because the law subjects do not sufficiently resemble human beings.[22]

It is to avoid such problems that I argue for MIT on the basis of more general fundamental assumptions shared across theories. In this connection, it is worth noting that the argument I offer here might strike positivists as making some implausibly strong assumptions about how official practices determine the grounds of law. But if one allows that officials can incorporate vague principles into the law by fixing the content through the statement of a norm, as Jules Coleman suggests, then it is that much easier to make the positive case for MIT

22 Although Hart seems to regard the incorporation of the minimum content of natural law into the law as merely a matter of natural necessity, there are some very good reasons to think that law must incorporate such content. First, the problem of the law's legitimacy comes up partly because it is coercive but also because law regulates a wide range of acts that includes acts that harm others, as well as acts that seem purely private in character. It is part of law's very nature that its authority (whatever that amounts to conceptually) covers and regulates the acts covered by the minimum content of the natural law. Second, if one denies the claim that positive law incorporates natural law then it becomes that much harder to distinguish law from other kinds of rules, such as rules governing a chess club. It might be plausible to call these rules "law," but they are not "systems of municipal law," which is the type of law with which conceptual jurisprudence is concerned.

precisely because it allows for the possibility of officials characteristically making mistakes about a social rule of recognition without its changing the status of that rule as stating grounds of law.[23] Of particular significance here is that the argument that can be made under Coleman's assumption would also provide support for MIT in a manner that is consistent with Dworkin's view about the relationship between sentences stating rules and the content of the propositions expressed by those sentences.

7 THE LIMITED EXPLANATORY POWER OF POSSIBILITY CLAIMS

Claims about what is merely possible have limited explanatory power with respect to what actually exists because the possible world that validates the claim, and this is certainly true of my arguments, might look nothing like the actual world. In the actual world, people are not morally infallible – although they are prone to doing what they believe to be wrong for the purpose of satisfying their own self-regarding interests. As far as coherence arguments of the type I offer here are concerned, they simply make intelligible the idea of moral grounds of law (i.e., as not contradicting other obvious conceptual truths about law). While Coleman's assumption makes possible a way of interpreting legal practice in the United States as incorporating moral grounds of law, along the lines of how Waluchow interpreted legal practice in Canada through the filter of MIT, it accomplishes, I argue, no more than that. An exclusive positivist can still interpret a legal system of that type as not incorporating moral grounds of law – although this would beg the question in the absence of a compelling counterargument (which I have argued above is lacking).

To see the plausibility of the idea that MIT has little to offer by way of explanatory potential, it is helpful to consider an issue in philosophy of religion. Some philosophers have argued that the very concept of an all-perfect God is incoherent; if that is true, then it is not possible for something to exist that instantiates all of the properties entailed by the locution "all-perfect." So a successful argument to the effect that the concept of an all-perfect God is incoherent implies that an *all-perfect* God does not exist. This does tell us something about the explanation of events in the world; it tells us that they cannot be explained in terms of the acts of an *all-perfect* God. But notice that what explanatory power this has is minimal because it tells you nothing about what explains events in the world; it simply tells you what does not explain those events.

23 Coleman (2001: 77–81). The assumption here is that norm could fix the content of the law without a judge necessarily knowing exactly how that statement applies in all cases but nonetheless endorsing the idea that there are correct answers to hard legal cases involving the interpretation of the norm.

A successful argument in the other direction has even less explanatory power. If we omit the questionable idea that perfection entails necessary existence, then a showing that the concept of an all-perfect God is coherent nets *nothing* by way of explanatory value. The reason is that what this shows is not that God *actually* exists (i.e., exists in this world) but rather that there is a logically possible world in which God exists. Given that we do not know whether that possible world is the actual one, the claim that God exists in some world tells us nothing by way of explaining events in this world.[24] What would be needed at the very least is a showing that God exists in this world; at least, then, we have reason to think that some of the events in this world *might* be explained by God's acts. But such a showing is not enough, by itself, to justify claims that God's acts explain any particular event in the world.

Exactly the same reasoning applies to MIT. Because MIT does not assert that there are *actual* legal systems that incorporate moral grounds, much less specify which ones do, it cannot explain any existing legal practices because it provides no grounds for identifying which ones have moral grounds of law. It asserts nothing more than the idea that moral grounds of law are coherent and thus that there is a conceptually possible legal system that incorporates moral grounds of law. The argument I give for the claim, it is true, points us in the direction of characteristics that are necessary conditions for a legal system to do this – in this case, a society where people are morally infallible but not inclined to do the right thing. But, as we are clearly not morally infallible, we cannot pick out worlds in which people are because we would have to be able to infallibly identify all the correct moral principles to determine whether people in some possible legal system have that capacity. For this reason, the explanatory power of MIT is, I argue, of negligible theoretical significance. Indeed, part of what might have temporarily quieted the debate is that the issue has come to seem substantively irrelevant to many conceptual jurisprudes. Nothing of practical value seems to turn on this.

Indeed, many legal theorists outside of conceptual jurisprudence are quite critical of the entire enterprise of conceptual analysis. Consider, for example, Richard Posner's plausible argument that conceptual jurisprudence is of no practical value. As he puts the point:

> I grant that even if the *word* 'law' cannot be defined the *concept* of law can be discussed; and that is after all Hart's title, though he uses the word 'definition' a lot. Philosophical reflection on the concept of justice has been a fruitful enterprise since Plato; for that matter, there is a philosophical literature on time. I have nothing against philosophical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question 'What is law?' if the question is to be worth asking by

24 Some philosophers argue that if God's existence is possible, then it is necessary. But these arguments are contestable.

> people who could use their time in other socially valuable ways. Nothing does turn on it. I go further: the central task of analytic jurisprudence is, or at least ought to be, not to answer the question 'What is law?' but to show that it should not be asked, because it only confuses matters.[25]

I cannot argue the point here in detail, but I think that Posner (1) is largely correct with respect to the practical implications of conceptual jurisprudence but that (2) fails to recognize the intellectually (and morally – since his seems to be a *moral* criticism) legitimate reasons for engaging in conceptual jurisprudence. As to (1), the choice of conceptual theory, as far as I can tell (and this is the subject for a different essay) contributes nothing to the solution of certain substantive problems arising with the law and paradigmatic legal practices. Of course, it is true that certain problems can seem to disappear under one conceptual theory that arise under other contending conceptual theories; however, the appearance is deceiving. To cite just one relevant example, Dworkin argues that the idea that judges have quasi-legislative discretion implies that cases in which that discretion is utilized to create new law that is applied to the case at bar entails that judges are illegitimately applying law in an *ex post facto* fashion. But Dworkin's theory faces an analogous difficulty. Assuming there is one right answer to every legal question, there is no guarantee that the judge will reach the correct decision. In that case, it might not be "law" that is applied in an *ex post facto* fashion; but the coercive mechanisms of law are being applied to enforce rules in that fashion – and that raises the same moral problems. But even when judges reach the right answer in a hard case, the law in a hard case fails to provide reasonable notice and hence fails to guide behavior in a way that is morally legitimate. Indeed, one can argue that the reason *ex post facto* laws are illegitimate is precisely because citizens do not have reasonable notice of how the coercive mechanisms of the state will be applied adversely against them. To put the point metaphorically, changing one's conceptual framework to solve a problem is analogous to trying to smooth out a carpet where an air pocket causes a bulge. Simply pushing on it accomplishes no more than to displace the bulge to another location on the carpet.

Indeed, this appears true of many, if not all, problems of conceptual analysis. Consider the trivial conceptual truth that bachelors are unmarried. It is hard to see what events in the world this truth could even begin to explain. The reason for this is that, on the traditional methodology with which most philosophers are familiar, the idea that conceptual truths are necessary truths entails that the truth of a conceptual claim does not depend on any particular contingent feature of a world. Insofar as that is true, it can be known without knowing anything more about a world except the conceptual content expressed by a concept-term (i.e., the meanings of the relevant terms). It is hard to see how

25 Posner (1997: 4).

conceptual claims true in every possible world could explain contingent events in any particular world, including this one.[26]

But the absence of practical benefits, *contra* Posner, does not imply that there is no reason to study conceptual jurisprudence. Posner's criticism is, at the end of the day, a moral criticism to the effect that pursuing theories that have no instrumental value wastes valuable resources that can be deployed to solving practical problems. This is simply not consistent with commonly held views about the value of knowledge *per se*; knowledge is, on the ordinary view, worth pursuing for its own sake. Indeed, it is not implausible to think that many areas of pure mathematics are pursued without regard for whether they are potentially valuable from an instrumental point of view. Further, some of the most famous achievements in mathematics do not seem likely, at this point in time, to have much by way of practical benefits. Indeed, Andrew Wiley's proof of Fermat's Last Theorem does not yet seem to have any practical benefits, yet hundreds of mathematicians spent thousands of hours pursuing a proof of the theory.[27] Some claims are worth knowing for their own sake – that is, because the truths they express are intrinsically, and not just instrumentally, valuable.

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26 I have discussed this problem as it pertains to other more important conceptual questions in other areas of philosophy. In particular, I have made a similar argument that the choice of a theory of the nature of mind contributes nothing the solution of the mind-body problem or related problems such as the problem of mental causation. Reconceptualizing the mind simply changes the way in which the problem is expressed without diminishing the gravity of the problem in any way. See Himma 2005.

27 I should note here that, although I am neither a mathematician nor a philosopher of mathematics, I have extensive experience studying pure mathematics at the graduate level while I was an undergraduate studying philosophy.

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Pierluigi Chiassoni*

Kelsen o naravnopravniški teoriji
Dolgotrajno kritiško razmerje

V nizu razprav, objavljenih med koncem dvajsetih in sredino šestdesetih let prejšnjega stoletja, je Hans Kelsen v naravnopravniško teorijo uperil radikalno kritiko. Avtor te razprave skuša to kritiko analitično obnoviti in kritično ovrednotiti. Njegov zapis je sestavljen iz dveh delov. V prvem se posveča temeljem Kelsnove argumentacijske strategije zoper naravno pravo in naravnopravniške teoretike. V drugem delu pa se osredotoči na dva kritična odgovora na Kelsnov napad. Enega je v imenu tradicionalne naravnopravniške teorije podal Edgar Bodenheimer, drugega pa je v imenu »Nove naravnopravniške teorije« izoblikoval Robert P. George. Avtorjeva analiza nakazuje, da se Kelsnova kritika uspešno zoperstavlja tem kritičnim odgovorom.

Ključne besede: Hans Kelsen, naravnopravniška teorija, razsodišče znanosti, Edgar Bodenheimer, Robert P. George

1 RAZSODIŠČE ZNANOSTI

V pisanjih Hansa Kelsna se izraz »naravnopravniška teorija« (tudi »naravnopravniška doktrina«; oba izraza sta prevoda nemškega *Naturrechtslehre*) nanaša na pisano množico teorij od antike do današnjih dni, ki si delijo tri temeljne trditve: (i) naravno pravo obstaja kot objektivni normativni red, ki je ločen in neodvisen od pozitivnega prava (ontološka trditev); (ii) ljudje ga lahko spoznajo (epistemološka trditev); (iii) naravnopravniški teoretiki na znanstven način razlagajo naravno pravo, kakršno je v resnici (trditev o znanstvenosti).

Kritika naravnopravniške teorije (NPT) predstavlja eno od osrednjih tem v Kelsnovem pravoslovju. Kelsen se je od konca dvajsetih let prejšnjega stoletja pa vse to konca svojega dolgega in plodnega akademskega udejstvovanja držal istega kritiškega pristopa: obtoži NPT pred »razsodiščem znanosti« (kot to izrecno stori v svoji znameniti razpravi iz leta 1949), izpostavi njene različne slabosti in tako poskrbi, da bo NPT dokončno obsojena kot ideologija (natančneje: kot ideološko premišljevanje o in utemeljevanje pravičnosti) po večini konzervativne naravnanosti, zakrinkana v pristno znanstveno dejavnost.[1]

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1 Glej, na primer, Kelsen 1928a; Kelsen 1928b; Kelsen 1949; Kelsen 1953; Kelsen 1957; Kelsen 1960b; Kelsen 1961; Kelsen 1964.

Da bi preprečili morebitne nesporazume, je treba nekaj razjasniti že zdaj. Po Kelsnovem mnenju obstaja zgolj eno pravo razsodišče znanosti. Gre za razsodišče, ki deluje na temelju radikalne pozitivistične epistemologije (»znanstveno-kritiška filozofija«, »relativistični pozitivizem«, »kritiški pozitivizem«, »kritiški empirizem«). Njegova temeljna načela je mogoče na kratko obnoviti takole:

1. *ontološki monizem*: obstaja zgolj ena resničnost, ki je podvržena znanstvenemu proučevanju, in to je resničnost iskustev, svet naravnih in družbenih pojavov, ki jih je mogoče zaznati s čutili in urediti z razumom (naša »sposobnost védenja«);
2. *relativistično epistemološko merilo*: absolutne »Resnice« ni, so le izkustvene resnice, ki so odvisne od racionalnih kriterijev znanstvenega proučevanja;
3. *zmerni epistemološki optimizem glede razuma in čutil*: ne glede na to, da so razum in čutila nezmožni proučevanja onkraj meja izkustva, in ne glede na to, da je njihova raba odvisna od določenih predpostavk in zahteva nenehno izvrševanje epistemičnega dvoma, jih je kljub temu treba imeti za precej učinkovita in zanesljiva orodja empiričnega proučevanja;
4. *epistemološki pesimizem glede različnih domnevnih orodij proučevanja*: razum in čutila so, naj bodo še tako nepopolni, edina pristna orodja znanstvenega proučevanja, ki so nam na voljo; druga domnevna orodja resnično ne zadovoljijo »iskanja [znanstvene] resnice«, temveč predstavljajo bolj ali manj odprte oblike »domišljije, ki uresničuje pobožne želje«;
5. *univerzalna epistemična veljavnost*: znanstveno-kritiški pristop ne velja zgolj za proučevanja na področju (vzročno povezanih) dejstev, temveč tudi za tista, ki zadevajo področje norm in vrednot. Isto razsodišče, ki je pristojno za razsodbo glede NPT (in v splošnem za pravo, politiko, moralo in njihove teorije), bi prav tako odločalo o primeru glede domnevnega čudežnega terapevtskega odkritja v medicini.
6. *metaetični subjektivizem in nekognitivizem*: z vidika znanosti sta *subjektivizem* (po katerem ne obstajajo objektivne moralne norme ali objektivne moralne vrednote, saj so te odvisne od voljnih dejanj človeka in odražajo njegove preference, čustva, interese) in *nekognitivizem* (po katerem razum – naša sposobnost védenja – ne more samostojno razrešiti problemov pravičnosti ali katerega koli drugega praktičnega problema) edini sprejemljivi metaetični stališči. Zgodovina, sociologija, psihologija in antropologija združeno podpirajo ta zaključek.[2]

Ta zapis je sestavljen iz dveh delov. V prvem delu stremim k analitični obnovi Kelsnove kritike NPT (§ 2), v drugem delu pa se osredotočam na dva zago-

2 Kelsen (1928b: 433 in nasl.); glej tudi Kelsen 1934; Kelsen 1948; Kelsen 1949; Kelsen 1950; Kelsen 1952; Kelsen 1953; Kelsen 1960b; Kelsen 1961.

vora NPT, ki se osredotočata na Kelsnovov razpravo *The Natural-Law Doctrine before the Tribunal of Science*:[3] prvi je zagovor »tradicionalne«, racionalistične NPT, ki ga je podal Edgar Bodenheimer (§ 3);[4] drugi pa je zagovor »nove« tomistične NPT, ki ga poda Robert P. George (§ 4).[5] Sledi nekaj zaključnih vrstic glede trajnega pomena Kelsnove kritike naravnopravniškega mišljenja (§ 5).

