**Introduction to the Special Issue of the Journal of Classical Sociology on ‘Social Theory and Natural Law’ (Forthcoming June 2013)**

Daniel Chernilo and Robert Fine

Relations between social theory and natural law have not figured prominently in scholarly debates and the case for their inter-connections, which is far from self-evident, needs explicit justification. The aim of this special issue, which is to explore linkages between social theory and natural law, requires that we take a step back and redefine the ways in which these traditions are conventionally viewed. We define natural law as a heterogeneous intellectual tradition whose core lies in the question of universalism. We can differentiate between traditional and modern, conservative and radical, religious and secular forms of natural law, as well as between natural law and natural right; but in all cases the problem of universalism remains central. We see social theory as a modern intellectual programme that, over the past two hundred or so years, has sought to understand the rise and main features of a number of socio-historical trends that still very much configure the world we live in: capitalism, democracy, the international system of states, and the differentiation of spheres of social life. The history of social theory’s relations to natural law builds on a distinction between the difficult but often intimate relation to natural law that social theory has *actually* experienced, and secondary reconstructions of social theory that read as if social theory has *definitively moved beyond* natural law and established in its place a scientific perspective. Our special issue confronts the latter view by explicitly addressing their interconnections.

We should like to make explicit four related aspects of the relationship between both traditions. First, natural law brings the normative into social theory based on some kind of contrast between actually existing society and an ideal society organised according to the laws of nature. Both traditions seek to understand the immanent tensions between description and normativity. Second, social theory brings history into natural law by emphasising human agency in the making of history and changing circumstances under which human beings make history. It brings contingency into natural law by emphasising that social life is not organised according to laws of nature or history. An ideal society is neither the starting point nor endpoint of history. Third, the idea of natural law only emerges when people begin to realise that not all law is divine law and when critical reason, looking backward, realises that profound changes have taken place in laws and customs; and looking outward, realises that profound differences exist among legal institutions and sociocultural practices. It is in the face of this diversity that natural law seeks a point of unity in a notion of what is essentially human. Fourth, as said, universalism is intrinsic to the idea of natural law insofar as natural law is a law that is universally valid. In recognising its debt to natural law, social theory affirms the centrality of universalism in its own understanding of the world through ideas of human nature (often implicit) and conceptions of the social (usually explicit). It incorporates the universalism of natural law precisely as it distances itself from any fixed or static notion of what the universal is. The claim to universalism is a tie that binds social theory to natural law. Normativity, historicity, diversity, universality: these are aspects of the relation between social theory and natural law that we need to bring to the surface.

The distinction between natural law and positive law underpins the history of European legal and political thought. This distinction, which was already present in medieval Europe, emerged in the modern era as an organizing principle for theoretical inquiry into the conditions of legitimate authority. Emphasis could be placed on the side of universal natural law, which implied a commitment to the normative justifications of political order, or on the defence of positive law, which meant accepting a more secular account of the foundations of legitimate state rule. In the nineteenth century the difference between these patterns of reflections assumed a striking salience when John Austin opposed positive law (‘law set by political superiors to political inferiors’) to normative theories of law and claimed that natural law had no place in a positive jurisprudence. From this point on, a dichotomy was established between theories promoting positive law as central to state authority and theories promoting principles of natural law as the normative foundation of jurisprudence. Positive law was identified with legal realism and natural law with normative theory. In the twentieth century Hans Kelsen and Carl Schmitt, though otherwise theoretical antagonists, expressed the common view that natural law entails a metaphysical and antiquated approach to questions of law’s foundations and that legal thought must restrict itself to scrutiny of legal facts.

The critical reaction reception of natural law is equally significant in the formation of sociology. Scepticism toward natural law standards of legitimacy was fundamental to the emergence of the discipline and yet they were always mixed with an ambivalent reception and the reintroduction of some principles of natural law. For example, Comte expressed hostility towards doctrines of universal right but still sought to account for the general laws with which to comprehend the evolution of humanity within a positive theory of society. Marx was critical of the idea of natural rights arising from the French Revolution but still claimed that law must enshrine an idea of individual and collective freedom. The deep sociological suspicion of the idea of a higher law above all social and historical determination is, however, built upon a number of continuities between Enlightenment theories of natural law and early sociology. The four features of natural law we have just mentioned – normativity, historicity, diversity, universality – are part of the heritage that social theory has systematically used to assert itself and this ambivalence between rejection and incorporation of natural law is articulated in the works of Tönnies, Durkheim and Weber. In their view, sociology ought to be critical of natural law and study the normative aspects of social life for what it actually is; at the same time, sociology was only going to be able to do this if it engaged seriously with normative ideals: justice, the rule of law, human dignity, individual and collective self-determination. A common trope of social theory over the past four decades, from postmodernism to rational choice to postcolonialism, is its underestimation of the role of normative ideas in social life. There is more to social life than power, strategic action and essential identities. In their different ways, the four papers in this collection seek to re-engage with the complicated relationships between philosophical and scientific claims to knowledge, between description and normativity, between the history of ideas and the analysis of socio-historical reality. Indeed, between social theory and natural law.

