

HUME'S LAW AND LEGAL POSITIVISM*

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1. *How legal positivism based a descriptive science of law on Hume's 'is-ought' distinction: Bentham, Kelsen, Hart*

Jeremy Bentham, whom I take to be the grounding father of legal positivism, acknowledges more than once his great indebtedness to David Hume. In his first book *A Fragment on Government*, Bentham refers to the reading of the third volume of the *Treatise of Human Nature* as a kind of illumination: "I well remember –he tells us– no sooner had I read that part of the work which touches on the subject –the whole passage turns on the subject of the original contract–, than I felt as if scales had fallen from my eyes." And summing up: "I learnt to see that *utility* was the test and measure of all virtue; of loyalty as much as any; and that the obligatio to minister to general happiness, was an obligation paramount to and inclusive of every other. . . I bid adieu to the original contract".¹ There is, however, another major thesis that Bentham owes to his earlier reading of Hume. Many years later he would describe it this way: "by David Hume, in his *Treatise of Human Nature* the observation was, for the first time, (it is believed) brought to light –how apt men have been, on questions

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¹ *A Comment on the Commentaries and A Fragment on Government*, J.H. Bruns, H.L.A. Hart ("Collected Works"), London, Athlone, 1977, p. 440-1. In the "Preface for the second edition" of 1823, Bentham says about the principle of utility: "that was the name adopted from David Hume" (*ibid.*, p. 508). But there were other sources. According to a statement written in 1783, Bentham could not remember the first one (Priestly or Beccaria): for this and later reports, cf. Baumgardt, *D. Bentham and the Ethics of today*, Princeton U.P., 1952, p. 36 and next note. Cf. also Bentham's letter to Dumont, 6 September 1822: "When I came out with the principle of utility, it was in the Fragment, I took it from Hume's Essays, Hume was in all his glory, the phrase was consequently familiar to everybody. The difference between me and Hume is this: the use he made of it, was –to account for that which is, I to show what ought to be." (*apud* Halevy, E., *La formation du radicalisme philosophique*, vol. I, Paris, Alcan, 1901, p. 282 n. 36.)

belonging to any part of the field of *Ethics*, to shift backwards and forwards, and apparently without their perceiving it, from the question, what *has been done*, to the question, what *ought to be done*, and vice versa: more especially from the former of these points to the other. Some five-and-forty years ago,² on reading that work, —from which, however, in proportion to the bulk of it no great quantity of useful instruction seemed derivable, that observation presented itself to the writer of these pages as one of cardinal importance”.³

In fact, one of the major features of Bentham’s legal theory is a sharp distinction between what the law *is* and what the law *ought to be*. In a language which is full of tacit references to Hume, says Bentham in the Fragment: “to the province of *Expositor* it belongs to explain what, as he supposes, the Law *is*: to that of the *Censor*, to observe to us what he thinks it *ought to be*. The former, therefore, is principally occupied in stating, or in inquiring after *facts*: the latter, in discussing *reasons*. The *Expositor*, keeping within his sphere, has no concern with any other faculties of the mind than the *apprehension*, the *memory* and the *judgement*: the latter, in virtue of these sentiments of pleasure of displeasure which he finds occasion to annex to the objects under his review, holds some intercourse with the *affections*.”⁴ The is-ought distinction is therefore at the very heart of the idea of an “expositive” or positive science of law, that can be sharply separated from ethics or political philosophy. From the best possible law nothing can be deduced about what *is* the law. From a bad law cannot be deduced that it is not a law. But the application of the ‘is-ought’ distinction to the distinction between the law as it is and the law as it ought to be implies also that it is meaningful to say that the law *is* somehow a fact that can be ascertained and stated. To make this point clear, Bentham says in a note to the above quoted passage, that “the establishment of a law may be spoken of as a fact, at least for the purpose of distinguishing from any consideration that may be

² Probably in 1769, which Bentham recollects to Bowring, as “a most interesting year... Montesquieu, Barrington, Beccaria and Helvetius but most of all Helvetius, set me on the principle of utility” (*Works*, ed. Bowring, X, p. 54). Hume’s name is missing here, but this could well be a *lapsus*.

³ *Chrestomatia* (1915-17) in *Works* (ed. Bowring), VIII, 128 n. Bentham seems to maintain here his severe judgement on the two first vols. Of the *Treatise*: “they might, without any great loss to science of Human Nature, be dispensed with” (*A Fragment*, p. 440 n.). The advice was not taken for himself: in an earlier paper (perhaps of 1790, according to Milne) on “Entities: real or fictitious”, there is a bold remission to Hume: “Perceptions are either Impressions or Ideas (see Hume)”: *apud Baumgardt, D.*, op. cit., p. 400.