2 KELSNOVA KRITIKA

Kot sem dejal že na začetku, Kelsen, ob zvesti rekonstrukciji, NPT pripiše tri temeljne trditve: ontološko trditev, po kateri obstaja objektivni normativni red – naravno pravo, ki je ločen in neodvisen od pozitivnopravnega reda; epistemološko trditev, po kateri ljudje lahko naravno pravo spoznajo; ter trditev o znanstvenosti, po kateri naravnopravniški teoretiki razlagajo naravno pravo, kakršno je v resnici. Kelsen uperi zoper vsako od teh trditev niz kritičnih argumentov. Te bom skušal predstaviti v njihovi najboljši luči in kar najbolj razumljivo.

2.1 Kritika ontološke trditve

Ontološka trditev NPT je v resnici sestavljena iz štirih medsebojno povezanih trditev: (1) obstaja naravno pravo (2) kot normativni red, (3) ki je ločen in (4) neodvisen od pozitivnega prava.

Strategija, ki jo Kelsen ubere, da bi spodbil ontološko trditev NPT, se osredotoča na domnevno ločenost (3. trditev) in neodvisnost (4. trditev) naravnega prava od pozitivnega prava. Njena struktura se kaže kot dvostopenjska. Kelsen najprej identificira razlike med naravnim pravom in pozitivnim pravom, do katerih je mogoče priti na podlagi obnove najbolj razširjene NPT, ki jo Kelsen šteje za korektno. Nato izpostavi probleme, ki jih takšne razlikovalne značilnosti naravnega prava povzročajo z znanstvenega vidika. Pri tem Kelsen, kot bomo videli v nadaljevanju, trdi, da naravno pravo »kot sistem norm, ki je ločen in neodvisen od pozitivnega prava«, nima nobene znanstvene veljave (»njegove veljavnosti z znanstveno-racionalnega gledišča *ni mogoče sprejeti*«)[6] in je v vsakem primeru »nemogoče«.[7]

3 Kelsen 1949.
4 Bodenheimer 1950.
5 George 2000.
6 Kelsen (1964: 114).
7 Kelsen (1928a: 39).

2.1.1 Ločevanje naravnega prava od pozitivnega prava

Po Kelsnovem mnenju NPT trdi, da se naravno pravo od pozitivnega prava razlikuje v petih ozirih: po objektivnosti, absolutni vrednosti, absolutni veljavnosti, statični strukturi in hierarhični nadrejenosti.

Objektivnost. Naravno pravo je *objektivni red* človeškega vedenja. Njegov obstoj ni odvisen od človeške pravodajne dejavnosti. Gre za naravni red, ki je lasten (»inherenten«) naravi v splošnem oziroma v specifični naravi človeka in kot tak za človeka predstavlja nekakšno »danost«, podobno kot gore, oceani ali zvezdnato nebo. Nasprotno je pozitivno pravo ustvarjeno s strani človeka: gre za človeško stvaritev, ki je nujno *subjektivnega* značaja, saj je neizogibno odvisno od subjektivne volje ljudi, ki po naključju opravljajo vlogo pravne oblasti v človeški družbi.[8]

Absolutna vrednost. Naravno pravo se odlikuje z absolutno vrednostjo – njegove norme so nujno norme absolutne *pravičnosti*, ki predpisujejo vedenje, ki je za vsakega človeka, v vsakem času in prostoru, *samo po sebi pravično* v odnosu do drugih ljudi. Nasprotno so norme pozitivnega prava zgolj priložnostno tudi norme pravičnosti, tj. če in samo če utelešajo naravnopravne standarde absolutne pravičnosti. Posledično imajo zgolj *relativno vrednost*. Če že obstaja vrednota, ki jo je mogoče razumeti kot nujno povezano s pozitivnim pravom, ta vrednota ni pravičnost, temveč *mir*, tj. vrednota mirne (pacificirane) družbe. Seveda pa je mir združljiv tudi z očitnimi kršitvami meril pravičnosti – kot vsi vemo, je cena miru, ki ga prinaša pozitivno pravo, lahko zelo visoka za prikrajšane družbene skupine (vladani razred, »manjvredna« kasta, »prekucniške« stranke ali gibanja in tako naprej).[9]

Absolutna veljava. Če se naravnopravne norme odlikujejo z absolutno vrednostjo, potem so tudi absolutno veljavne: upoštevane in uporabljene naj bi bile *kot take*, ne glede na čas in prostor. Dana jim je, kot to včasih trdijo naravnopravniški teoretiki, »notranjo nujnost«.[10] Zaradi te absolutne veljave oziroma notranje nujnosti je naravno pravo *anarhičen* normativni red: prisila in organizacija nista lastnosti njegove zasnove. Nasprotno so pozitivnopravne norme zgolj *relativno veljavne*: s strogo pozitivnopravnega gledišča naj bi jih upoštevali in uporabljali, če in samo če predpostavimo – s pomočjo pravne »domneve«[11] oziroma pravne »fikcije«[12] – veljavnost temeljne norme, katere funkcija je preoblikovati neko izvorno zgodovinsko dejstvo nepooblaščene stvaritve prava s strani ljudi, ki so posedovali večjo zmožnost prisiljevanja (»moč«, nem. *Macht*),

8 Kelsen (1928a: 28–30); Kelsen (1949: 142).
9 Kelsen (1928a: 37 & 56–57); Kelsen (1928b: 435).
10 Kelsen (1928a: 37–38).
11 Kelsen 1934; Kelsen 1960a; Kelsen (1960b: § 52).
12 Kelsen 1979.

v pooblaščeno pravodajno dejanje.[13] Pravniki – v vlogi razlagalcev pozitivnega prava – ne morejo kar po mili volji predpostaviti veljavnosti temeljne norme pozitivnega normativnega reda. Slednje je mogoče, če in samo če so norme tega reda po večini učinkovite. Učinkovitost spodbujajo prisilne sankcije, za uporabo katerih so pooblaščeni uradniki. Tako je v končni posledici relativna veljavnost pozitivnega pravnega reda odvisna od prisile in organizacije. Medtem ko je naravno pravo anarhično, pozitivno pravo najde svojo »izpopolnitev« v obliki *državnega* pravnega reda, tj. v prisilnem in visoko organiziranem normativnem redu.[14]

Statična struktura. Naravno pravo, vsaj kar se tiče prevladujoče NPT, idealno stremi k temu, da obstaja kot *statičen* normativni red, tj. kot množica norm, ki vključuje *eno temeljno vsebinsko normo* in druge norme, ki jih je iz prve mogoče izvesti z »golo umsko operacijo«.[15] Tako je, na primer, naravnopravni red, opredeljen na podlagi temeljne norme »*Suum cuique tribuere*« (»Vsakomur svoje«), sestavljen iz te norme ter iz norm, ki so iz nje izvedene s (pravilnim) sklepanjem, kot na primer »Ne kradi«, »Izpolni sklenjene pogodbe«, »Ne izkoriščaj ljudi v hudi stiski« itd. Nasprotno so pozitivnopravni redi v svojem bistvu *dinamične* normativne ureditve: gre za množice norm, ki vključujejo eno *temeljno formalno* oziroma *normo o pristojnosti* ter norme, oblikovane s strani organov, ki jih takšna temeljna norma neposredno ali posredno ustanavlja.[16] Na primer: pozitivnopravni red, opredeljen na podlagi temeljne norme »Kar koli odredi kraljica, je pravo«, je sestavljen iz te pooblastilne norme in vseh norm, ki jih kraljica ali njeni delegati. Statična narava naravnega prava kaže na še eno temeljno razliko glede na pozitivni pravni red. Naravnopravne norme so postavljene enkrat za vselej – so imune pred spremembami, njihova vsebina se v času ohranja. Z drugimi besedami: so »večne in nespremenljive« norme. Nasprotno pa pozitivnopravne ureditve, kot dinamične ureditve, izkazujejo vgrajeno strukturno podvrženost spremembam v času in prostoru.[17]

Hierarhična nadrejenost. Končno predstavlja naravno pravo zaradi svoje absolutne vrednosti in absolutne veljave tudi normativni red, ki je *nadrejen* pozitivnopravnim ureditvam (slednje so mu torej *podrejene*). Odnos med obema normativnima redoma je nujno hierarhičen odnos.[18]

13 Kelsen (1928b: 435–437).

14 Kelsen (1928a: 33–34); Kelsen (1928b: 441).

15 Kelsen (1928b: 399–400); kot bomo videli v § 2.2, Kelsen naravnopravniške teorije, ki zagovarjajo dinamične, »izključno pooblaščujoče«, naravnopravne temeljne norme, razume kot »neskladne« s »čisto idejo naravnega prava«.

16 Kelsen (1928b: 400).

17 Kelsen (1928: 38).

18 Kelsen (1928b: 410–411); Kelsen (1960b: § 50).

2.1.2 Spodkopavanje ontološke trditve

Kot sem že dejal, je razgrnitev posebnosti, ki naj bi, skladno s »čisto idejo« naravnopravnega reda, naravno pravo ločevale od pozitivnopravnih redov, prva, pripravljalna stopnja Kelsnove kritike ontološke trditve NPT.[19] Zdi se, da želi Kelsen napeljati na naslednjo misel: ko smo si enkrat ustvarili jasno predstavo o domnevnih temeljnih lastnosti naravnega prava in jih želimo zatem zaradi intelektualne poštenosti jemati resno z znanstvenega stališča, naš »kritični razum«[20] ne more ravnati drugače, kot da v njih prepozna pomanjkljivosti, sporna stališča in pobožne želje.

Argumenti, ki jih Kelsen uperi zoper ontološko trditev NPT, so usmerjeni zoper tri tarče: prvič, zoper idejo naravnega prava kot objektivnega normativnega reda, ki se odlikuje z absolutno vrednostjo; drugič, zoper idejo norm naravnega prava, ki ji je dana notranja nujnost; tretjič, zoper idejo naravnega prava kot statičnega, samouresničujočega se reda, ki ga je mogoče »razvijati« preko čistih umskih operacij, v povezavi z idejo naravnega prava kot reda, ki je ločen in neodvisen od pozitivnega prava.

A. *Prevpraševanje objektivnosti in absolutne vrednosti naravnega prava*

Da bi spodkopal domnevno objektivnost in absolutno vrednost naravnega prava, Kelsen uporabi štiri argumente: argument nenavadnosti, genealoški argument, argument, ki temelji na človeški psihologiji (psihološki argument) in končno, argument o nujnosti teizma. Vsa poimenovanja tu in v nadaljevanju so rezultat moje rekonstrukcije Kelsnove kritike.

Kot bomo videli, ni mogoče za nobenega od teh argumentov trditi, da ima uničujočo moč – a se Kelsen niti ne pretvarja, da jo imajo. Namesto tega so namenjeni vzpostavitvi mreže razlogov, ki skupaj nakazujejo na možnost zavrnitve ontološke trditve NPT z znanstvenega vidika (Pod pogojem, da bi *te* bile temeljne značilnosti naravnopravnega reda, se lahko vprašamo: so sprejemljive z vidika nepristranskega racionalnega proučevanja? Bi ga naredile za *obstojen* normativni red?).

Argument nenavadnosti. Naravnopravniški teoretiki navadno predstavljajo objektivnost in absolutno vrednost naravnega prava kot nekaj samoumevnega. A brž ko nanju vržemo hladen pogled razuma, se ti domnevni lastnosti narav-

19 Mimogrede: za Kelsnovo obnovo »čiste ideje« naravnopravnega reda se zdi – daleč od tega, da bi bila nenavadna ali idiosinkratična – da je skladna celo z različnimi obnovami avtorjev, ki so naklonjeni naravnopravniškemu mišljenju. Tako na primer Mark Murphy identificira tri temeljne lastnosti »paradigmatičnega naravnopravniškega pogleda«: (1) objektivnost (»naravno pravo je dano od Boga«); (2) absolutna veljavnost (»po naravi poseduje avtoriteto nad vsemi človeškimi bitji«); (3) podvrženost védenju (»po naravi ga lahko spoznajo vsa človeška bitja«). Glej Murphy (2011: § 1.4.).

20 Kelsen (1928: 435).

nega prava izkažeta za izrazito sporni, saj svoje podpornike zavezujeta k *ontološkemu dualizmu*. Ideja naravnega prava kot normativnega reda, ki ga ni ustvaril človek, temveč zanj predstavlja nekakšno *danost*, nosi s seboj idejo dvojne normativne resničnosti: empirične, površinske resničnosti s strani človeka ustvarjenih norm pozitivnega prava in družbene morale, ki jih je mogoče zaznati s čutili in razumsko urediti, ter »višje« oziroma »globlje« resničnosti naravnopravnih norm, ki jih ni ustvaril človek. Tudi ideja absolutne veljave naravnega prava – ki je, kot smo videli, absolutna veljava pravičnosti, utelešene v normah naravnega prava – nakazuje dvojno resničnost vrednot: empirično, površinsko resničnost subjektivnih, relativnih človeških vrednot, ki so odvisne od človeških norm ter »višjo« oziroma »globljo« resničnost objektivnih vrednot, ki so odvisne od objektivnih norm in so »vrednote same po sebi« – tako kot obstajajo »stvari same po sebi«, drugače kot običajne, nepopolne stvari v empirični resničnosti.

Kelsen vztraja, da ontološki dualizem (»podvojitev območja zaznavanja«) »tvori jedro celotne metafizike in religije«, da je temeljni gradnik »tragikomičnega podvzema«, s katerim »človek ustvarja iluzijo preraščanja samega sebe«.[21] Brž ko naravnopravniškim teoretikom zastavimo neizogibna vprašanja, kot so: »Kako nastanejo naravnopravne norme?«, »Od kod prihajajo?«, »Kaj je vir – če ta sploh obstaja – absolutne vrednosti pravičnosti?«, »Kakšne vrste reč je ta višja oziroma globlja resničnost norm in vrednot, ki jih ni ustvaril človek?« itd., dobimo odgovore, ki kažejo na naravo, ki je pravodajna, na naravo, ki se odlikuje z objektivno usmerjevalno močjo, oziroma, še pogosteje, na (transcendentno) božanstvo, ki je ustvarilo naravo in človeka kot njen del ter vanjo umestilo naravnopravne norme in merila absolutne vrednosti.

Kelsen pa nas z argumentom nenavadnosti pozove, da pred vstopom in začetkom skrbnega proučevanja v (čudoviti) svet metafizične in religiozne misli zastanemo. Kot sodnike razsodišča znanosti nas povabi, da premislimo ontološki dualizem kot tak: tj. kot trditev, ki je ne glede na njene odlike v nasprotju z ontološkim monizmom kritiškega empirizma. Če bomo ravnali tako, potem nam po Kelsnovem prepričanju ne preostane drugega kot sklep, da je hipoteza o ontološkem dualizmu norm in vrednot nenavadna: da je nenavadna ideja o nekem drugem svetu »višjih« oziroma »globljih« norm in vrednot, ki zadevajo človeško ravnanje, a jih vendar ta ni ustvaril – tako kot pozitivne in moralne zakone empiričnega sveta.[22]

Argument nenavadnosti izvablja razumljiv odgovor: domnevna nenavadnost ontološkega dualizma norm in vrednot je odvisna od opazovalca. Če naj bi bil ontološki dualizem res tako »nenavadna hipoteza«, kot to trdi Kelsen,

21 Kelsen (1928b: 419).

22 Kot je dobro znano, je podoben argument – »argument čudnosti« – zoper moralni objektivizem na splošno naperil Mackie (1977: 38–42).

kako je potem mogoče, da ga celotne generacije filozofov in ljudi na splošno – vključno z nekaterimi izmed največjih umov, ki so bili kdaj rojeni – jemljejo kot nekaj samoumevnega?