In his article *Natural law, state formation and the foundations of social theory,* Chris Thornhill proposes that the sociological critique of natural law, though foundational for sociology as a discipline, has paradoxically adopted an approach to natural law that is *non-sociological* as it naively accepts the antinomy between natural and positive law. Thornhill directs us toward consideration of the social function of conceptual norms and in particular the role of natural law in the historical construction of European states and societies. He calls on sociology to comprehend natural law principles sociologically by treating them not as abstracted norms against which sociology defines its methodological structure, but rather as intrinsic parts of the social and historical reality we call modernity. His article offers an account of natural law that seeks to overcome the antinomy between natural and positive law and to think sociologically about the institutional functioning of natural law. His proposal is that the dichotomy between natural law and positive law is, functionally, without sociological reality. Thornhill focuses on the functionality of natural law and its relations to positive law for European state formation. In his view, the Kantian conception of natural law as a formal deduction from practical reason – one which recognized the rights of all members of society as equally protected under law, attached to all persons qua persons, and stripped of all local and status residues – came to act as the source for the *reconstruction* of state power. If traditional natural law theories allowed the states of early European society to establish their autonomous power, the advent of universal subjective rights permitted states radically to extend their positive forms of power. Thornhill observes that this reconstruction renders precarious the supposed dichotomy between the rights theories of the Enlightenment and the more positivistic orientation of sociological inquiry. This is because the positivising functions of rights become visible partly in the capacity of states to represent universal rights as the source of their own public power and thus to exercise power at a heightened level of abstraction; and partly in the capacity of states to control the terms of inclusion in such a way as to ensure that natural persons possessing rights were not required or even able to enter the political system in any meaningful manner. Thornhill contends that the formal type of natural law that evolved in the Enlightenment enabled the state to authenticate its power as inclusively legitimated power and to detach it from all other spheres of society, such family and the economy, and from all external actors, most saliently the Church. If early sociology formed itself through a positivistic reaction against the natural right theories of the Enlightenment, Thornhill argues that this view rested on a series of reductive assumptions that neglected the internal relation of natural rights to historical processes of political abstraction and legal positivisation.

In his *Bringing ‘right’ back in: natural law, sociology and critical* theory, *Bob Fine* acknowledges that the sociological critique of natural law is premised on a justified suspicion of the idea of a higher law above human agency and independent of all historical and social conditions. But he reverses this perspective by considering the suspicion of sociology harboured by modern natural law theorists: namely, that the attributes of sociology which led it to repudiate natural law – an emphasis on the historicity of moral norms, the plurality of co-existing cultures, the relativity of ethical values and the human origins of all laws – may also impede it from facing up to the violence of the modern world. From this point of view, sociology’s emphasis on the relativity of values threatens to devalue all values and potentially equalises the most criminal of principles with the most elevated; and its conviction that all laws are positive laws threatens to remove all limits on what the state, ‘race’, ‘culture’, or indeed ‘the nation’ can posit with the result that everything, however horrendous, becomes possible and can be justified. If sociology retains something that situates social life outside the sphere of substantive ethical consideration, the allure of natural law is that it provides a standard against which to compare and evaluate different moral and legal systems. Fine suggests that this may explain why we may wish to carve a space between natural law and sociology. Natural law raises the thought that the human condition of living with others may contain moral imperatives that in certain circumstances can be neutralised by surrounding social forces, and that the concrete possibilities of resistance to oppressive power can be found at every moment of history. Sociology reminds us that we judge and act as members of a particular community guided by our community sense, but in the modern world we are also members of a world community and have the capacity to take our bearings from the idea of being world citizens. Our ‘cosmopolitan existence’, as Arendt calls it, is one in which the idea of an original compact based on inalienable human rights inspires our judgment and actions. Fine pursues this thought in a discussion of the philosophies of right of Kant and Hegel, the social theories of right of Marx and Marxism, and the critical theories of right of Arendt and Adorno. He maintains that recognition of the rights of all members of society to be equally protected under law acts as a source for reconstructed state power but also as a starting point for the arduous journey of human emancipation. He concludes that critical theory is a way of thinking that moves between natural law and sociology, impelled by the generative capacity of rights to inspire action even in the presence of a travestied positive legal framework.