⁴ *A Fragment*, p. 397.

offered as a *reason* for such law”, This seems to concede what Kelsen would here say: that the law is the meaning of the act of establishing it; it does mean an ought and not a fact; it is, however, related to such an ascertainable fact as the fact of establishing a law. Such a fact is according to Kelsen an act of the will: a norm, says Kelsen, is the meaning of an act of the will.⁵ Bentham would rather say that a law is the expression of a will.⁶ Nowadays Professor Hart holds that legal positivism depends on social sources of law and his own blend of it depends on the social practice of the judges by accepting a rule of recognition.⁷ If the law then originates in a fact, how to deny that it can be deduced from it? So the application of Hume reveals a peculiar difficulty: how to explain positive law as an ought that can be ascertained as a fact. How to accommodate positive law with Hume's sharp direction between is and ought, that is, between fact and law?

It looks as if legal positivism after using Hume's guillotina⁸ to execute the natural law theories, for deducing what ought to be done from what the nature is, should take care to keep his head out of it.

2. *The general outline of Hume's argument*

Let us insert Hume's famous passage in the general outline of the argument of the *Treatise of Human Nature*. The point about the logical *non-sequitur* between propositions with “is”, or “is not” as copula, and propositions with “ought” or “ought not” predicates is only a part of a more general argument about propositions with moral predicates. It applies equally to Hume's favourite moral predicates, which are not “obligatory”, or “permitted”, but “virtuous” or “vicious”.

Hume finds two extraordinary things about moral propositions. Firstly we take sides in morals, and so we actually think that the question lies within human comprehension⁹ and can be rationally decided. “Reason is the discovery of truth or falsehood. Truth or falsehood consists in an agreement or disagreement either to the *real* relations of ideas, or to *real* existence and matter of fact.”¹⁰ But there

⁵ *Allgemeine Theorie der Normen*, Wien, Manz, 1979, p. 2.

⁶ *A Comment*, p. 78. Surely, both Kelsen and Bentham have a lot more to say about the conditions for an act of will to be legally relevant.

⁷ “El nuevo desafío al positivismo jurídico,” *Sistema 36-Revista de Ciencias Sociales*, 1980, pp. 5, 7.

⁸ To use the image of Max Black, “The gap between ‘is’ and ‘should’ ” (1964) in *The Is-Ought Question*, ed. W.D. Hudson, London, Macmillan, 1969, p. 100.

⁹ *Treatise of Human Nature*, III, I, 1 (ed. Selby-Bigge, p. 456).

¹⁰ *Ibid.* (p. 458).

are only four such relations of ideas: “resemblance, contrariety, degrees in quality, and proportions in quantity and number; all these relations belong as properly to matter [which is neither moral nor immoral], as to our actions, passions, and volitions [and similar subjects of moral merit or demerit].”¹¹ On the other hand, moral predicates are stated of external objects, such as actions, sentiments or characters of other persons, and they are not given in the external experience, there is no impression of an external object which originates the moral ideas. “Take my action allow’d to be vicious: wilful murder, for instance. Examine it in all lights, and see if you can find any matter of fact, or real existence, which you call *vice*. In which ever way you take it, you find only certain passions, motives, volitions and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object.”¹² Therefore, when we say that A’s action is obligatory or B’s character is virtuous, such a statement, in spite of having the form of a true statement about an external object, goes beyond external experience and reason.

The argument so far leaves the possibility open for a special moral sense, a kind of inner sentiment, and of corresponding primary qualities. Moral propositions would be based on impressions of peculiar internal objects, and so again capable of truth or falsehood. Such a theory would fit with some passages adjacent to the *is-ought* text. The quoted passage on wilful murder continues this way: “you can never find it [the vice] till you turn your reflexion into your own breast, and find a sentiment of disapprobation which arises in you, towards this action. Here is a matter of fact; but it is the object of feeling, not of reason. It lies in yourself, not in the object. So that when you pronounce any action or character to be vicious, you mean nothing but that from the constitution of your nature you have a feeling or sentiment of blame from the contemplation of it.”¹³ Hume seems to hold here two contradictory views: that vice is an object of feeling, and that vice is the feeling you have from the contemplation of the object. It has been said¹⁴ that the first view is indeed an impropriety of Hume, who should have said: “‘tis a feeling not an object of reason.” But then it should be explained why the fact of a feeling cannot be an object of reason, and how to pass from a proposition about a fact which lies in yourself to a proposition about the object and vice versa.