Zoper takšen odgovor se Kelsen zateče h genealoškemu in psihološkemu argumentu. Kot bomo videli kmalu, prvi dozdevno odreka ontološkemu dualizmu kakršno koli znanstveno verodostojnost s tem, ko se sklicuje na njegov zgodovinski izvor v človeških družbah in kulturah; slednji pa se nameni razložiti trajni uspeh ontološkega dualizma s sklicevanjem na človeško psihologijo, posebno na dva značilna gona človeškega uma.

Genealoški argument. Od kod izhaja ontološki dualizem? Kot vsi drugi človeški konstrukti ne more biti nič drugega kot proizvod človeškega mišljenja. A kakšne vrste mišljenja? Ideja naravnega prava je ideja norm, zakonov oziroma načel za človeško ravnanje, ki so naravi »lastna«, ki »izhajajo iz« narave, ki jih je v naravi »mogoče najti«. Vendar pa je *narava* z vidika znanstveno-kritiškega mišljenja kaos dejstev, ki jih (lahko) zaznavajo naša čutila, razum pa jih ureja preko načela vzročnosti in drugih načel znanstvenega proučevanja.[23] Zato narava, kot jo vidi kritični empirizem, ne more biti narava, ki podaja oziroma vsebuje norme in ki jo imajo v mislih teoretiki naravnega prava. Biti mora narava drugačne vrste. Ideja o naravi, ki postavlja oziroma vsebuje norme, ima, tako Kelsen, svoj izvor v primitivnem mišljenju. Primitivni ljudje v naravnem okolju, ki obdaja njihove vasi (drevesa, gozdovi, vodni izviri, jezera, hribi, divje živali, zvezde itd.) vidijo naseljene duhove, ki jih je treba primerno častiti in miriti, da bi se tako izognili zlim posledicam (bolezni, lakoti, suši ipd.). Takšno poduhovljeno naravo primitivni ljudje razumejo kot del njihove družbe – kot množico entitet, ki nagrajujejo pravilna in kaznujejo napačna ravnanja. Z opazovanjem »obnašanja« takšnih entitet se ljudje naučijo, kako morajo oziroma kako ne smejo ravnati. Primitivni animizem predstavlja izvor ideje, da obstajajo *objektivne* norme za človeško ravnanje in posledično tudi izvor ontološkega dualizma norm in vrednot. Tovrstno primitivno mišljenje so do zdaj že skorajda povsod postopoma nadomestile bolj prefinjene oblike religioznega mišljenja, vse tja do velikih monoteističnih religij. Čeprav duše dreves in gora nadomešča transcendentno božanstvo, se temeljna oblika mišljenja ohranja: transcendentno božanstvo je izvor objektivnih zakonov – zakonov, ki jih ni ustvaril človek, ki jih je mogoče odkriti z »branjem« teleološko-teološke »knjige narave« in ki so za ljudi absolutno zavezujoči.[24]

Psihološki argument. Zakaj so generacije filozofov in ljudi na splošno podpirale – in to počno še danes – ontološki dualizem norm in vrednot? Zakaj so tako nedovzetni za argument nenavadnosti in genealoški argument? Po Kelsnovem mnenju razlog ni v tem, da je ontološki dualizem *resnična* znanstvena trditev –

23 Kelsen (1960: § 31).

24 Glej Kelsen (1928b: 422–423); Kelsen (1949: 137 in nasl.).

kritičnemu empirizmu navkljub. Prav nasprotno: kot kaže genealoški argument, je razlog v tem, da ontološki dualizem sploh ni znanstvena trditev. Pripada namreč domeni prakse. Gre za ideološko pripravo, katere primež nad omenjenimi generacijami filozofov in ljudi na splošno je mogoče razložiti z medigro dveh značilnih gonov človeškega uma. Na eni strani gre za gon »primitivnega uma«, ki stremi k iskanju takšnega absolutnega in heteronomnega temelja (tj. vira in utemeljitve) temeljnih meril človeškega vedenja, ki omogoča izogibanje osebni odgovornosti. Na drugi strani imamo opravka z oportunističnim gonom, naklonjenim načinom mišljenja, ki so zmožni zagotoviti spodbujanju lastnih interesov (individualnih ali skupinskih) pečat objektivnih in absolutnih vrednot. Skladno s tem naj bi bila torej prikladnost temeljni motiv v ozadju trdovratnega vztrajanja ontološkega dualizma norm in vrednot.[25]

Argument o nujnosti teizma. Nekateri naravnopravniški teoretiki skušajo, lahko bi rekli, ločiti usodo naravnega prava – ali bolje, tistega pojmovanja naravnega prava, ki ga zagovarjajo – od usode teizma (vere v transcendentno božanstvo) s tem, da zanikajo kakršno koli nujno povezanost med naravnim pravom na eni strani in kakršnim koli teološkim temeljem le-tega na drugi strani. Na ta način, trdi Kelsen, skušajo zagovor naravnega prava okrepiti s tem, da pokažejo, kako to ne potrebuje teološke utemeljitve, ki je s filozofskega gledišča sporna. Žal pa po Kelsenovem mnenju takšna ločitev naravnopravniške teorije od religioznih temeljev ni mogoča. Argument o nujnosti teizma je precej zapleten, Kelsen pa z njim udejanja temeljna načela svojega empiricističnega pogleda na svet (nem. *Weltanschauung*) in teorije norm. Povzeti ga je mogoče takole: naravno pravo je normativni red, čigar norme niso človeški proizvod. Norma je predpisovalna pomenska vsebina (nem. *Sinngehalt*) voljnega akta, usmerjenega k nekogaršnjemu ravnanju. Naravnopravne norme pa že po izhodiščni predpostavki ne morejo biti pomenska vsebina človeških voljnih aktov. Tako sledi, da morajo biti pomenska vsebina voljnih aktov neke nečloveške entitete. Če nismo primitivni animisti, ki verjamejo v duše dreves, rek, gora itd., imamo zgolj eno možnost: predpostavljati moramo obstoj transcendentnega božanstva, po volji katerega so bile naravnopravne norme ljudem postavljene kot vodila.[26]

Če strnemo: Kelsen meni, da obstajajo vsaj štirje dobri razlogi za to, da se znebimo ideje o obstoju naravnega prava kot objektivnega normativnega reda,

25 Kelsen (1928b: 419 in nasl.); Kelsen (1952: 22); Kelsen (1953: 10–11 & 22–24); Kelsen (1960b: § 51); Kelsen (1964: 114 in nasl.). Zdi se, da se Kelsen popolnoma zaveda prepričevalnega »razkoraka« v njegovih argumentih. Kritiški empirizem sicer lahko v ospredje prikliče temeljne praktične motive za človeško vero v ontološki dualizem. Prav tako se lahko – nasproti »primitivnemu umu« – zavzema za »moderni um« moralne avtonomije in končne osebne odgovornosti v praktičnih zadevah. A se mora, glede na to, da kot neosnovan molče zavrača t. i. »optimizem razuma«, zadovoljiti s tem in upati, da bo – prej ali slej – med ljudmi prevladalo zrelo in iskreno mišljenje.

26 Glej Kelsen (1928b: 422 in nasl.); Kelsen (1949: 138); Kelsen (1964: 114 in nasl.).

ki se odlikuje z absolutno vrednostjo. Prvič, s čisto racionalno-znanstvenega gledišča gre za nenavadno domnevo. Drugič, izhaja iz animističnega mešanja med družbo in naravo, ki je značilno za primitivno mišljenje. Tretjič, pripada domeni prakse in ideologij, kjer se prilega dvema značilnima gonoma človeškega uma, ki se tu združita v prikladnosti domneve o obstoju objektivnega reda človeškega ravnanja. Četrtič, ta ideja ne more obstati »sama po sebi«, temveč potrebuje teološko »utemeljitev« (v obeh pomenih te besede, tj. kot polaganje temeljev in kot opravičilo), da bi ji uspelo utemeljiti to, kar bi danes poimenovali »normativnost« naravnega prava.

B. *Prevpraševanje notranje nujnosti naravnopravnih norm*

Naravnopravniški teoretiki včasih trdijo, da je naravnopravnim normam dana »notranja nujnost«.[27] S Kelsnovega gledišča je to trditev mogoče razumeti na dva načina.

Po prvem možnem razumevanju je ideja o »notranji nujnosti« enaka trditvi o *absolutni veljavi* naravnopravnih norm. Kot smo videli, je absolutna veljava odvisna od absolutne vrednosti. Slednja pa je odvisna od obstoja objektivnega reda naravnopravnih norm. Tako je prvo razumevanje trditve o »notranji nujnosti« sporno iz tistih štirih razlogov, ki pod vprašaj postavljajo ontološki dualizem.

A nam je na voljo še drugo razumevanje te trditve. Po tem je zatrjevanje »notranje nujnosti« naravnopravnih norm enako trditvi, da povezava med prorekom (antecedentom) in porekom (konsekventom) naravnopravne norme ni normativna povezava pripisovanja, temveč neke vrste vzročna povezava med prorekom, ki izraža pogoj, in porekom, ki izraža njegovo nujno posledico.

To drugo razumevanje pa po Kelsnovem mnenju zaznamuje nepopravljiva zmešnjava, ki ima za NPT neprijetne posledice.

Prvič, s tem ko naravnopravne norme – ki so *najstveni* oziroma deontični zakoni (»Če se nekdo znajde v položaj, ko bi lahko kradel, potem naj ne krade«) – predstavlja kot zakone *nujnosti* oziroma vzročnosti (»Če se nekdo znajde v položaj, ko bi lahko kradel, potem nujno ne bo kradel«, kar je enako kot: »Če se kovinsko telo segreje, se bo nujno razširilo«), zmotno izniči razliko med pravimi normami na eni strani in izjavami o empirični vzročnosti na drugi strani. Ko ravna tako, NPT izkazuje primitiven, kulturno slabo razvit miselni ustroj, saj je mešanje normativnih in vzročnih povezav (mešanje med družbo in naravo) značilno za primitivno mišljenje.

Drugič, s tem ko NPT naravnopravne norme predstavlja kot neke vrste zakone vzročnosti, postavlja trditev, ki spodbija samo sebe: če so naravnopravne norme res (take kot) zakoni vzročnosti, potem so »izgnane iz domene

27 Kelsen (1928a: 35).

normativnega«.[28] Kot takšne nikakor ne morejo *usmerjati* človeškega ravnanja, prav tako kot nas zakon gravitacije ne more »usmeriti« k temu, da ostanemo z nogami na zemlji. Če, na primer, stavka »Moč je enaka pravici« (angl. »*Might is right*«*)* ne razumemo, kot da izraža normativno načelo, ki upravičuje in legitimira neko učinkovito oblast (»Ljudje z močjo naj vladajo«), temveč tako, kot da izraža zakon vzročnosti v človeški družbi (»Ljudje z močjo morajo vladati«; »Ljudje z močjo morajo nujno voditi«, »Če so v družbi ljudje z močjo, potem morajo ti nujno vladati«), potem takšna izjava izgubi vsakršno usmerjevalno moč. Takšen naravni zakon, sestavljen iz izjav o nujnem človeškem ravnanju, sploh ne bi bil nikakršen zakon oziroma normativni red, saj ne bi mogel izpolniti normativne funkcije, ki mu jo naravnopravniški teoretiki pripisujejo.[29]

C. *Prevpraševanje možnosti naravnega prava kot normativnega reda, ločenega in neodvisnega od pozitivnega prava*

Zadnji argument zoper ontološko trditev NPT je naslednji: četudi bi pustili ob strani vse prejšnje argumente, bi se ontološka trditev vseeno soočala z usodnim problemom. Po Kelsnovih besedah gre kar za »celoten problem« naravnega prava.[30] Gre za problem individualizacije (nem. *Individualisierung*, *Konkretisierung*). Kelsen pravi, da gre za problem, s katerim se mora NPT uspešno soočiti – tega pa ne more storiti, ne da bi se odpovedala trditvi, da je naravno pravo normativni red, ki je ločen in neodvisen od pozitivnega prava. Ta, lahko bi mu rekli, *argument o nujnosti pozitivizacije*, gre približno takole: tako kot vsak normativni red mora tudi naravno pravo vsebovati splošne norme (tudi najčistejši dinamični sistem mora vsebovati vsaj eno splošno normo, ki pooblašča vrhovno normodajno avtoriteto, kot, na primer, »Ljudje naj se ravnajo skladno s kraljevimi zakoni«). Kot statični normativni red (§ 2.1.1) mora naravno pravo vsebovati splošne materialne norme (kot, na primer, »*Bonum faciendum, malum vitandum*«). Vendar pa splošne materialne norme zaradi svoje »abstraktne« narave ne morejo delovati kot merila za posamične primere, tj. v posamičnih primerih jih ni mogoče uporabiti, ne da bi jih poprej individualizirali oziroma konkretizirali (z drugimi besedami: nujno se soočajo z »individualizacijskim razkorakom«). Postopek individualizacije splošnih materialni norm je, kar se pozitivnopravnih ureditev tiče, nujno diskrecijski postopek: gre za postopek diskrecijskega nadomeščanja splošnih norm z (ne-nujno »ustrezajočimi«) individualnimi normami, ki ne temelji zgolj na védenjskih, temveč tudi na voljnih aktih (izvršilni organ mora na »konstitutiven« način ugotoviti, da ima pred seboj individualni primer iste vrste, kot ga predvideva prorek splošne norme, prav tako pa mora na »konstitutiven« način ugotoviti, kakšna pravna posledica

28 Kelsen (1928a: 50).

29 Kelsen (1928a: 34); Kelsen (1949: 139); Kelsen (1956: 177).

30 Kelsen (1928: 39).

naj iz tega sledi). NPT ta problem navadno spregleda in splošne naravnopravne norme razume kot samouresničujoče se, tj. kot take, ki se na posamezne primere nanašajo preko čistih miselnih aktov njihovih naslovnikov. Da bi takšni rešitvi uspelo ohraniti identiteto in obstoj naravnega prava kot posebnega normativnega reda, bi morala NPT predpostavljati, da so vsi ljudje enako modri in dobri moralni akterji. Zgolj na podlagi takšne predpostavke bi lahko splošne naravnopravne norme enako uporabili v posamičnih primerih; zgolj na podlagi takšne predpostavke bi te norme delovale kot »samouresničujoče se« v posamičnih primerih. Žal pa je predpostavka, da so vsi ljudje enako modri in dobri moralni akterji, pretirana celo za domišljijo NPT. Le sorazmerno malo ljudi je dovolj modrih in dobrih, da bi lahko uporabljali splošne naravnopravne norme. Da bi naravnopravni red lahko deloval, je tako treba tem posameznikom zaupati uporabo splošnih norm naravnega prava v oblikah in na načine, ki so univerzalno zavezujoči. Vendar pa ta poteza pomeni, da se te modre in dobre ljudi spremeni v prav toliko organov, ki uporabljajo naravnopravne norme. Poleg tega pa je, da bi zagotovili učinkovitost njihovih sodb, treba zagotoviti tudi neko vrsto prisile. Vendar pa to pomeni, da mora naravno pravo postati pozitivno pravo: da bi bilo naravno pravo delujoč normativni red, mora prestati postopek pozitivizacije. A če je tako, moramo skleniti, da naravno pravo kot normativni red, ki je ločen in neodvisen od pozitivnega prava, enostavno »ni mogoče«.[31]

Kelsnov argument o nujnosti pozitivizacije se morda zdi v očeh privrženca naravnega prava prikrojen lastnim potrebam. A vendar kaže na ključen tehnični problem NPT. Če želimo namreč trditev NPT o obstoju naravnopravnega reda jemati resno, se neizogibno soočimo s problemom praktičnega delovanja takšnega reda. In če je mogoče pokazati, da ta v obliki popolnoma objektivnega, samouresničujočega se normativnega reda ne more delovati, potem se zdi, da celoten podvzem NPT obljublja več, kot lahko izpolni. Njegova celotna usmerjevalna vrednost se tako zdi navidezna – ta je v najboljšem primeru sestavljena iz izpostavljanja sklopa (zelo) abstraktnih načel, ki naj jih razvijajo izbrani modri in dobri razlagalci in uporabniki. Kelsen se sicer zaveda, da naravnopravniški teoretiki po večini vztrajajo pri tem, da naravno pravo *zahteva* obstoj pozitivnopravnih ureditev. A kot bomo videli (§ 2.3), to razume kot zgovorno »neskladje« v njihovi argumentaciji.