Bryan Turner focuses his *Alasdair MacIntyre on Morality, Community and Natural Law*Alasdair MacIntyre’s sweeping criticisms of the moral incoherence both of modern society and of a value-neutral sociology unable to engage with moral issues. In his analysis of religious change and the decline of working class community MacIntyre argued that urbanization and the industrial revolution in the United Kingdom brought about the destruction of the forms of communal life, to which religion had given symbolic expression, and that in a modern secular society there is no authoritative language within which to settle moral disputes. Turner then reconstructs MacIntyre in three steps: firstly, his proposition that this problem is expressed philosophically in a relativism that rules out the possibility of reaching agreement about moral principles and in an ‘emotivism’ that treats what feels good as good; secondly, his conviction that the moral incoherence of modern society is rooted in deeper issues about loss of community, secularisation, fragmentation of values and the effects of capitalist modernization; and thirdly, the sociological agenda of analysing the social structures that underpin the decline of traditional moral standards and natural law. However, Turner breaks from what he sees as the nostalgia of MacIntyre’s thesis, with its image of past societies as unified and organic communities, and criticizes his inability to come to terms with the modern transition from *Gemeinschaft* to *Gesellschaft.* Turner argues that, despite his Thomist presuppositions, MacIntyre has surprisingly little to say about the evolution of law in modern societies or about the shared values across cultures that human rights can represent. Turner maintains that rights and law function today as a shield against the erosion of the community and that human rights might serve as a solution to the problem of moral dissolution MacIntyre raises. Turner argues that we must reconsider the separation between law and morality put forward by sociological and legal positivists alike, and he roots his own ontology of human rights in what we might call a natural law of human vulnerability. He looks in particular to the ethical-legal sensibility of a leading Thomist scholar of human rights, Jacques Maritain, who played a significant role in the drafting of the Universal Declaration of Human Rights in 1948. Maritain’s ‘integral humanism’ rejected Western secularism as barren, but sought to build a bridge between a reconstituted Christian natural law and human rights. Turner sees in Maritain’s reconstruction of Thomist natural law an effective antidote to MacIntyre’s nostalgic view of the world that nonetheless addresses the substance of his critique of capitalist modernity.

In his contribution *Jürgen Habermas: Modern social theory as postmetaphysical natural law*, Daniel Chernilo explores Habermas’s longstanding engagement with natural law and the intellectual resources, normative and empirical, it provides for social theory. He focuses on the universalistic premises that establish a link between natural law and social theory, acknowledges that Habermas’ engagement with natural law arises from the standpoint of social theory and eventually characterises Habermas’s social theory as itself a postmetaphysical form of natural law. Chernilo endorses the view he finds in Habermas that the historical decline of natural law and rise of social theory represent an emancipation from external modes of argumentation that are bound to remain backward looking in their normative implications. It signifies that individuals cannot delegate responsibility for their normative decisions. However, he argues that this is only one side of the story since contemporary intellectual currents (positivist, postmodern and postcolonial) that treat normative reflection as no longer meaningful or possible pose as great a threat as conservative natural law. For Habermas the normative questions raised by modern natural law, of how the old promise of a self-organizing community of free and equal citizens can be reconceived under modern conditions, continues to link social theory to the natural law tradition. The emphasis is placed on modern natural law with Kant as its highest expression, since traditional natural law, while having some inkling of the universality of the human species, had little idea of the subjectivity of individuals as moral agents. By contrast, normative claims in modern natural law are pulled in two different and possibly conflicting directions: they aspire to achieve ‘objective’ general acceptance but must do so ‘subjectively’, that is, by individuals themselves in their particular life-worlds. The great strength of Habermas is his attempt to make the subjective and the objective standpoint work together and Habermas translates this principle into a theory of the co-originality of rights and democracy, whose internal tensions Chernilo brings to the fore. On the one hand, he critically reassesses the distinction between liberal and republican natural law that run throughout Habermas’s *oeuvre*. On the other, Chernilo questions why intersubjective deliberation must always and necessarily be better equipped to arrive at sound moral and political decisions than monological thinking – especially in the context of the rationality deficits of public deliberation of which Habermas is well aware. Nonetheless, Chernilo defends Habermas’s commitment to construct a truly postmetaphysical approach that is philosophical though not foundationalist, normative though open to dialogue and learning. It is this universalism that led Habermas to engage with natural law in the first place, since a sociology worth its salt, one that transcends empirical description to address fundamental human concerns, cannot erase its debt to natural law.