¹¹ *Ibid.* (p. 464).

¹² *Ibid.* (p. 468).

¹³ *Ibid.* (pp. 468-9).

¹⁴ L.W. Beck, “‘Was-must be’ and ‘is-ought’ in Hume”, *Philosophical Studies*, 26 (1974), p. 223.

If we take Hume to mean that there is a matter of fact which is an object of a particular moral sense, and take "sentiment" to be synonymous with sense —it is not,¹⁵ then it should be an object of reason, however peculiar. There remains the possibility that the object of feeling is not a given matter of fact that can be described in true or false propositions: it is what is felt, namely, disapprobation or blame. Surely, we still have to explain how to pass from a statement about a subjective reaction like blame to a proposition about the object which provokes such a reaction and vice-versa. This we will discuss later.

Hume has however another argument which clearly implies that moral propositions are not descriptions of a peculiar matter of fact accessible through the moral sense. This relates to the second motive Hume finds worth wondering in moral discourse.

The second extraordinary thing about moral propositions is that they seem to express a judgement but in fact they influence actions. Hume holds a psychological doctrine, whose origin is to be searched in Aristotle, according to which only desire (Hume: passion) not intellect (Hume: reason) moves to action. Aristotle says in *De Anima*: "there is one thing which produces movements, the faculty of desire. For. . . the intellect does not appear to produce movement without desire (for wishing is a form of desire, and when one is moved in accordance with reasoning, one is moved in accordance with one's wish too), and desire produces movement even contrary to reasoning."¹⁶ The doctrine is disputable, once Hume recognizes that reason can have an influence in our conduct "either when it excites a passion by informing us of the existence of something which is a proper object of its or when it discovers the connexion of causes and effects, so as to afford us means of exerting any passion".¹⁷ And Hume does not prove that it is possible to act without such a collaboration of reason. However, Hume sticks firmly to the Aristotelien doctrine: "the merit and demerit of actions frequently contradict, and sometimes control our natural propensities. But reason has no such influence. Moral distinctions, therefore, are not the offspring of reason. Reason is wholly inactive, and can never be the source of such an active principle as conscience, or sense of morals."¹⁸ We may safely conclude that

¹⁵ A sense gives information about an object, a sentiment is a reaction to a belief: so J. Harrison, *Hume's Moral Epistemology*, Oxford, Clarendon, 1976, p. 115.

¹⁶ 433 a 21-26 (transl. of D.W. Hamilyn, *Aristotle's De Anima, Books II and III*, Oxford, Clarendon, 1968).

¹⁷ *Treatise*, III, I, 1 (p. 459).

¹⁸ *Ibid.* (p. 458).

the moral sense is not in Hume like the other senses which inform us how things are.

As a result, for Hume moral propositions are not founded in sense experience —and not only in ordinary sense experience of external objects— and therefore cannot be empirically true. They are not *a priori* either. They are not, in consequence, true or false. In Hume's words: they are not derived from reason. They cannot be said properly to be contrary to reason: “ ‘tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger.”¹⁹ Why then do we use them and what do they mean? This is for Hume the problem of moral philosophy.

It has already been observed²⁰ that there is a striking parallelism between Hume's theories of morality and causality. Causality, just as moral predicates, is not observed by the senses. Causal knowledge, like moral distinctions, is not *a priori*: there is no contradiction between affirming an event and denying any other event. Therefore when we state a causal, that is, a necessary connection between two events, we go beyond the testimony of the senses and the power of reason. As a matter of fact, there is only an association of ideas, due to the repetition of like pairs of events. When the impression of the event *x* is associated with the corresponding idea, it produces the belief in the associated idea of *y*. In this way the belief in *y* exists in us, and we think and live as if there would be a necessity of *y* in the object.

3. *The controversy about the interpretation of Treatise, III, I, 1*

It is in this context that the famous passage on *is* and *ought* has to be interpreted. It would certainly run against Hume's intentions to deny the traditional interpretation, which has been given to it by Bentham, among others, that you can not deduce normative (“deontological”) conclusions from factual premises. That is Hume's “Law” (“no ‘ought’ from an ‘is’”) and that is why it is a “fork”²¹ for separating good and bad reasoning in morals, and a “guillotine” to the vulgar systems of morality;

The point Hume is making here is not that a motive is not logically derivable from a statement.²² This was a reinforcing argument for

¹⁹ *Treatise*, II, III, 3 (p. 416).