Do zdaj smo se ukvarjali s Kelsnovo kritiko ontološke trditve. A kot sem povedal že na začetku, s Kelsnovega vidika NPT podaja še dve nadaljnji trditvi: prvič, da ljudje naravno pravo lahko spoznajo (epistemološka trditev NPT); in drugič, da naravnopravniški teoretiki na znanstven način razlagajo naravno pravo, kakršno je v resnici (trditev o znanstvenosti NPT). Trditev o znanstvenosti se zajeda v epistemološko trditev, saj obstane ali pade kot posledica osnovanosti ali neosnovanosti slednje – če namreč ljudje naravnega prava ne morejo

31 Kelsen (1928a: 39–56).

spoznati, potem naravnopravniški teoretiki ne morejo biti njegovi znanstveni razlagalci. Vseeno pa Kelsnova kritika NPT očitno vsebuje tudi nekaj argumentov, ki so usmerjeni neposredno zoper trditev o znanstvenosti. V nadaljevanju bom ločeno pretresel Kelsnovo kritiko teh dveh trditev.

2.2 Kritika epistemološke trditve

Skladno z epistemološko trditvijo ljudje naravno pravo lahko spoznajo: kot objektivna ureditev človeškega vedenja, ki se odlikuje z absolutno vrednostjo in veljavnostjo, je naravno pravo primeren predmet človeškega védenja.

Kelsen zoper to trditev ubere argumentacijsko strategijo, s katero naj bi pokazal, da nobena od metod, ki jih NPT predstavlja kot metode za spoznavanje naravnopravnih norm, ne prestane preizkusa znanstveno-kritiške filozofije. Z drugimi besedami, nobene od teh ni mogoče razumeti kot pristne metode znanstvenega proučevanja. Kelsen pri tem razvije tri temeljne argumente: (1) argument logične zmote, (2) argument nesamoumevnosti, (3) argument protislovnosti praktičnega uma.

Argument logične zmote. NPT trdi, da je naravnopravne norme mogoče »izpeljati« oziroma »deducirati« iz narave. Razumljene dobesedno, takšne izjave ni mogoče sprejeti z vidika racionalno-znanstvene filozofije, saj je logično zmotna. Izjava namreč molče predpostavlja, da je narava množica dejstev. Vendar pa iz samih izjav o dejstvih še ni mogoče logično izpeljati nobenih zaključkov: na primer, iz izjav: »ljudje se po naravi nagibajo k družbi« in »velike ribe žrejo male ribe« ne sledi, da »naj se ljudje vedejo tako, da ohranjajo družbo« niti ne, da »naj velike ribe žrejo male ribe«. Takšno sklepanje je mogoče če in samo, če je neka norma predpostavljena, na primer: »ljudje naj se vedejo skladno z njihovimi naravnimi vzgibi« ali »živali naj se vedejo kot ponavadi«.[32]

Seveda lahko naravnopravniški teoretiki na argument logične zmote odgovorijo rekoč, da po njihovem gledanju narava ni zgolj množica dejstev, tj. da vsebuje tudi naravnopravne norme, ki so vanjo že vgrajene. Nadalje lahko trdijo tudi, da naravnopravnih norm pravzaprav ne »izpeljujejo« iz narave (izjav o naravi), temveč da jih v njej zaznavajo, najdejo oziroma odkrivajo.

Vendar pa bi lahko, gledano s Kelsnovega stališča, odvrnili, da je govoriti o »izpeljavi« ali »dedukciji« naravnopravnih norm »iz narave« zavajajoče. Prej bi lahko rekli – kot predlaga argument o nujnosti teizma – da gre za postopek *razlaganja* tiste transcendentne volje, ki je (kot se predpostavlja) ustvarila naravo in naravnopravne norme.[33] Vendar pa NPT v povezavi s takšno razlagalno dejavnostjo ni ponudila nobene jasne, v rezultat usmerjene in zanesljive metode.

32 Kelsen (1949: 141); Kelsen (1959: § 31: 68–69); Kelsen (1960b: § 32: 72–73).

33 Glej zgoraj § 2.1.2; glej tudi Kelsen (1949: 138: »proučevanje narave je pravzaprav enako proučevanju Božje volje«).

Tako se zdi, da argument logične zmote izpostavlja resen metodološki problem NPT, ne glede na to, kako razumemo ključni pojem narave.[34] Takšen zaključek podpirata tudi druga dva argumenta Kelsnove kritike.

Argument nesamoumevnosti. NPT prav tako trdi, da so norme naravnega prava ali pa vsaj njegova vrhovna načela samoumevna (očitno obstoječa, očitno veljavna sama po sebi). Vsi ljudje bi jih mogli doumeti na podlagi lastnega (racionalnega) umévanja. Vendar pa nam zgodovina NPT pokaže, da se je skozi čas različnim naravnopravniškim teoretikom kot samoumevna kazala množica različnih, pogosto med seboj neskladnih naravnopravnih norm (na primer glede enakosti, suženjstva, zasebne lastnine, avtokratske vlade, socialne varnosti ipd.). Tako moramo, gledano s strogo znanstvenega stališča, skleniti, da samoumevnost odpove kot zanesljiv, objektiven preizkus razlikovanja med pravimi in nepravimi naravnopravnimi normami. Morda bi lahko celo rekli, da trditev o samoumevnosti naravnopravnih norm ni nič drugega kot sredstvo, s katerim naravnopravniški teoretiki na podlagi lastnih vrednostnih sodb – kadar se jim to zdi prikladno – naravnopravne norme predstavljajo kot nekaj popolnoma samoumevnega.[35]

Naravnopravniški teoretiki racionalistične provenience – ki navadno delujejo v okviru tradicije, ki jo navdihuje Tomaž Akvinski – bi lahko odgovorili, da v nasprotju z argumentom nesamoumevnosti ljudje *dejansko* kot samoumevna dojemajo *ista* naravnopravna načela. Pomislimo, na primer, na načela kot so »vsakomur svoje« (lat. *suum cuique tribuere*), »delaj dobro, izogibaj se slabega« (lat. *bonum faciendum, malum vitandum*), »vedno ravnaj s pravo mero« itd. Pomislimo, če se spomnimo na uglednega predstavnika »Nove NPT« Johna Finnisa, na katalog temeljnih dobrin (življenje, védenje, igra, estetska izkušnja, prijateljstvo, družabnost, praktična razumnost in religija), ki so nujne za človeški razvoj, in takšne, da vodijo do »splošnih moralnih standardov« – ki so preko načel praktične razumnosti tudi same del naravnega prava.[36]

A s Kelsnovega stališča je na voljo nekaj (preprostih) odgovorov.

Prvič, nikakor ni *očitno*, da vsa ta načela pripadajo enemu in edinemu pravilnemu naravnopravnemu redu; daleč od tega, da bi bila resnično objektivna – so zgolj kulturno odvisna, priložnostna merila.

Drugič, v vsakem primeru so tovrstna, domnevno univerzalna, samoumevna načela tako abstraktna, da so dejansko prazna in posledično praktično neuporabna: v resnici ne zmorejo zagotoviti nikakršnih smernic za človeško ravnanje, če in dokler niso ustrezno razlagana, podrobneje opredeljena, konkretizirana, individualizirana ter usklajena. Žal pa NPT glede teh nujnih operacij ne

34 Zdi se, da to priznava tudi Murphy 2011.

35 Kelsen (1949: 172–174); Kelsen (1949: 142, besedilo in op. 9; 143–144; 151 in nasl. & 172–174); Kelsen (1959: § 45); Kelsen (1960b: § 45 & 105–106).

36 Finnis (2011: 23 in nasl. & 85 in nasl.).

ponuja nobene zanesljive znanstvene metode.[37] Kar vidimo iz nepristranskega zornega kota, so zgolj vaje v normativni argumentaciji.

Argument protislovnosti praktičnega uma. Včasih se NPT v podporo epistemološkemu argumentu sklicuje na praktični um. Načela naravnega prava naj bi bila dostopna človekovemu praktičnemu umu: šlo naj bi za načela, ki se razkrijejo preko sposobnosti, ki istočasno vé, kaj je absolutno pravilno in dobro storiti, ter želi, da se to tudi zgodi. Vendar pa je z vidika racionalistično-znanstvene filozofije treba védenje, pridobljeno preko človekovega praktičnega uma, zavrniti kot nezanesljivo. Že sama ideja praktičnega uma, ki istočasno vé, kaj je dobro, in si želi, da se to zgodi, je namreč protislovna. Z znanstvenega stališča sta namreč védenje in hotenje dve ločeni, čeprav empirično sorodni sposobnosti. Kakršno koli trditev o njuni ontološki povezavi v eni sami sposobnosti je treba zavrniti kot neznanstveno: podprejo jo lahko zgolj metafizični argumenti in dejanja vere.[38]

2.3 Kritika trditve o znanstvenosti

Kritika epistemološke trditve spodbija tudi trditev o znanstvenosti – ki pravi, da so naravnopravniški teoretiki znanstveni razlagalci naravnega prava, kakršno je v resnici – glede njene predpostavke, in sicer z zanikanjem možnosti obstoja kakršnega koli resničnega, znanstveno zanesljivega védenja o naravnem pravu. Kot takšna je tudi kritika trditve o znanstvenosti, saj zatrjuje, da naravnopravniški teoretiki dejansko *ne morejo* opravljati dela, za katerega trdijo, da ga opravljajo. Ta kritika, usmerjena neposredno na trditev o znanstvenosti, vzame v ozir kritiko epistemološke trditve ter jo, lahko bi rekli, dopolni, s tem ko trdi, da naravnopravniški teoretiki dejansko opravljajo drugačno, in heterogeno, nalogo od tiste, za katero trdijo, da jo opravljajo. Na kratko: sodelujejo pri ideološki dejavnosti, ki je sestavljena iz oblikovanja normativne, s subjektivnim vrednotenjem obremenjene moralne, politične in pravne filozofije, pod pretvezo znanstvenega razlaganja objektivne ureditve človeških odnosov. V podporo takšnemu zaključku Kelsen vpreže tri temeljne argumente: (1) argument protislovja, (2) argument obratne dedukcije (oziroma argument »projekcije«), (3) argument funkcij.

Argument protislovja. NPT trdi, da naravnopravni red obstaja, da se odlikuje z absolutno vrednostjo in absolutno veljavo ter da je hierarhično nadrejen pozitivnopravnim redom. Če vzamemo takšne trditve zares, potem bi, tako Kelsen, morali pridi do zaključka, da gre z naravnopravnega stališča pozitivno pravo razumeti bodisi kot odvečno – kadar se njegove norme skladajo z naravnopravnimi normami – bodisi kot neveljavno (nično) – kadar se njegove norme ne

37 Kelsen (1952: 13 in nasl.); Kelsen (1960b: §§ 10–13 & 15).

38 Kelsen (1960b: §§ 39–43: 86–89).

skladajo z naravnopravnimi.[39] Vendar pa se naravnopravniški teoretiki navadno izogibajo obema zaključkoma.

Po eni strani trdijo, da pozitivno pravo, ki spoštuje naravno pravo, ni odvečno, temveč je dejansko nujno. To pa zato, dodajajo, ker bi številni, če ne bi bilo pozitivnopravnih norm, ki predvidevajo prisilne sankcije, zaradi arogance in zlih vzgibov ravnali v nasprotju z naravnim pravom.[40]

Po drugi strani pa razmerje med naravnim in pozitivnim pravom pojmujejo tako, da je kakršen koli konflikt med njima v celoti nemogoč (Hobbes), ali pa tako, da če je že mogoč, neveljavnost pozitivnopravnih norm, ki nasprotujejo naravnopravnim, ni samodejna in navadno tudi ne pomeni, da so akterji odvezani obveznosti ravnati se po njih.[41] Vrh tega večina naravnopravniških teoretikov izključuje obstoj naravne pravice do upora zoper (tudi močno) nepravične pozitivnopravne norme in poverja razlaganje naravnopravnih norm (državnim) uradnikom pozitivnopravnega reda.[42]

Po Kelsnovem mnenju NPT na obeh mestih zagovarja stališča, ki so protislovna njenim lastnim temeljnim trditvam. Kelsen trdi, da je to protislovje tako resno, da pomeni že »popolno razvodenitev naravnopravniške doktrine«.[43] Zakaj je tako? Morda bi lahko takšno protislovje pripisali malomarnemu razlogovanju. Po drugi strani pa bi lahko trdili, da je napaka dejansko v očeh opazovalca, tj. da »protislovja«, ki ga v NPT vidi Kelsen, ob dobrohotnem branju v resnici sploh ni.

Vendar pa Kelsen, da bi poudaril svoje stališče, predlaga drugačno branje: takšno »protislovje« NPT gotovo ni logične narave. Lahko bi rekli, da je »pragmatične« narave; natančneje, da gre za zgovorno »nenavadnost«. Nadalje pa to protislovje NPT tudi ni naključno, temveč načrtno. Razgrinja namreč dejstvo, da ima večina naravnopravniških teorij vgrajen jasen *upravičevalni cilj*: stremijo k upravičevanju obstoječih pravnih redov kot (bodisi *prima facie* bodisi ob upoštevanju vseh dejstev) moralno pravičnih in legitimnih. To pa je očitno ideološka, in ne znanstvena funkcija.[44]

Argument obratne dedukcije (oziroma *argument projekcije*). Po Kelsnovem mnenju na ideološko naravo NPT nakazuje še eno stališče, ki ga deli večina na-

39 Kelsen (1949: 142 & 144).

40 Kelsen (1960b: 113–114, kjer se sklicuje na Akvinskega: »*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).

42 Kelsen (1949: 146–147 & 148–150); Kelsen (1960b: 119–121).

43 Kelsen (1949: 150).

44 Glej na primer Kelsen (1960b: § 50), kjer, sledeč Troeltshu, izpostavi preoblikovanje pozitivnega prava s strani stoikov in krščanske cerkve v nepopolno obliko naravnega prava – ne glede na njegovo vsebino.

ravnopravniških teoretikov. Gre za stališče, da naravnopravne norme niso izpeljane iz človeške narave kot celote, temveč zgolj iz njenega dobrega (razumnega, pravega) dela. Na ta način pa se dozdevna »dedukcija« (»izpeljava«, »doumetje«) naravnopravnih norm iz narave človeka oziroma narave na splošno obrne na glavo:

> Pufendorf – in vsi drugi pisatelji – ne izpeljujejo tega, kar razumejo kot naravno pravo, iz človeške narave, kakršna je v resnici, temveč iz človeške narave, kakršna naj bi bila in kakršna bi bila, če bi se skladala z naravnim pravom. Ni torej naravno pravo izpeljano iz (prave) narave človeka – narava človeka, idealna narava človeka, je tista, ki je izpeljana iz naravnega prava, ki je tako ali drugače predpostavljeno.[45]

Kelsen meni, da je mogoče oblikovanje standardne NPT razumeti kot dvostopenjski postopek. Na prvi stopnji se naravnopravniški mislec odloči, katera so načela naravnega prava – tistega pravega, pristnega, naravnega prava. Na drugi stopnji pa zanje poišče oporo v naravi človeka in človeškega stanja. Na ta način naravnopravniški teoretik v naravo projicira svoje videnje naravnega prava. To projekcijo razgrinja neizbežna izbira naravnih podatkov, ki jo opravi vsak naravnopravni teoretik, pri čemer izključi tiste podatke, tista naravna nagnjenja oziroma gone človeškega uma (navadno gre za nagnjenja k agresiji, dominaciji, zastonjkarstvu itd.), ki ne bi smeli tvoriti podlage nobenega naravnopravnega načela.[46]

Argument funkcij. Argument (dejanskih) funkcij NPT – zadnji, ki ga bom proučil v tej predstavitvi Kelsnove kritike naravnopravniškega mišljenja – se resnično zajeda v predhodne argumente. Povzeti ga je mogoče takole: naravnopravniški teoretiki trdijo, da so znanstveni razlagalci naravnega prava, kakršno je v resnici. Argumenti zoper epistemološko trditev spodnašajo tla pod nogami takšni trditvi o znanstvenosti (glej zgoraj § 2.2). A če jih pustimo ob strani, je mogoče do enakega zaključka priti preko naslednjih vprašanj: Kakšna je oziroma je zgodovinsko bila neposredna funkcija NPT? Pripada takšna funkcija sferi znanstvenga védenja ali pa mogoče sferi prakse (politika, morala, pravo)? Kot namiguje že argument protislovja, so imele in imajo še danes naravnopravniške teorije upravičevalno funkcijo: ideja naravnega prava je bila (in je) uporabljena za upravičevanje bodisi ohranitve bodisi reforme – v redkih primerih celo revolucionarnega prevrata – obstoječe vladavine in pozitivnopravnega reda. Takšna upravičevalna funkcija je – ne glede na njen moralni, politični in pravni pomen – očitno izven domene znanstvenega proučevanja, kot ga opredeljuje racionalno-znanstvena filozofija »relativističnega pozitivizma«. Gre za ideološko, normativno funkcijo.[47]

45 Kelsen (1949: 144); Kelsen (1960b: §§ 33–36).

46 Kelsen (1960b: §§ 33–36).

47 Kelsen (1960b: §§ 50–52).

3 NARAVNOPRAVNIŠKA TEORIJA VRAČA UDAREC: BODENHEIMER PROTI KELSNU

Edgar Bodenheimer je leta 1950 objavil zapis z naslovom *The Natural-Law Doctrine before the Tribunal of Science: A Reply to Hans Kelsen*. Tam si zastavi nalogo obraniti tradicionalno, racionalistično, neteološko NPT pred Kelsnovim »silovitim napadom«, in sicer tako, da se z njim – »vodilnim predstavnikom logičnega pozitivizma v pravoslovju« – sreča »na njegovem terenu«: tj. s tem, da »izzove veljavnost njegovih zaključkov na 'sekularni' osnovi, brez pomoči verskih ali metafizičnih aksiomov«.[48]

Bodenheimerjeva obramba NPT temelji na več argumentih. Nekateri izmed njih celo predstavljajo odprto priznanje ideološke narave NPT. Tako je na primer, ko Bodenheimer kritizira Kelsna, ker ta zagovarja vrednostno nevtralen pojem prava, ki niti ne izključuje možnosti vključitve »arbitrarnih, spremenljivih in neracionalnih zapovedi v izrazu 'pravo'«, namesto da bi predstavil racionalen pojem, ki bi »podpiral prizadevanja prava« in »ohranjal dobro ime prava«.[49]

V nadaljevanju puščam ob strani tovrstne rešitve, ki očitno spodkopavajo same sebe in se osredotočam na pet argumentov, za katere se vsaj *prima facie* zdi, da pomenijo resen izziv Kelsnovi kritiki NPT. Gre za (poimenovanja in rekonstrukcija so, kot že prej, moja): (1) argument nedobrohotnosti, (2) argument kontingentnosti teizma, (3) argument uspešnosti, (4) argument netogega ločevanja med dejstvi in normami, (5) argument empirične nevzdržnosti etičnega subjektivizma. Vsakega od teh argumentov bom premeril enega za drugim in pogledal, kakšen, če sploh kakšen, odgovor nanje je mogoče ponuditi s Kelsnovega gledišča.

3.1 Argument nedobrohotnosti

Bodenheimer trdi, da je Kelsnov napad na NPT pretirano nedobrohoten, saj spregleduje enega temeljnih vidikov naravnopravniškega mišljenja. Na ta način podaja nepošteno podobo NPT.

> Izhodišče tega pristopa bi preprosto lahko bil *premislek o nekaterih temeljnih človeških značilnostih in potrebah, ki jih pravo ne sme zanemariti*. Na primer, *izjava v smislu, da naj bi bil človeški zakon, ki bi prepovedoval spolno občevanje med moškim in žensko, v nasprotju z »naravnim pravom«, ne bi nujno zahtevala teološke podpore*. Tako verniki kot agnostiki bi se strinjali, da *zakon, ki predpisuje dvaindvajseturni delovnik, nasprotuje zakonom narave*, ki zahtevajo, da človek določen čas počiva. Zakon, ki bi predpisoval, naj ljudje hodijo po vseh štirih ali da je treba novorojene otroke hraniti s koščki mesa, bi najverjetne vsakdo zavrnil kot »nenaraven« /.../; *naravnopravniška doktrina,*

48 Bodenheimer (1950: 335).

49 Bodenheimer (1950: 363).

> *v tej določeni različici, zgolj priznava obstoj določenih osnovnih značilnosti, gonov in instinktov človeške narave, ki jih ni mogoče zanemariti oziroma v celoti zatreti, četudi jih človeški zakonodajalec lahko ureja in usmerja*. Zakonom, nesprejemljivim za človeško naravo, se bodo ljudje aktivno ali pa pasivno uprli in jih kar najhitreje odpravili. *Vse, kar je v igri pri tem vidiku te doktrine, je ugotovitev, da obstaja v človeški naravi prvina, ki omejuje moč zakonodajalca in brzda njegovo arbitrarnost*. Takšno stališče je skladno tako s sekularnim kot z religioznim pristopom k pravu.[50]

Z gledišča Kelsnove teorije pa je argument o nedobrohotnosti vendarle mogoče zavrniti z različnih vidikov.

Prvič, Kelsnova kritika NPT se jasno zaveda empiričnih omejitev, ki jih za učinkovitost pozitivnopravnih norm predstavlja človeško stanje (tj. človeška fiziologija in psihologija). Tako, na primer, pri obravnavanju problema socialne pravičnosti vztraja, da bo pravni red, utemeljen na kompromisu, ki zadovoljuje različne med seboj tekmujoče interesne skupine, verjetno bolj stabilen (miroljuben, učinkovit) kot pa pravni red, v katerem »zmagovalec pobere vse«.[51]

Drugič, Kelsen bi ugovarjal opredelitvi množice empiričnih izjav o običajnih fizičnih in psiholoških lastnostih ljudi (»moški in ženske ne morejo preživeti brez spolnih odnosov«, »ljudje ne morejo delati dvaindvajset ur na dan«, »novorojenčki ne morejo biti hranjeni s koščki mesa« itd.) kot »naravno pravo«. To pa zato, ker bi takšna raba izraza »naravno pravo« najverjetneje povzročala zmešnjavo med tovrstnim čistim empiričnim »naravnim pravom« na eni strani in normativnim naravnim pravom, kot množico norm, domnevno »izvedenih« iz naravnih človeških lastnosti, na drugi strani. Poleg tega pa to – kot to počne Bodenheimer v zgornjih omenjenih vrsticah – neupravičeno namiguje, da je prehod iz prvega v drugo pojmovanje nekaj samoumevnega.

Tretjič, Kelsen bi Bodenheimerja opomnil, da osrednje opravilo NPT ni ukvarjanje z nujnimi oziroma nemogočimi človeškimi ravnanji kot vsebino pozitivnopravnih norm, temveč ukvarjanje s področjem fakultativnih ravnanj in njihovim »pravilnim« urejanjem s strani »pravične« oblasti.

3.2 Argument kontingentnosti teizma

Videli smo, zakaj mora po Kelsnovem mnenju NPT stati na teoloških temeljih (glej zgoraj, § 2.1.2).

Vendar pa Bodenheimer meni, da je mogoče to Kelsnovo trditev zavrniti. Za podporo temu zaključku se Bodenheimer zateče k avtoriteti Huga Grotiusa, očeta racionalistične NPT 17. stoletja:

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50 Bodenheimer (1950: 336–337; kurziva dodana; glej tudi 338–339, glede Grotiusa, Hobbesa in Puffendorfa).

51 Glej Kelsen (1952: 21–22).

> Grotius gre v svojem poskusu *postaviti naravno pravo na imanentno racionalistične temelje* še dlje, s tem ko razglasi pravo narave zavezujoče za Boga in zanika njegovo moč, da ga spremeni. To so njegove besede: »Naravno pravo je še enkrat več, nespremenljivo – tudi v smislu, da ga ne more spremeniti Bog. Ne glede na neizmernost Božje moči je mogoče trditi, da obstajajo stvari, na katere se ta moč ne razteza /.../. Prav tako kot niti Bog ne more povzročiti, da dva in dva ne bi bilo štiri, tako tudi ne more povzročiti, da to, kar je samo po sebi zlo, ne bi bilo zlo.« *Grotius je tako naravno pravo ločil od razodete volje transcendentnega Boga. Utemeljil ga je na neodvisnem večnem razumu, ki prežema celoten kozmos, dasiravno je priznal alternativno možnost teološke utemeljitve*.[52]

S Kelsnovega gledišča je mogoče odgovoriti takole. Grotiusove besede niso nikakršen argument zoper nujnost teizma. Dejansko zgolj porajajo vprašanje. Grotius trdi, da je naravno pravo mogoče ločiti od razodete volje transcendentnega Boga. Namesto tega naj bi bilo naravno pravo »utemeljeno« na »neodvisnem večnem razumu, ki prežema celoten kozmos«. Žal pa za takšne trditve ne predstavi nobene opore: razen morda, sklicevanja na njihovo samorazvidno pravilnost. Vendar pa Kelsnovo dovršeno razlogovanje pokaže, da je v tako kočljivi zadevi sklicevanje na samorazvidnost v resnici sklicevanje na domišljijo, ki uresničuje pobožne želje. Bodenheimerjev argument se opira na Grotiusovega – Grotius pa ne predstavi nobenega argumenta: temelj »neodvisen večni razum, ki prežema kozmos« postane, če nanj pogledamo s hladnim očesom, še bolj skrivnosten in begajoč, kot je katero koli transcendentno božanstvo. Posledično Bodenheimerjev zagovor kontingentnosti teizma ni oprt na noben argument – kot vse kaže, je zgrajen iz čistih pobožnih želja.

3.3 Argument uspešnosti

Kot smo videli, je eden ključnih elementov Kelsnove kritike trditev, da NPT ne predstavlja pravega znanstvenega podvzema, temveč zakrinkano moralno, politični in pravno ideologijo (in argumentacijo; glej zgoraj, § 2.3).

Vendar pa je po Bodenheimerjevem mnenju Kelsnova trditev prenagljena:

> Dejstvo, da so postulati pravičnega prava, ki so jih [teoretiki racionalističnega naravnega prava] postavili, v 18. in 19. stoletju postali temelj zakonov v vseh civiliziranih državah v Evropi in Ameriki, *kaže na to, da so bile njihove predpostavke glede človeške narave in »naravnega prava«, ki se tej prilega, vendarle morda manj »neznanstvene«, kot trdijo [njeni] sodobni nasprotniki*.[53]

A vendar gre Bodenheimerjev argument predaleč. S Kelsnovega gledišča je namreč mogoče nanj odgovoriti, kot navajamo v nadaljevanju.

Prvič, neizpodbojno zgodovinsko dejstvo je, da političnega in institucionalnega uspeha niso doživeli vsi postulati pravičnosti znotraj modernega, raciona-

52 Bodenheimer (1950: 338, kurziva dodana).

53 Bodenheimer (1950: 339, kurziva dodana).

ličnega naravnopravniškega mišljenja, temveč zgolj tisti, ki izvirajo iz Lockea in Rousseaja.

Drugič, politični in institucionalni uspeh postulatov liberalno-demokratične vladavine nikakor ne »izkazuje« »znanstvenega« značaja z njimi povezanih pogledov na človeško naravo; izkazuje zgolj dejstvo, da so se vplivne skupine ljudi odločile privzeti in podpreti te postulate kot lastna usmerjevalna načela, medtem ko so se istočasno druge vplivne skupine odločile ravnati po drugačnih načelih, načelih političnega absolutizma in verske nestrpnosti, prav tako utemeljenih na »naravnem pravu«.

Tretjič, človeška narava, ki jo v obzir jemlje NPT, je, kot kaže, že argument obratne dedukcije (glej zgoraj, § 2.3), resnično idealen, ideološki konstrukt, in ne izid resničnega znanstvenega proučevanja.

3.4 Argument netogega ločevanja med dejstvi in normami

V svoji kritiki NPT Kelsen zagovarja »togo ločitev« dejstev in vrednot, resničnosti in norm – vsaj zdi se, da Bodenheimer tako razume Kelsnovo vztrajanje pri ločitvi biti in najstva ter argumentu logične zmote (glej zgoraj, § 2.2).

Bodenheimer meni, da je treba takšno togo ločitev zavrniti, in sicer iz naslednjih razlogov:

> *[Š]tevilne pravne norme so globoko zakoreninjene v objektivnih okoliščinah resničnosti in se zakonodajalcu vsiljujejo bodisi zaradi določenih posebnosti človeške narave bodisi zaradi dinamičnih zakonov družbenega in ekonomskega razvoja* /.../. Pomena in namena pravne norme pogosto ni mogoče dognati, ne da bi raziskali zgodovinske in sociološke okoliščine, iz katerih izvira /.../. *[V] družbenem razvoju prihaja do zapletenega prepletanja vrednot in dejstev, pravo pa je eden od pomembnejših odsevov njunega medsebojnega vplivanja* /.../. [N]ormativni predpisi so lahko brez učinka že od nastanka ali pa postanejo s časom mrtve črke na papirju, zato je temeljito razumevanje normativnega sistema pogosto nemogoče brez poglobljenega študija njegovega dejanskega »delovanja« v praksi. Na tak način *domnevni prepad med vrednotami in dejstvi premoščajo številni trdni mostovi*.[54]

S Kelsnovega gledišča je Bodenheimerjev kritika »prepad med vrednotami in dejstvi« zgrešena. Gre za očiten primer nepoznavanja sporne točke (lat. *ignoratio elenchi*). Poglejmo, zakaj. Bodenheimer nasprotuje »togemu« razlikovanju med dejstvi in vrednotami, resničnostjo in normami, z izpostavljanjem številnih empiričnih povezav, ki dejansko obstajajo med predmeti, ki pripadajo tema domnevno ločenima svetovoma. Vendar pa niti Kelsnova kritika NPT niti njegova splošna teorija prava (»čista teorija prava«) nista nikoli zanikala, da vsebina pravnih norm izhaja »iz družbe«: iz človeških potreb in interesov, iz človeških pogledov na pravičnost in političnih strategij.[55] »Prepad« med dejstvi

54 Bodenheimer (1950: 341, 342 & 344, kurziva dodana).

55 Glej, na primer, Kelsen (1960b: 69–71).

in vrednotami, med dejstvi in normami, ki ga zagovarja Kelsen, ni, kot smo videli, empiričen, temveč logični prepad. Pomeni logično neizvedljivost izpeljave normativnih zaključkov iz čisto faktičnih premis. A vendar Bodenheimer ta poudarek povsem spregleda.

3.5 Argument empirične nevzdržnosti etičnega subjektivizma

Kot smo videli (§ 2), je Kelsnova kritika NPT utemeljena na trdi različici metaetičnega subjektivizma in nekognitivizma.