²⁰ By L.W. Beck *loc. cit.*

²¹ These appellatives are to be found in Hare: *Freedom and Reason*, Oxford, Clarendon, 1963, p. 108; “Descriptivism” (1963) in *The Is-Ought Question*, p. 240.

²² So j. Finnis, *Natural Law and Natural Rights*, Oxford, Clarendon, 1980, p. 42.

Hume's Law, but the Law does not depend on the soundness of the argument and has other arguments to support it. Hume had explained before that motives and passions, not judgements, influence actions, and he begins the passage by saying that he is "adding to these reasonings an observation, which may, perhaps, be found of some importance".

Even less does Hume pretend to offer a better, and conscious derivation of "ought" from "is".²³ He certainly says that "as this *ought*, or *ought not* expresses some new relation or affirmation, 'tis necessary that it shou'd be observed and explained". And the so needed explanation will connect it to facts, as Hume does. Such a connection however is not of logical deduction, as the "ought" proposition is a "new" one. If an explanation is due, the authors criticized by Hume have an impossible task: to give a reason "for what seems (is) altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it". If it would not be, but only seem, inconceivable, then the attention to it would not subvert, but only seem to subvert —as Harrison remarks²⁴— the vulgar systems of morality.

It has been said by the new interpreters that the traditional reading does not fit with Hume's positive theory about the meaning of moral sentences. Sometimes Hume seems to defend what Mackie²⁵ calls dispositional descriptivism, that is, the statement "this is virtuous (vicious)" means "this is such as to arouse a feeling of approbation (disapprobation) in X in circumstances C": "you pronounce any action or character to be vicious, you mean nothing, but that from the constitution of your nature you have a feeling or sentiment of blame from the contemplation of it."²⁶ At a first look, Hume says here that to predicate vice means to predicate the existence of a feeling or sentiment of blame of the speaker. but actually Hume does speak of the sentiment aroused from the constitution of the nature of the speaker, and as the nature is common to everybody, they are the sentiments aroused in everyone. Hume speaks indeed of "a peculiar set of terms in order to express. . . universal sentiments of censure and approbation".²⁷ Moral principles form "the *party* of humankind".²⁸ Human-

²³ So A.C. MacIntyre, "Hume on 'is' and 'ought' " (1959) in *The Is-Ought Question*, pp. 35 ss.; G. Hunter, "Hume on 'is' and 'ought' " (1962), *ibid.* pp. 59 ss.

²⁴ *Op. cit.*, p. 70.

²⁵ Mackie, J.L., *Hume's Moral Theory*, London, Routledge, 1980, p. 73.

²⁶ *Treatise*, III, I, 1 (p. 469).

²⁷ *An Enquiry Concerning the Principles of Morals*, s. IX, part I (*Enquires*, ed. Selby Bigge, p. 274).

²⁸ *Ibid.* (p. 275).

kind is the “audience” intended in the following important passage of the *Enquiry*: “When a man dominates another his *enemy*, his *rival*, his *antagonist*, his *adversary*, he is understood to speak the language of self-love, and to express sentiments, peculiar to himself, and arising from his particular circumstances and situation. But when he bestows on any man the epithets of *vicious* or *odious* or *depraved*, he then speaks another language, and expresses sentiments, in which he expects all his audience to concur with him.”²⁹

A more considered reading will also notice that the relevant contemplation is not the actual contemplation of the action or character. It should correct the tendencies we have to feel more strongly of the action near in space and time, specially if witnessed, than of the actions remote in space and time,³⁰ and to disapprove more strongly of our enemies than of our friends.³¹ It should also correspond to an impartial “spectator”³² as Hume’s disciple Adam Smith argued.³³ Another correction may be needed which relates specifically to the character. When a character, which in its natural tendency is beneficial to society, “is attended with good fortune which renders it really beneficial to society, it gives a stronger pleasure to the spectator, and is attended with a more lovely sympathy, and yet we do not say that is more virtuous. . . We know that an alteration of fortune may render the benevolent disposition entirely impotent; and therefore we separate, as much as possible, the fortune from the disposition.”³⁴ The beliefs about the action or character, which cause us to feel approval or disapproval may be mistaken or incomplete: “in order to pave the way for such a sentiment, and give a proper discernment of its object, it is often necessary, we find, that such reasoning should precede, that nice distinctions be made, just conclusions drawn, distant comparisons formed, complicated relations examined, and general facts fixed and ascertained.”³⁵ All this would draw us to an interpretation of moral sentences as descriptions of ideal dispositions of an ideal spectator under ideal circumstances.