Vendar pa je po Bodenheimerjevem mnenju takšno »doktrino etične relativnosti« mogoče ovreči na podlagi izkustev:

> Doktrina etične relativnosti izgubi svojo moč, če nam uspe dokazati, da 90 ali 95 % zgodovinsko znanih družb soglaša glede potrebe po prepovedi določenih praks, ki so razumljene kot neskladne z zahtevami organiziranega družbenega življenja. Vendar pa, da bi ovrgli teorijo, da sta pravo in etika v celoti relativna, niti ni treba pokazati na univerzalno soglasje vseh ljudstev glede določenih meril vedenja. Če nam uspe pokazati, da civilizirane in zrele družbe delijo določene vrednostne sodbe in se strinjajo glede določenih temeljnih aksiomov družbeno zaželenega ravnanja, bi nam s tem uspelo izoblikovati pomembno področje absolutnih ali skoraj absolutnih standardov civiliziranega človeka. V resnici so klasični naravnopravniki imeli v mislih prav takšno naravno pravo.[56]

Gledano s Kelsnove perspektive, Bodenheimerjev argument izvablja naslednji odgovor.

Prvič, izkustva res kažejo, da nobena človeška družba ni mogoča brez prepovedi določenih praks za zaščito življenja, telesne celovitosti in dobrin. Vendar pa ta izjava o »minimalnem« ali »empiričnem« naravnem pravu (kot ga poimenuje Hart)[57] pravi zgolj to, da življenje, telo in dobrine *morajo* biti zaščiteni, če naj bo družba mogoča. Ne pove pa ničesar o tem, *kako naj* bi bili življenje, telo in dobrine zaščiteni; prav tako ne pove ničesar o tem, *čigavo* življenje, telo in dobrine naj bi bili zaščiteni. Prav vprašanja glede »čigav« in »kako« tega »minimalnega naravnega prava« so tista, kjer v igro vstopajo skupinski in individualni interesi; so tista, kjer so bila skozi prostor in čas sprejeta različna končna, med seboj neskladna načela pravičnosti; kjer so bile vzpostavljene najbolj različne družbene ureditve, ki so vse upoštevale tovrstne »naravne omejitve« in si vse zase lastile blagoslov absolutne pravičnosti.

Drugič, Bodenheimerjev argument se sklicuje tudi na »pomembno področje absolutnih ali skoraj absolutnih standardov civiliziranega človeka«, ki naj bi bili objektivni, naravnopravni standardi. A tak sklep je popolnoma neupravičen: liberalno-demokratični standardi so standardi, ki so jih odobrili ljudje, ki jih Bodenheimer odobravajoče imenuje »civilizirani«. Iz strogo empiričnega,

56 Bodenheimer (1950: 347–348).

57 Hart (1961: pogl. IX).

znanstvenega gledišča so ti standardi omejeni na te ljudi in njihove kulture. Kot smo že videli, njihov končni uspeh ni nikakršen dokaz njihovega privilegiranega »naravnopravnega« statusa.

Gledano v celoti je z gledišča Kelsnove znanstveno-kritiške filozofije Bodenheimerjev zagovor NPT popolna polomija. Če ji sploh kar koli uspe, je to – paradoksalno – da pokaže, kako NPT resnično ni nikakršen znanstveni podvzem, temveč vrednostno obremenjen, ideološki podvzem, utemeljen na moralnem in političnem argumentu.

4 ZAGOVOR NOVE NARAVNOPRAVNIŠKE TEORIJE: GEORGE PROTI KELSNU

Izraz »Nova naravnopravniška teorija« se, kot je dobro znano, nanaša na naravnopravniško teorijo, navdahnjeno s tomizmom, ki jo od 60. let prejšnjega stoletja naprej med drugimi razvijajo Germain Grisez, John Boyle in John Finnis.[58]

Ob petdeseti obletnici Kelsnove *The Natural-Law Doctrine before the Tribunal of Science* iz leta 1949 je Robert P. George, pripadnik Nove NPT, temu besedilu posvetil recenzijo, v kateri se nameni obraniti naravnopravniško doktrino Tomaža Akvinskega in temeljne gradnike Nove NPT, ki so na njej osnovani (George 2000). Ob koncu recenzije George trdi, da mu je uspelo dokazati naslednje:

Prvič, da Kelsnova ocena NPT iz leta 1949 »nima praktično nobenega stičišča z mislijo Tomaža Akvinskega«, čigar dela sploh ne omenja.

Drugič, da se Kelsnova kritika NPT posledično »komajda oziroma praktično ne nanaša na tomistično naravnopravniško teorijo. Niti teorija identifikacije naravnopravnih načel Tomaža Akvinskega niti njegova razlaga njihovega odnosa do božanske moči in pozitivnega prava ne njegovi pogledi glede njihovih posledic za probleme pravne nepravičnosti in tiranije niso zajeti v Kelsnovem komentarju in kritiki«.

Tretjič, »lahko bi sklenili, da je Kelsen ravnal dobro, ko se je izognil omembi Tomaža Akvinskega, če je želel vztrajati pri takšnem opisu 'naravnopravniške doktrine'. Vendar pa je najmanj nenavadno, da je 'razsodišče znanosti' pustilo neslišano in neomenjeno misel tako pomembnega zagovornika naravnopravniške tradicije.«[59]

George v imenu Nove NPT zastavi resen izziv Kelsnovi kritiki. Če ima George dejansko prav, bi bila Kelsnova kritika NPT istočasno prikrojena la-

58 Glej Grisez, Boyle, Finnis 1987; Finnis 1980; George 1999; Bix (2002: 85–89); Murphy 2011.

59 George (2000: 30).

stnim potrebam (saj bi se spoprijemala s slamnatim možem) in nesmiselna (saj bi se izogibala »pravemu spopadu« s Tomaževo NPT, tj. z NPT v njeni domnevno najboljši in najmočnejši obliki).

Žal pa menim, da se George moti, in sicer iz naslednjih razlogov:

1. Res je, da Kelsen v razpravi iz leta 1949, ki jo George recenzira, nikoli ne omenja Tomaževega naravnopravniškega nauka. Vendar pa Kelsen ni ignoriral njegove naravnopravniške doktrine. To smer razmišljanja je namreč izrecno obravnaval v drugih svojih pisanjih, posvečenih kritiki NPT.[60] Posledično Georgeva tretja trditev, čeprav resnična, kar se tiče razprave iz leta 1949, ne drži v luči Kelsnove kritike NPT kot celote.
2. Zanašajoč se na tako nepopoln opis Kelsnove kritike NPT George v drugi točki svojega odgovora trdi tudi, da se ta kritika »komajda oziroma praktično ne nanaša na tomistično naravnopravniško teorijo«. Še posebno – če omenim le vprašanje, na katerega se želim osredotočiti v nadaljevaju – naj bi Kelsnova kritika ne imela nič za povedati o »Tomaževi teoriji identifikacije naravnopravnih načel«.

V luči celotne Kelsnove kritike NPT pa je treba tudi to Georgevo trditev zavrniti.

Poglejmo si »Tomaževo teorijo identifikacije naravnopravnih načel«, kot jo predstavi George. Jedro teorije pravi, da so naravnopravna načela objektivni, samoumevni razlogi za ravnanje, ki jih ljudje lahko preko praktičnega uma spoznajo in zanje predstavljajo motivacijo za ravnanje.

Je Kelsnova celotna kritika NPT res nesposobna soočiti se s takšnim pogledom? Menim, da nikakor ni tako.

(a) Za začetek se spomnim na tri argumente, ki jih Kelsen uporabi v svoji kritiki epistemološke teze in teze o znanstvenosti NPT: argument nesamoumevnosti, argument protislovnosti praktičnega uma in, ne nazadnje, argument obratne dedukcije (oziroma argument projekcije; § 2.2, 2.3).

Če se spomnite, je prvi argument poudarjal, kako nezanesljiv je preizkus samoumevnosti kot objektiven, znanstveni preizkus spoznavanja pravih naravnopravnih načel. Pri tem se je skliceval na zgodovino etiških teorij, ki so (in tako še danes) kot »samoumevne« »odkrivale« kopico med seboj neskladnih izvornih naravnopravnih načel.

Izpostavil je tudi (morda še bolj uničujoče za NPT), da je bil argument o samoumevnosti določenih domnevnih načel naravnega prava, na primer »Vsakomur svoje«, »Delaj dobro, izogibaj se slabega«, »Vedno ravnaj s pravo mero« itd. – in, lahko dodamo, takšnih sodb, kot so »Štej življenje, védenje, igro itd. za temeljne dobrine človeškega razcveta« – sprejet za ceno »odkritja« pov-

60 Glej Kelsen (1960b: §§ 32, 34, 35, 40, 43, 47, 50 a., e. & f.); Kelsen (1964: 136 in nasl.).

sem praznih praktičnih načel: tj. načel, ki so popolnoma nezmožna zagotoviti jasna vodila za človeško ravnanje, če jih ne dopolni postopek razlage in konkretizacije, ki jih napolni z vsebino.

Prav tako je Kelsnova analiza praktičnega uma nakazala, da je takšna ideja protislovna s stališča empirične psihologije človeka, saj bi pri tem šlo za *eno* sposobnost človeškega uma, ki bi skrivnostno povezovala dve raznovrstni sposobnosti védenja in hotenja. Tako so z vidika Kelsnove kritike ključne značilnosti Tomaževe teorije o identifikaciji načel naravnega prava (samoumevnost z vidika praktičnega uma) – daleč od tega, da bi »ostale nepoškodovane« – tarče radikalne kritike.

Morda bi lahko nekoliko postali in pomislili, da je Kelsnova kritika Tomaževega pojmovanja praktičnega uma na neki način nedobrohotna.[61] Vendar pa bi lahko Kelsen, v luči argumenta obratne dedukcije (oziroma argumenta projekcije), Akvinskemu – ter Georgu in drugim teoretikom Nove NPT – odgovoril, da se sklicuje na praktični um, to nenavadno in skrivnostno sposobnost, kot na temeljno orodje za *projiciranje njihovih lastnih pogledov* na dobro življenje, resnično védenje, pravo prijateljstvo in podobno, na podlagi dozdevno objektivnih podatkov o naravnih temeljnih dobrinah.[62]

(b) Ali v svoji razlagi Tomaževe teorije George po naključju doda kakšno sestavino, s katero se Kelsnova teorija ne sooči in se ne more uspešno soočiti? Poglejmo.

George napravi dva poudarka, ki ju je vredno proučiti. Prvič, Tomaževa naravnopravna načela niso predpisi, temveč razlogi za ravnanje. Drugič, Kelsnov etični subjektivizem, ki ga navdihujeta Hume in kritika praktičnega uma, je v popolnem nasprotju z običajnim načinom razmišljanja posameznikov o njihovem moralnem življenju; z drugimi besedami, gre za slab prikaz le-teh, čeprav trdijo, da so skladni z empirično človeško psihologijo.

George pravi, da načela naravnega prava niso predpisi, ki jih je treba ubogati zato, ker prihajajo s strani nadrejene volje, temveč so razlogi za ravnanje; njihova usmerjevalna sila izhaja iz dejstva, da so razumna, tj. da se kot razumna kažejo racionalnim bitjem:

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61 Navedeni odlomek iz Tomaža, ki se nanaša na velelno naravo praktičnega uma – posebno vrstica »*ratio imperat de his quae sunt ad fnem*« – je mogoče brati tudi tako, da um »uči«, katera ravnanja so instrumentalno nujna, da bi prišli do cilja, ki ga je volja že poprej izbrala. Glej Kelsen (1960b: 88 in nasl., besedilo in op. 4). Vendar pa je treba pripomniti, da se zdi, da George po zgledu Akvinskega sprejema prav takšno mešano pojmovanje praktičnega uma, ki ga Kelsen kritizira.

62 Mimogrede, Kelsen bi bil navdušen, ko bi videl, da različni »novi naravnopravniki« identificirajo različne kataloge temeljnih naravnih dobrin in da lahko na njihovi podlagi iz njih tudi »izvajajo« različna pravila, s tem ko uporabljajo lastno praktično razumnost. Glede tega glej jasno razlago, ki jo podaja Murphy 2011.

> Drugače kot drugi teoretiki naravnega prava se je Akvinski izognil voluntarizmu, ki ga implicira to pojmovanje moralne obveznosti. Moč praktičnih načel, vključno z moralnimi, je po mnenju Akvinskega *racionalna*; ta načela podajajo *razloge* za (ne)ravnanje; oporekati jim je ravno toliko narobe, kot je to *nerazumno*. V tem smislu naravno pravo ni nekakšno zunanje vsiljevanje tuje volje – bodisi »volje« narave bodisi česa (ali kogar koli) drugega. Izvira namreč iz človeških bitij; njegovi osnovni naslovniki so človeške dobrine, ki predstavljajo človeško dobrobit in izpopolnitev ter so točno kot takšne razlogi za ravnanje.[63]

Ta odlomek nakazuje možnost, da je Kelsnov argument o nujnosti teizma zmoten ali pa vsaj zastreljen, če ga uporabimo zoper tomistično navdahnjeno NPT. Če se spomnite: argument pravi, da mora, če so naravnopravne norme res *norme,* in ne empirične izjave, obstajati normodajna avtoriteta – ki mora biti po predpostavki transcendentno božanstvo – po volji katere so te norme ustvarjene. A Akvinski trdi, da je naravno pravo »vrojeno človeškim bitjem« in da zadeva »človeške dobrine«, ki »predstavljajo človeško dobrobit in izpopolnitev ter so točno kot takšne razlogi za ravnanje«.

Se je Kelsnova kritika NPT zmožna uspešno soočiti s takšnim racionalističnim stališčem? Menim, da se je. Naravnopravna načela ljudem kažejo, kaj naj bi počeli, da bi kot človeška bitja dosegli popolnost (»dobrobit in izpolnitev«). Popolnost je tu razumljena kot objektivni pojem, neodvisen od človeškega uma in volje. Celotna podoba je tako očitno oblikovana na podlagi Aristotelove doktrine *entelehije*: gre za teleološko podobo človeka z vgrajenim objektivnim gonom k objektivnemu cilju izpopolnitve. Takšna teleološka podoba ne more biti nič drugega kot načrt nekega stvaritelja vesolja. In dejansko gre za načrt božjega praktičnega uma. Tako pride torej teološki temelj na plano tudi pri pristopu, ki naravno pravo razume kot razlog(e) za ravnanje.

A si zavoljo razprave zamislimo, da se takšna teološka podpora sploh ne pojavi, niti ji tega ni treba. Zamislimo si, da lahko, kot je trdil Grotius, razlogi za ravnanje, ki jih identificira praktični um, stojijo sami po sebi. Bi bila tedaj Kelsnova kritika NPT neškodljiva? Morda bi morali argument o nujnosti teizma postaviti na stranski tir. A ima Kelsen v svojem arzenalu tudi druge argumente – tiste tri, na katere sem spomnil malo prej – h katerim se je mogoče zateči in ki so Novi NPT sposobni zadati nekaj usodnih udarcev.

George vseeno ne bi soglašal. Ko kritizira Kelsnov etični subjektivizem in kritiko praktičnega uma, trdi, kot sem že dejal, da nasprotujeta temu, kar ljudje navadno menijo o svojem moralnem življenju:

> Hume in njegovi privrženci, morda tudi Kelsen, predpostavljajo, da če »vrednot« ni mogoče izvesti iz »dejstev«, potem te ne morejo biti objektivne (oziroma »resnične«), temveč morajo biti zgolj projekcije občutij, čustev ali drugih neracionalnih dejavnikov, ki so zmožni motivirati človeško ravnanje. Zanikajo, da lahko praktični razlogi

63 George (2000: besedilo pri op. 23-25; kurziva dodana).

> kot taki motivirajo ljudi. Zato zaključijo, da se, kolikor naravnopravniški teoretiki ne zagrešijo »naturalistične zmote« z zatrjevanjem izvajanja »najstva« iz »biti«, njihova doktrina sesede v neke vrste etični nekognitivizem. A to zgolj poraja vprašanje v odnosu do tomistov in drugih, ki trdijo, da lahko razumemo in smo torej motivirani za ravnanje zavoljo praktičnih razlogov, ki so več kot zgolj instrumentalni. *Slabo jim uspeva razložiti izkušnje večine, ki vendarle pogosto šteje, da je motivirana za to, da nekaj storiti (oziroma da nečesar ne stori tako, kot bi sicer) ne zaradi golih želja, temveč zato, ker razume vrednost, in s tem praktični smisel, tovrstnega početja (oziroma nepočetja).*[64]

Ključni odlomek za sedanje potrebe je zadnji, poudarjeni. Tu je mogoče z gledišča Kelsnove teorije podati tri pripombe.