But even such a qualified descriptivism would not render Hume’s intentions. What there is in reality is not necessarily what is meant.

²⁹ *Ibid.* (p. 272).

³⁰ *Treatise, ibid.* (pp. 581-2).

³¹ *Ibid.* (p. 583).

³² *Enquiry*, App. I (p. 289). Cf. *Treatise ibid.* (p. 581: “judicious spectator” and 583: “impartial conduct”).

³³ *The Theory of Moral Sentiments* (1759), *apud* Raphael (ed.), *British Moralists*, Oxford U.P., 1969, Nr. 811:

³⁴ *Treatise, ibid.* (pp. 584-5).

³⁵ *Enquiry*, s. I (p. 173).

Hume invokes here Locke's doctrine of secondary qualities. "Vice and virtue" says Hume, "may he compar'd to sounds, colours, heat and cold, which, according to modern philosophy, are not qualities in objects, but perceptions in the mind."³⁶ But Locke does not say that by predicating blue, or yellow, etc. of something, we mean that it is such as to produce a certain colour sensation in us, but that "we are so forward to imagine, that those ideas are the resemblances of something really existing in the objects themselves".³⁷ This seems to suggest that this kind of explanation of moral sentences does not explain their actual meaning just as the explanation of sentences about secondary qualities does not explain their meaning. Hume is bound to hold some sort of non-descriptivism, to be coherent with Hume's Law. He must think that moral sentences are similar to expressions of feeling or to commands or to advice, in so far as they do not state a matter of fact, do not describe things as they are. It may also be argued that dispositional descriptivism, if related to an ideal observer, is already dispositional prescriptivism.³⁸

What then is their meaning? It is difficult to combine Hume's various remarks to a coherent theory. Such a reconstruction would have to use conceptual tools which were prepared indeed but not used by Hume, in order to state more clearly what Hume was trying to say. Hume was not aware of today's usual distinctions in the theory of meaning nor of the different types of ethical theory we are able to recognize. Perhaps, he was not even mainly interested in these questions. There is happily no need for our purposes to make such a reconstruction. It is enough for us to consider some points which may shed light on Hume's Law and on legal positivism.

4. *Three levels of explanation of moral sentences: causal, pragmatic and of meaning*

Most critics of Hume's alleged inconclusiveness in this matter do not distinguish among three levels of explanation. I will call these levels causal, pragmatic and of meaning. The causal explanation of moral language will relate it to such facts as the impressions and ideas of the mind, the relations of resemblance and contiguity (Hume refers here to relations of blood, acquaintance, education and custom) among

³⁶ *Treatise*, III, I, 1 (p. 469).

³⁷ *An Essay Concerning Human Understanding*, II, IX, para. 25 (ed. Nidditsh, Clarendon, 1975, p. 142). Cf. Mackie, *op. cit.* pp. 58-9.

³⁸ Mackie, *op. cit.*, p. 73 classifies it as a kind of sentimentalism.

them, the operations of the imagination which give to the related ideas the vivacity or liveliness of our own impressions and so explain “the nature and cause of sympathy”, which makes us sensitive to the feelings of others as if they were our own: “when we sympathize with the passions and sentiments of others, these movements appear at first in *our* mind as mere ideas, and are conceived to belong to another person as we conceive any other matter of fact.” It is in sympathy that “the ideas of the affections of others are converted into the very impressions they represent, and that the passions arrive in conformity to the images we form of them”. “For besides the relation of cause and effect, by which we are convinced of the reality of the passion, with which we sympathize, besides this”, says Hume, “we must be assisted by the relations of resemblance and contiguity in order to feel the sympathy in its full perfection. And since these relations can entirely convert an idea into an impression, and convey the vivacity of the latter into the former, so perfectly as to lose nothing of it in the transition, we may easily conceive how the relation of cause and effect alone, may serve to strengthen and inviven an idea.”³⁹ In the causal explanation of moral language, sympathy must however be corrected by reflection and experience: “all sentiments of blame or praise are variable, according to our situation of nearness or remoteness, with regard to the person blaim’d or prais’d, and according to the present disposition of our mind. But this variation we regard not in our general decisions, but still apply the terms expressive of our liking or dislike, in the some manner, as if we remain’d in one point of view. Experience soon teaches us this method of correcting our sentiments, or at least, of correcting our language, where the sentiments are more stubborn and inalterable.”⁴⁰ This is an experience of reflection, with the help, again, of imagination: “We blame equally a bad action, which we read of in history, with one perform’d in our neighbourhood t’other day: The meaning of which is that we know from reflexion, that the former action wou’d excite as strong sentiments of disapprobation as the latter, were it plac’d in the same position.”⁴¹ The reflection must here recur to imagination: “the imagination adheres to the general views of things, and distinguishes the feelings they produce, from those which arise from our particular and momentary situation.”⁴² As we have seen, in the *Treatise*, it is sympathy, corrected

³⁹ *Treatise*, II, I, 9 (pp. 318-20).

⁴⁰ *Treatise*, III, III, 1 (p. 582).

⁴¹ *Ibid.* (p. 584).

⁴² *Treatise*, *ibid.* (p. 587).

by reflexive experience, which "interests us in the good of mankind".⁴³ In the *Enquiry*, Hume prefers to speak at this point of a peculiar sentiment of *humanity*, opposed to the selfish sentiments or passions, like avarice or ambition. "The distinction", he says, "between these species of sentiment being so great and evident, language must soon invent a peculiar set of terms, in order to express those universal sentiments of censure or approbation, which arise from humanity. . . Virtue and vice become then known; morals are recognized."⁴⁴

Language may be explained not only by the sentiments and operations of the mind which are its antecedents, but also by the goals of its use. This is the pragmatic level of explanation.⁴⁵ It is sometimes difficult to separate it from the causal one, as the representation of these goals and the will of attaining them are moments which constitute part of the reflexive experience which causes a certain use of language. It may however be said that such representation and will are antecedents of language, but goals are to be realized in future. On the other hand, the action of meaning something by the utterance of moral phrases or sentences is an intentional one, and so intends to attain goals as means for other goals. But the pragmatic level is only concerned with the goals which are not meant in the relevant use of language. "General language", says Hume, "being formed for general use, must be moulded on some general views and must affix the epithets of praise or blame in conformity to sentiments which arise from the general interests of the community."⁴⁶ Moral language, at this pragmatic level, is then explained by the rational satisfaction of factual needs and the prosecution of factual interests of all of us. We find here in first place, the need to avoid "perpetual contradictions" with others, and the interest in peaceful society and conversation: "we every day meet with persons, who are in a different situation from ourselves, and who could never converse with us on any reasonable terms, were we to remain constantly in that situation and point of view, which is peculiar to us. The intercourse of sentiments, therefore in society and conversation, makes us form some general inalterable standard, by which we may approve or disapprove of characters and manners. And tho' the heart does not always take part with those general notions, or regulate its love and hatred by them, yet are they sufficient for discourse, and serve all our purposes in company, in the

⁴³ *Ibid.* (p. 584).

⁴⁴ *Enquiry*, s. IX, part I (p. 274).

⁴⁵ L.W. Beck, *loc. cit.*, p. 225 writes that in Hume "the ascription of moral predicates is pragmatic and lies in their peculiar function in the social relations of mankind".

⁴⁶ *Enquiry*, s.V, part II (p. 228).

pulpit, on the theatre, and in the schools.”⁴⁷ We need the language of morals in social life as we need the language of causality in natural life.

Actually, Hume seems less interested in the explanation of the meaning of moral sentences than in giving causal and pragmatic explanations of them. However, when he tackles the question again and again, he does it by relating the moral sentences or phrases with facts. In two already quoted passages, Hume comes as near as ever to the formulation of a meaning rule, which in the *Enquiry* runs thus: “when a man bestows on any man the epithets of *vicious* or *odious* or *depraved*, he then expresses sentiments, in which he expects all his audience (i.e., an universal audience) to concur with him”; or similarly in the *Treatise*: “when you pronounce any action or character to be vicious, you mean nothing but that from the constitution of your nature you have a feeling or sentiment of blame from the contemplation of it.” We may hopefully depart from these formulations, recall some of the conditions of the last mentioned “contemplation”, which is the contemplation of a “judicious” or impartial spectator, and arrive—with the help of some current work on meaning—to the following incomplete account of the speaker’s meaning: By saying that the action *a* or the character *c* is vicious, the speaker intends to bring his audience to have a feeling of blame; he intends his audience to think that he believes that any one (including his audience) under certain circumstances *u* to be further specified (i.e., who impartially contemplates *a* or *c*) would have the same feeling; he intends his audience to think that he has such a feeling; he intends to achieve these results by means of the recognition by his audience of the corresponding intentions. This is so, because the speaker follows, and intends his audience to follow a meaning rule which relates his saying that the action *a* or the character *c*, is vicious, with the described intentions. Because of such rule, the speaker (conventionally) implies the existence of such intentions. By means of the same rule, his audience accomplishes those implications as well and so recognizes his intentions.