Prvič, lastne »domneve« ljudi o tem, kako deluje njihovo moralno razlogovanje, so lahko napačne: »domnevati«, da miselni proces pride do zaključka, da je nekaj tako in tako (tj. da odkrije objektivno vrednost danega ravnanja), ni dokončen in zanesljiv dokaz, da dejansko zaključi, da je nekaj tako in tako (tj. da dejansko *odkrije objektivno vrednost* tistega ravnanja).

Drugič, jasno se kaže, kako je čudež praktičnega uma, tj. sposobnosti, ki bi bila hkrati védenje in usmerjanje, odvisen od besednega uroka. A takoj, ko se takšnega uroka znebimo, spoznamo, da nekaj ni v redu z idejo o »biti spodbujeni napraviti nekaj« zaradi »razumevanja vrednosti« takšnega ravnanja. Zamislimo si naslednje. Za začetek, zaznavanje cene oziroma vrednosti neke slike me ne spodbudi k temu, da bi jo kupil, *razen* če sem, recimo, pohlepen zasebni zbiratelj ali pa jo želim pridobiti za mestni muzej. Neodvisna želja (namen, cilj) je nujna, da bi prišlo do ravnanja. Nadalje ni niti približno jasno, da je »zaznavanje« tisti glagol, ki ga je primerno uporabiti v povezavi z vrednostjo človeškega ravnanja; ali je res smiselno reči: »Zaznavam vrednost obglavljenja vseh krivovercev, ki mi pridejo pod roke?« Za kakšne vrste »zaznavanje« gre pri tem? Ali ni ta beseda uporabljena zunaj svojega običajnega konteksta, tako da se izneveri svoji običajni rabi in postane retoričen trik? Menim, da bi Kelsen nekako v tem smislu nasprotoval Georgu.

Tretjič, tako kot vsi nasprotniki etičnega subjektivizma ga George predstavlja kot zavezanega »surovim poželenjem«. Vendar ni nujno tako. Etični subjektivizem trdi, da so končne norme našega ravnanja odvisne od naših osebnih preferenc in čustev; da um ne more namesto nas rešiti naših etičnih problemov. Vendar pa ta pogled ne izključuje nujno možnosti, da izbira končnih norm ne bi bila odvisna od poželenj, ki temeljijo na izkušnjah in refleksiji.

64 George (2000: besedilo ob op. 44–47; kurziva dodana).

5 IMA NAVSEZADNJE KELSEN PRAV?

Ta moj prikaz Kelsnove kritike NPT vodi do morda nevznemirljivega zaključka: Kelsnova kritika NPT se kaže kot trpežna. Očitno se ji uspe upreti tako odgovorom tradicionalne, racionalistične NPT, ki jih predstavi Edgar Bodenheimer, kot tudi nasprotnim kritikam Nove NPT, ki jih predstavi Robert George. Če imam prav, bodo morali čudaki iz *Götterdämmerung*-a počakati na novo priložnost.

Iz angleškega izvirnika prevedel
*Matija Žgur.***

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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 scientificity 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]

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

2 Kelsen (1928b: 433 ff.); see also Kelsen 1934; Kelsen 1948; Kelsen 1949; Kelsen 1950; Kelsen 1952; Kelsen 1953; Kelsen 1960b; Kelsen 1961.

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*:[3] on the one hand, the case for "traditional", rationalistic, NLT, as argued by Edgar Bodenheimer (§ 3);[4] on the other hand, the case for "the new" Thomistic NLT, as argued by Robert P. George[5] (§ 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).

10 Kelsen (1928a: 37–38).

11 Kelsen 1934; Kelsen 1960a; Kelsen 1960b: § 52.

12 Kelsen 1979.

perior physical force ("power", *Macht*) into an authorized act of law creation.[13] Jurists, *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 *state* legal order, i.e., of a coercive and highly organized normative order.[14]

Static structure. At least so far as mainstream NLT is considered, natural law "ideally tends to be" a *static* normative order: i.e., a set of norms that includes one *basic material norm* and the norms derivable from it by means of "a mere intellectual operation".[15] For instance, the natural law order identified by the basic norm "*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 *dynamic* normative orders: they are sets of norms that include one *basic formal* or *competence norm* and the norms produced by the authorities that such a basic norm directly or indirectly establishes.[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.[17]

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

13 Kelsen (1928b: 435–437).

14 Kelsen (1928a: 33–34); Kelsen (1928b: 441).

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".

16 Kelsen (1928b: 400).

17 Kelsen (1928a: 38).

18 Kelsen (1928b: 410–411); Kelsen (1960b: § 50).

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.[19] 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"[20] 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".[21] 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.[22]

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

21 Kelsen (1928b: 419).

22 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.[23] 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.[24]

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 severe 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".[27] 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".[28] 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 legitimizes 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.[29]

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.[30] 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".[31]

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

31 Kelsen (1928a: 39–56).

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".[32]

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.[33] Concerning such an

32 Kelsen (1949: 141); Kelsen (1959: § 31: 68–69); Kelsen (1960b: § 32: 72–73).

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.[34] 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.[35]

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.[36]

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.

35 Kelsen (1949: 172–174); Kelsen (1949: 142 text and fn. 9; 143–144; 151 ff. & 172–174); Kelsen (1959: § 45); Kelsen (1960b: § 45: 105–106).

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 Scientificity Claim

The critique of the epistemological claim undermines the scientificity 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 scientificity 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 scientificity 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 scientific 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,

37 Kelsen (1952: 13 ff.); Kelsen (1960b: §§ 10, 11,12, 13 & 15).

38 Kelsen (1960b: §§ 39–43: 86–89).

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).

42 Kelsen (1949: 146–147 & 148–150); Kelsen (1960b: 119–121).

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).

46 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 charitableness 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.

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50 Bodenheimer (1950: 336–337; italics added; see also 338–339 as to Grotius, Hobbes and Pufendorf).

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

52 Bodenheimer (1950: 338, italics added).

> 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*".[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:

> *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*.[54]

53 Bodenheimer (1950: 339, italics added).

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.[55] 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 out-lawing 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.[56]

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),[57] 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

55 See, e.g., Kelsen (1960b: 69–71).

56 Bodenheimer (1950: 347–348).

57 Hart (1961: ch. IX, § 2).

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, 35, 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.[61] 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.[62]

(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.[63]

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

63 George (2000: text by fn. 23–25).

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.

64 George (2000: text by fn. 44–47; italics added).

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.

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Bartosz Brożek*

Law and Defeasibility

A few comments on *The Logic of Legal Requirements* (Eds. Ferrer Beltrán & Ratti, Oxford: OUP 2012)

The Logic of Legal Requirements. Essays on Defeasibility, edited by Jordi Ferrer Beltrán and Giovanni Battista Ratti, and published by Oxford University Press in 2012, is a very much welcome contribution to one of the most discussed topics in the contemporary legal theory and philosophy. Defeasibility is connected to many essential issues such as the nature of legal reasoning, the structure of legal norms and legal system, the concept of legal validity, as well as the mechanisms and limits of legal interpretation. It suffices to consider this list in order to see that defeasibility constitutes an important topic in any discussion concerning the theoretical reconstruction of legal practice. Moreover, the past two decades have generated substantial literature on the subject, ranging from accounts which fully embrace defeasibility, to very sceptical voices, which question the usefulness of the concept in question.

In this context, the collection put together by Ferrer Beltrán and Ratti, containing differentiated, often competing account, provides the much-needed panorama of the contemporary discussions of defeasibility. The book is divided into four parts. Part I, including the contributions by Ferrer Beltrán and Ratti themselves, Carlos R. Alchourrón, Juliano S.A. Maranhão, Frederick Schauer, Jorge L. Rodríguez, Giovanni Sartor, and Rafael Hernández Marín, is devoted to the logical and conceptual aspects of defeasibility in the law. Part II, with contributions by Pierluigi Chiassoni, Riccardo Guastini, Brian H. Bix, Daniel Mendonca, and Ricardo Caracciolo, concerns the relationship between defeasibility and the process of legal interpretation. In Part III, devoted to defeasibility in the context of various conceptions of law, one can find papers by José Juan Moreso, Manuel Atienza and Juan Ruiz Manero, Wilfried J. Waluchow, Bruno Celano, Juan Manuel Pérez Bermejo, and María Cristina Redondo. Finally, Part IV, including contributions by Fernando Atria, Richard H. S. Tur, Jonathan R. Nash, and Bruce Chapman, is devoted to defeasibility and adjudication.

It would be difficult to address all the issues raised in those twenty-two, almost uniformly good, papers; it would be even more difficult to attempt any serious review thereof.[1] At the same time, selecting but a few of them and engaging in a discussion with their authors, would result in setting aside what Ferrer Beltrán and Ratti's collection has to offer: a complex, intriguing picture of the legal-theoretic uses of the concept of defeasibility. Thus, instead of reviewing some selected chapters of the book, I decided to address – against the background provided by the collection – three fundamental questions: (1) what is defeasibility?; (2) how to formally capture defeasibility?; and (3) is there defeasibility in the law? Such an approach also gives me an opportunity to rethink and revise some of the claims I made in my *Defeasibility of Legal Reasoning* (cf. Brożek 2004).

Defeasibility is a fashionable concept, at least in the domain of legal theory. The problem is, however, that it is quite difficult to provide a definition of defeasibility that would be commonly acceptable. Let us illustrate this point. Pierluigi

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1 Although the review written for *Revus* by Vojko Strahovnik (2012) manages to do so.

Chiassoni (2012) puts together the following list of phenomena that are referred to as defeasible: (1) facts, (2) beliefs, (3) legal concepts, (4) norm formulations, (5) legal interpretations or meanings, (6) norms, rules or principles, (7) legal reasoning, (8) legal positions, (9) legal arrangements, (10) legal claims, and (11) legal conclusions. To that collection, one can add, at least, (12) properties (Hernández Marín 2012), (13) arguments, and (14) argument-forms (Prakken & Vreeswijk 2002). In the relevant literature, one can also find references to numerous kinds of defeasibility, including ontological, conceptual, epistemic, deontic, and logical (Hage 2005, Brożek 2004). In contrast, Giovanni Sartor and Henry Prakken consider a different aspect of the problem and distinguish between inference-based, process-based, and theory-based defeasibility (Prakken & Sartor 2004). To complicate things even further, defeasibility is often linked with other concepts, such as vagueness, open texture, and revisability (Bix 2012, Brożek 2008).

In light of the above, it is no surprise that the contributions collected in Ferrer Beltrán and Ratti's book take quite different definitions of defeasibility as their points of reference. For example, Ferrer Beltrán and Ratti consider, *intera alia*, the following formulation: "a norm is defeasible when it has the disposition not to be applied even though it is indeed applicable" (Ferrer Beltrán & Ratti 2012: 31). Frederick Schauer, in turn, claims that "the key idea of defeasibility /…/ is the potential for some applier, interpreter, or enforcer of a rule to make an ad hoc or spur-of-the-moment adaptation in order to avoid a suboptimal, inefficient, unfair, unjust, or otherwise unacceptable, rule-generated outcome", and concludes that "defeasibility is not a property of rules at all, but rather a characteristic of how some decision-making system will choose to *treat* its rules" (Schauer 2012: 81 & 87). Jorge L. Rodríguez says that "when we express a conditional assertion, we assume the circumstances are normal, but admit that under abnormal circumstances the assertion may become false", and – transferring this characteristic of defeasibility into the domain of law – claims that "legal rules [are defeasible since they] specify only contributory, yet not sufficient, conditions to derive the normative consequences fixed by legal system" (Rodríguez 2012: 88). Still, Giovanni Sartor defines a defeasible reasoning schema, i.e. such a schema, in which "one should, under certain conditions, refrain from adopting its conclusions though endorsing its premises" (Sartor 2012: 112). Rafael Hernández Marín defines a defeasible property as a property that is "an apparent, but not, or not necessarily, real property" (Hernández Marín 2012: 137). Finally, Riccardo Guastini claims that legal rules are defeasible since "there are fact situations which defeat the rule although they are in no way expressly stated by normative authorities in such a way that the legal obligation settled by the rule does not hold anymore" (Guastini 2012: 183).

This complicated, if not chaotic theoretical picture connected to the concept of defeasibility seems to generate more confusion that clarity. My suggestion is that a more structured and useful discussion of defeasibility may result from adopting the following two postulates.

> **Postulate 1**. *Defeasibility is primarily a feature of rules. To speak of defeasibility of other entities is to use the term in a derivative sense.*

This postulate is justified by two observations. First, it enables to logically capture the mechanism of defeasibility, since rules can be expressed as some kind of conditionals. Secondly, arguably all other kinds of defeasibility are, ultimately, reducible to defeasibility of (some) rules. For example: concepts may be said to be defeasible when the rules of their application are defeasible; social facts are defeasible since the 'count-as' rules that generate them may be defeasible; beliefs are defeasible because they may be represented formally with defeasible rules; legal interpretation may be said to be defeasible because some of the canons of interpretation are defeasible rules; legal reasoning (in general) is defeasible, because it often takes advantage of defeasible rules; legal arguments are defeasible, since they might include defeasible rules; and legal properties may be said to be defeasible since we ascribe them to individuals using some defeasible rules.

> **Postulate 2**. *Defeasibility should be regarded as a domain-neutral feature of rules (and, derivatively, of other phenomena).*

I agree with Giovanni Sartor (2012) that the methodologically sound analysis of defeasibility must take it in its most general form, i.e. as a feature of rules (or argument schemata), which are applicable in all kinds of contexts. In other words, I believe that the more general and context-independent concept of defeasibility one has, the better theoretical tool it becomes. On the one hand, defeasibility defined along the lines of Postulate 2 can be applied in different legally-relevant problems (application of law, validity of law, interpretation of law, etc.). On the other hand, if it turns out that defeasibility is useful in non-legal domains (e.g., theoretical reconstructions of morality, language or social ontology), it would constitute an additional argument to take the role of defeasibility in the law seriously, as it would transpire that defeasibility is an important mechanism in quite different attempts to conceptualize our experience.

In line with the Postulates 1 and 2, we can formulate the following definition:

> **Defeasibility**. *A rule of the form A => B is defeasible iff it is possible that although A obtains, B does not follow.*
> (*Note that the logical connective '=>' between A and B cannot be the material conditional.*)

One of the consequences of adopting the above formulated definition is that defeasibility may be clearly distinguished from other concepts such as vagueness (a predicate *P* is vague iff there are such objects of which neither P nor ~P can be predicated), open-texture (a predicate P is open-textured iff some changes in reality may make it so that there will emerge objects of which neither P nor ~P can be predicated), and revisability (a rule of the form *A => B* is revisable if and only if it can be substituted with a rule or a set of rules that would better represent the relevant aspect of experience) (cf. Brożek 2008). The clear distinction between these concepts also has the advantage of opening the way for the discussion how defeasibility is related to vagueness, open texture and revisability (in reference to the last problem, see below).

The second question I would like to address is how to formally capture defeasibility. There exist three approaches to this question. First, it is claimed that defeasibility may be represented only in a non-monotonic logic (cf. Sartor 2012). Second, some scholars (cf. Alchourrón 2012, Maranhão 2012) argue that what is referred to as "defeasibility" may be formally accounted for without introducing non-monotonicity: what suffices is the classical logic with some suitable belief revision mechanism. The third stance is that defeasibility is not reconstructable logically, and hence should be considered an "extremely confusing" concept (Hernández Marín 2012: 148).