This account needs many qualifications, but I shall consider only two. Firstly, the first implication is detachable,⁴⁸ since I can intelli-

⁴⁷ *Treatise*, III, III, 3 (p. 603).

⁴⁸ I am using the terminology of H.P. Grice, “The Causal Theory of Perception” (1961), in Warnock, G.J. (ed.), *The Philosophy of Perception*, p. 91, whose work on meaning influenced much of the above account—cf. H.P. Grice, “Meaning,” *The Philosophical Review*, 66 (1957), pp. 337 ff., “Utterer’s Meaning, Sentence-meaning and Word-meaning,” *Foundations of Language*, 4 (1968), pp. 225 ff.; “Utterer’s Meaning and Intentions,” *The Philosophical Review* 78 (1969), “Logic and Conversation” in P. Cole, J.L. Morgan (eds.), *Syntax and Semantics. Volume 3. Speech Acts*, New York, Academic Press, 1975, pp. 41 ff.

bly say that 'a is vicious but I do not mean to imply that I intend you to have a feeling of blame' (in case I disagree with you and know you are stubborn). The last but one implication is also detachable, since I can intelligibly say that a is vicious but I do not mean to imply that I have the feeling of blame' (since I may be unable to overcome my love for the agent). Secondly it would be inappropriate to say that what he says implies any of the above intentions. The sentence 'a is vicious', implies apparently only that anyone under u is to have a feeling of blame.

Hume does not even make the beginning of an analysis of the meaning of "ought" sentences as he does of sentences which predicate "vicious". One may however safely admit that a human account of the meaning of 'x ought (morally) to do A' would consider that such a sentence does not state a matter of fact, is not a proposition. It implies however that any man under appropriate circumstances would want x to do A; that he would want A to be done by another person y under the circumstances of x; that once the action is done, everyone who knows it will feel a sentiment of approval. I would add, it is a specific implication of an ought sentence (both in moral discourse and outside it) that A is still undone and that x can do it.

5. *Conclusions about Hume's Law*

We are now in a position to make up our mind about Hume's Law. It is certainly true that no proposition about a state of affairs entails an "ought" sentence. This has been much disputed. I will consider briefly only two counter-examples.

"If you want to arrive at the conference in time, you ought to take a taxi." I will call this "ought" finalistic. It does not prescribe at all. It is an application of a causal rule, based upon the experience of the time needed by any alternative means of transportation. Let us now suppose that you truly want to arrive in time. Then I may conclude: "you ought to take a taxi." This sentence has, however, no prescriptive force, since I am not telling you to take a taxi. I am just saying that if you don't take a taxi you will not arrive at the conference in time.

Searle argued that in the following series of elements, any former statement entails the next one with the eventual help of additional statements which are not evaluative:

1) Jones uttered the words "I hereby promise to pay you, Smith, five dollars".

2) Jones promised to pay Smith five dollars.

- 3) Jones placed himself under (undertook) an obligation to pay Smith five dollars.
- 4) Jones is under an obligation to pay Smith five dollars.
- 5) Jones ought to pay Smith five dollars.⁴⁹

The last “ought” sentence has only prescriptive force if the speaker accepts the social practice, or institutional fact of promising. By doing so, the speaker is taking the internal point of view of someone who plays the “game of promising”, who thinks that promises are to be kept.⁵⁰ Otherwise, if the speaker is acting in a play, for example, by uttering the words of 1) he did not make a promise at all.

Searle adds two statements between 1) and 2), which seem to avoid this consequence:

1a) Under certain conditions O anyone who utters the word (sentence) “I hereby promise to pay you, Smith, five dollars” promise to pay Smith five dollars.

1b) Conditions C (here Searle includes the condition that the utterer is not acting in a play) obtain.

The essential move, as Searle recognizes, is from the specification of a certain utterance of words 1) to the specification of a certain speech act 2). “The move is achieved —says Searle— because the speech act is a conventional act, and the utterance of the words, according to the conventions, constitutes the performance of just that speech act.”⁵¹ The relevant convention in the case of a promise is described in 1a). Searle pretends: 1. that 1a) states “a fact about English usage”; 2. that “no moral premises are lurking in the logical woodpile”.