I agree with the proponents of the first stance that the only way to formally capture defeasibility is through the utilization of some kind of non-monotonic logic. The reason I reject the combination of the classical logic and belief revision as the formal mechanism behind defeasibility is that it makes it impossible to distinguish defeasibility from revisability, and – as I remarked earlier – I think it is useful to have both concepts. It does not follow, of course, that legal rules (or some other legal phenomena) should be considered both defeasible and revisable. My point is methodological: it is always better to have more formal tools at one's disposal, and the choice of which of the available tools is best suited for some theoretical purpose is made at the stage of theory-construction.

However, the dispute between the defenders of non-monotonic logics and the proponents of the approach to defeasibility based on revision has a more fundamental dimension. Painting with a broad brush, one can describe the philosophical difference between the classical and the non-monotonic logic as formal systems suitable for reconstructing the reasoning of, respectively, perfect and imperfect agents. The classical monotonic logic assumes that the agent has a perfect knowledge of the facts, while the non-monotonic logics are designed to handle situations in which the agent does not have, or – due to some cognitive or physical limitations – cannot have, access to all relevant information (cf. Sartor 2012). Let us consider the famous example:

(Fly) If *x* is a bird, than *x* flies.

The rule (Fly) does not constitute a faithful representation of the world: we know that if *x* is a penguin or an ostrich, *x* does not fly. The claim of

the proponents of non-monotonic logics is that we nevertheless use rules such as (Fly), because in real-life situations it is often impossible to gather all relevant facts (i.e., to check whether *x* is not a penguin or an ostrich or has a broken wing, etc.); so, we have no other choice but to make inferences with rues such as (Fly) as long as we do not have evidence contrary to the rule's conclusion. The defenders of the classical logic disagree. They claim that the accumulation of knowledge consists in constant revisions of the cognitive rules we use. So, as soon as the rule (Fly) turns out false (say, because we have observed a penguin, which is a non-flying bird), we revise it in the following way:

(Fly_Revised_1) If *x* is a bird and *x* is not a penguin, than *x* flies.

Such revisions are needed whenever an exception to the rule is established, giving more and more complex formulations:

(Fly_Revised_2) If *x* is a bird and *x* is not a penguin and *x* is not an ostrich, and *x* does not have a broken wing, and …, than *x* flies.

Therefore, at the philosophical level the difference between the first two stances (of the proponents of non-monotonic logic on the one hand, and the defenders of the classical logic with belief revision on the other), is how to represent agent's knowledge. The first camp believes that there is some advantage in leaving the formulation of (Fly) intact (e.g., they claim that the use of such complex rules as (Fly_Revised_2) would be cognitively too demanding); the second camp has a transcendental view of the thinking subject: they disregard some factual limitations of the agent and require her to do everything in her cognitive efforts to approximate the behaviour of a perfect agent. To put it in different terms, if the first camp provides a logical framework for reconstructing the reasoning of a judge, the second camp does the same for a judge Hercules. It is not my claim that one of those two approaches is better than the other. In fact, both are fully legitimate attempts to reconstruct human cognitive efforts, both in theoretical and practical domains. The point is that they are different, just like the concept of defeasibility is different from the concept of revisability.

The idea of rendering defeasibility in the law by using non-monotonic logic is also dismissed by the defenders of the third approach (cf. Hernández Marín 2012). The dismissal is based on two claims: that legal logic is impossible and that non-monotonic logic does not encode any consequence relation (the latter position is adopted by other scholars too, in particular Carlos Alchourrón). It so happens that both these claims are based on the same idea pertaining to the nature of logic, i.e. that logic encodes a consequence relation which guarantees the transmission of truth from the premises to the conclusion of a logically valid argument. This idea was made explicit in Alfred Tarski's (1936) famous essay *O pojęciu wynikania logicznego*:

> A sentence A follows logically from the set of premises r if and only if in every case in which the premises belonging to r are true, A is also true.

If so, then logical relations obtain only between propositions which may be ascribed truth or falsehood (and since norms are neither true nor false, there is no logic of norms). Moreover, if Tarski's analysis is sound, then non-monotonic logic is flawed, since truth is a monotonic property (it is hard to imagine that an addition of a new premise would turn some true propositions into false ones). The problem is that Tarski's view of logical consequence has become a kind of dogma, while it shouldn't have. To analyse this problem, let me repeat an analogy developed by John Etchemedy. In metamathematics several different formal systems characterizing the class of computable functions have been developed. It turned out that the results provided by the systems are coextensive. It was the basis for the claim (known as Church's Thesis) that the class of intuitively computable functions is coextensive with the class of computable functions as defined by the systems. The problem with Church's Thesis is that it hasn't been proved (and possibly cannot be proved) mathematically (cf. Olszewski, Brożek & Urbańczyk 2014). Now, Etchemedy's analogy is that a similar problem was faced by the early 20th Century logicians whose various proof-the-

oretic or, in other words, syntactic systems were designed to capture the intuitive notion of logical consequence. Etchemedy calls the claim that those systems captured the intuitive notion of consequence, Hilbert's Thesis. Hilbert's Thesis has had a different fate to Church's Thesis. As Etchemedy puts it, it has been replaced by soundness and completeness theorems and the idea of those theorems is ultimately based on Tarski's analysis of logical consequence (Etchemedy 1990). But what does the 'proof' of Hilbert's Thesis consists in? This is an exercise in the formalist paradigm of doing logic and mathematics. Any soundness and completeness theorems establish certain relations between two mathematical structures; it so happens that some elements of one of these structures (semantics) are informally interpreted as designating truth values. This does not mean, however, that one cannot account for some interesting relations between propositions which have nothing to do with their truth values. This is exactly the case with nonmonotonic logic, which encode a relation of the transmission of justification, not of truth (cf. Hage 1997). To conclude, the rejection of non-monotonic logic as "confused" or "not a logic at all" has nothing to do with its comprehensiveness, but rather is based on some philosophical choices related to the question what is the nature of logic.

The final question I would like to comment on is *whether there is defeasibility in the law*. This question can be interpreted in two ways: either as inquiring into the possibility of reconstructing legal phenomena with the utilization of the mechanism of defeasibility, or as demanding the answer, whether defeasibility is an inherent feature of the law. On the first reading, the question is trivial: yes, it is possible, and many theories of law utilizing the concept of defeasibility have in fact been developed. On the second reading the question is ill-stated, as it assumes that there exists some nature of law – independent of our theories – which can (and should) be theoretically captured. To put it differently: there is no unique, ultimate theory of law. What we can do is to develop different, often competing views of legal phenomena, and the only way to decide which is better is to compare them against some chosen criteria (e.g., some practical ends). From this point of view, defeasibility – similarly to revisability – is just one tool we have at our disposal when attempting to reconstruct the investigated legal issues. Thus, ultimately, the use of defeasibility (and non-monotonic logic) to model some phenomena is a theoretical choice; whether the choice is justified, can be assessed only by comparing the resulting model with some alternatives.

* * *

I do not want to suggest that the conceptual framework I sketched above is the only theoretical option. I believe, however, that it has the advantage of providing clear conceptual distinctions, and hence paves the way to a more balanced discussion pertaining to the relationship between law and defeasibility. Defeasibility is a formal mechanism which may – but also may not – be used to model legal phenomena. The utilization of defeasibility remains our theoretical choice, which hangs together with other theoretical choices we make (e.g., the view on the nature of logic), as well as our practical ends. Still, the concept of defeasibility is theoretically very fruitful, as illustrated by the engaging and multifaceted contributions collected in Ferrer Beltrán and Ratti's book.

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Synopsis

Andrej Kristan

Razumeti ustavo

SLOV. | Prvi del prispevka obravnava besedilno ustavo – in argument namena, s katerim razlagalci včasih radi istovetijo svoje odločitve v konkretnem sporu z voljo ustavopisca. Takšno rabo tega argumenta avtor izpodbije. Z miselnim eksperimentom pa nato utrjuje še, da bi ustavna teorija morala razlikovati med istočasno vplivnimi a) besedilno ustavo, b) predstavnoskladnimi oziroma ideološkimi ustavami in c) habitusom v smislu družbene ustave. | Besedilo je bilo napisano ob dvajsetletnici Ustave RS in objavljeno (skoraj enako) že v jubilejnem zborniku: Igor Kaučič (ur.), *Dvajset let Ustave Republike Slovenije. Pomen ustavnosti in ustavna demokracija* (US RS, Ljubljana 2012).

Ključne besede: avtor in razlaga ustave, argument namena, besedilna ustava, predstavnoskladne oz. ideološke ustave, družbena ustava

ENG. | *Ways of a Constitution*. The author makes a claim in favour of distinguishing three ways of a constitution. He rejects first the (mis)use of the argument from intent as a rhetorical figure with no grounds to connect an interpretation of a constitutional text with the legitimacy of the historical text-writer. The author then supports his claim by introducing a thought experiment, according to which constitutional theory needs to distinguish clearly between the textual constitution, the ideologic constitutions, and the social constitution, being all in force at the same time.

Key words: constitution's author, constitutional interpretation, the argument from intent, textual constitution, ideologic constitutions, social constitution

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Synopsis

Kazimierz Opałek & Jan Woleński

Ser, deber y lógica

SLOV. | *Dejstvo, najstvo in logika*. Avtorja obravnata problem je/naj z vidika razmerja med deontično logiko in logiko norm. Najprej se osredotočita na nekognitivistični rešitvi Weinbergeja in von Wrighta. Ti zavrneta kot neuspešni, sama pa predlagata nejezikovno razumevanje norm, po katerem je normiranje dejanje, norma tvorba tega dejanja in normativna izjava izraz te norme. | Razprava je bila sprva objavljena v angleščini v *Archiv für Rechts- und Sozialphilosophie*, Vol. LXXIII (1987) No. 3, 373–385. Za Revus sta jo v slovenščino prevedla Vojko Strahovnik in Vesna Česen, v španščino pa Sebastián Figueroa Rubio.

Ključne besede: problem je/naj, deontična logika, logika norm, Weinberger, von Wright, nejezikovno pojmovanje norm

ENG. | *Is, Ought, and Logic.* The paper discusses Is/Ought problem in light of the relationship between deontic logic and the logic of norms. The authors focus first on noncognitive solutions of Weinberger and von Wright. After refuting both of them as unsuccessful, they defend a non-linguistic conception of norms, which takes norming to be an act of some sort, norm the product of such an act, and normative statement the expression of the norm. | This article was published in English in *Archiv für Rechts- und Sozialphilosophie*, Vol. LXXIII (1987) No. 3, 373–385.

Keywords: is/ought problem, deontic logic, logic of norms, Weinberger, von Wright, non-linguistic conception of norms

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Synopsis

Kenneth Einar Himma

The Logic of Showing Possibility Claims

A Positive Argument for Inclusive Legal Positivism and Moral Grounds of Law

SLOV. | *Logika dokazovanja trditev o možnosti: pozitivni argument v prid odprtega pravnega pozitivizma in moralnih temeljev prava*. Avtor zavzame stališče, ki ga odprti pozitivisti delijo z Ronaldom Dworkinom in po katerem je logično mogoče, da pravni sistem vključuje moralne kriterije pravnosti (oziroma »temeljev prava« kakor temu pravi Dworkin). To stališče je poznano kot trditev o vključenosti morale (TVM). Dosedanja razprava o tej temi se je v odvijala v okviru napadov zoper koherentnost TVM, pri čemer so skušali zagovorniki obravnavane trditve te napade zgolj odbiti. Ta članek pa podaja pozitiven argument v prid TVM. V ta namen najprej predstavi logiko dokazovanja možnostnih trditev, kakršna je TVM. Ker je ta logika precej drugačna od tiste, ki ureja dokazovanje opisovalnih trditev, da sta pravo in morala povezani priložnostno ali nujno, se avtor posluži razlage pomembni značilnosti modalne logike. S tem postavi temelje za argument v prid TVM, ki ga nato izvede s pomočjo presenetljivo preprostega miselnega preizkusa. Pri tem se opre na Razov argument o možnosti obstoja pravnega reda brez mehanizmov prisilnega izvrševanja prava (po njem naj bi v družbi angelov lahko imeli pravni red, četudi bi ne razpolagali s sredstvi prisile). Ta je sicer v končni fazi neuspešen, a premore dve prvini, ki ju avtor uporabi v svojem pozitivnem argumentu v prid TVM.

Ključne besede: morala, pravo, temelji prava, merila veljavnosti, odprti pozitivizem, zaprti pozitivizem, Dworkin, naravno pravo

ENG. | In this essay, the author argues for a view that inclusive positivists share with Ronald Dworkin. According to the Moral Incorporation Thesis (MIT), it is logically possible for a legal system to incorporate moral criteria of legality (or "grounds of law," as Dworkin puts it). Up to this point, the debate has taken the shape of attacks on the coherence of MIT with the defender of MIT merely attempting to refute the attacking argument. The author gives a positive argument for MIT. He begins with an explanation of the logic of establishing possibility claims, such as MIT. At the outset, it is worth noting that the logic of establishing possibility claims is very different from the logic of establishing contingent descriptive claims or necessary claims. For this reason, some explication of the relevant features of the semantics of modal logic will be necessary here. Once the structural framework is adequately developed, the argument for MIT will be grounded on the strength of a thought experiment of a surprisingly simple kind. Indeed, the argument is inspired by a Razian argument for the possibility of a legal system without coercive enforcement machinery; on his view, a society of angels could still have a system of law without any coercive machinery. The argument in this paper possess two theoretically important qualities that are also possessed by Raz's powerfully simple, but ultimately unsuccessful, argument.

Keywords: morality, law, grounds of law, criteria of validity, inclusive positivism, exclusive positivism, Dworkin, natural law

Summary: 1. Introduction. — 2. Types of Legal Theory and the Morality Incorporation Thesis. — 3. The Structure of the Debate between Inclusive and Exclusive Positivism. — 4. Giving a Positive Argument for a Possibility Claim. — 5. A First Stab at a Positive Argument for MIT. — 6. A Positive Argument for MIT. — 7. The Limited Explanatory Power of Possibility Claims.

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Synopsis

Pierluigi Chiassoni

Kelsen and Natural Law Theory
An Enduring Critical Affair

SLOV. | *Kelsen in naravnopravniška teorija: dolgotrajno kritiško razmerje*. V nizu razprav, objavljenih med koncem dvajsetih in sredino šestdesetih let prejšnjega stoletja, je Hans Kelsen v naravnopravniško teorijo uperil radikalno kritiko. Avtor te razprave skuša to Kelsnovo kritiko analitično obnoviti in kritično ovrednotiti. Njegov zapis je sestavljen iz dveh delov. V prvem se posveča temeljem Kelsnove argumentacijske strategije zoper naravno pravo in naravnopravniške teoretike. V drugem delu pa se osredotoči na dva kritična odgovora na Kelsnov napad. Enega je v imenu tradicionalne naravnopravniške teorije podal Edgar Bodenheimer, drugega pa je v imenu »nove naravnopravniške teorije« izoblikoval Robert P. George. | Razpravo je v slovenščino prevedel Matija Žgur.

Ključne besede: Hans Kelsen, naravnopravniška teorija, razsodišče znanosti, Edgar Bodenheimer, Robert P. George

ENG. | In a series of essays published from the late 1920s up to the mid-1960s, Hans Kelsen carries out a radical critique of natural law theory. The present paper purports to provide an analytical reconstruction and a critical assessment of the Kelsenian 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, and by Robert P. George, on behalf of "the new natural law theory".

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

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Synopsis

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Law and Defeasibility

A few comments on *The Logic of Legal Requirements* (Eds. Ferrer Beltrán & Ratti, Oxford: OUP 2012)

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