Let us consider first, the second thesis of Searle. Indeed 1a) must not be a moral premise. It may be one of the premises of a moral reasoning coupled with a moral rule, as “promises are to be kept” and a statement of fact, as 1). However, it is certainly not a moral rule. The moral rules are regulative of conduct, not constitutive of effects. The rule “promises are to be kept”, is violated whenever a promise is broken. But 1a) cannot be violated in this way. The promise remains as a valid promise, in spite of the breach, and develops its efficacy by the very fact that not only the utterance *must* still count as a promise, but also the deviant conduct of the promise breaker *must* count as a breach of a promise. The rule gives us the reason why Jones did not simply utter words, but by doing it the way he did,

⁴⁹ “How do derive ‘ought’ from ‘is’ ” (1964) in *The Is-Ought Question*, p. 121.

⁵⁰ Cf. R.M. Hare, “The Promising Game” (1964) in *The Is-Ought Question*, pp. 144 ff.

⁵¹ *Loc. cit.*, p. 126.

placed himself under an obligation, and so made a prescriptive or evaluative statement, which allows us to evaluate this conduct in future, whether it keeps the promise or breaks it (whether it fulfils or violates the obligation implied by the promise). Once the set of conditions C obtain and the utterance is made, the utterance *must* count as a promise. If it is not a promise in a particular case, the set of conditions has to be reformulated in order to account for such a case.

There is a possible objection against this thesis. It has already been said that 5), the last “ought” sentence, has only prescriptive force if the speaker by uttering 1) takes the internal point of view of one who accepts the rule that “promises are to be kept”. Searle, who denies that such a rule be implied by 1), inserts between 2) and 3) the definition:

2a) All promises are acts of placing oneself under (undertaking) an obligation to do the thing promised, which allows us to make the last phrase of 1a) (“promises to pay Smith five dollars”) equivalent to the phrase “places himself under (undertakes) an obligation to pay Smith five dollars”. However, this shows –so runs the objection–, that 1a) applies or implicitly contains a synthetic moral principle (“promises imply the corresponding obligations” or “promises are to be kept”).⁵²

To answer the objection, the argument must be further developed. Both 1a) and 2a) are constitutive rules of a promise, which is therefore an institutional fact. They state facts in so far as institutional facts, such as laws or rules of social morality, are facts. They do not describe what the English usually do when they promise, but how the English are to be understood when they promise. So 1a) is not a merely descriptive statement about English usage. By the same token 2a) is not a tautological definition. It allows us to evaluate one's conduct in future, whether it keeps the promise or breaks it (whether it fulfils or violates the obligation implied by the promise). Now, “Promises are to be kept” may mean just a more colloquial way of expressing 2a). Searle himself recognizes that “the whole proof rests on an appeal to the constitutive rule that to make a promise is to undertake an obligation”. But he adds: “and this rule is a meaning rule of the ‘descriptive’ word ‘promise’ .”⁵³ Some of his critics, however, like Hare, maintain that it is a moral rule. I think that both parties are wrong. 2a) is a rule constitutive both of the meaning of promises and of the promising game itself. But this is the very reason why promises

⁵² So Hare, *loc. cit.*, who is unable to distinguish the constitutive rules of the promising game from the regulative rules of morals.

⁵³ *Speech Acts*, Cambridge U.P., 1969, p. 185.

are institutional facts and why the word ‘promise’ is not merely a “descriptive” word. We cannot describe institutional facts –games are one kind– without recurring to the rules of the institution and we cannot subscribe to an institution –as Jones did by uttering such words under such circumstances– without accepting all its rules –and so Jones implied that promises had to be kept, without saying it. 2a) not only constitutes, with facts and other rules, the game (or institution) of promising, it regulates and evaluates also the conduct of the players. But it regulates conduct only from the point of view of the promising game. That is why Searle now says that we need to distinguish between:

5’) *As regards his obligation to pay Smith five dollars*, Jones ought to pay Smith five dollars, and

and

5’’) All things considered, Jones ought to pay Smith five dollars.

Searle correctly stresses that “if we interpret 5) as 5’’) we cannot derive it from 4) without additional premises.”⁵⁴ This shows that we are dealing with the obligation, and the corresponding “ought”, internal to the institution of promising. 5’) could be rewritten: “As regards his promise. . .”. But then neither the obligation nor the “ought” meant in 5’) are moral. The only moral statement in Searle’s argument is 5’), which he excludes.

The argument is reinforced if we imagine a conflict situation. Jones, for example, has (ought) to spend his last five dollars, buying bread for his child to survive. Jones’s moral obligation to keep his promise may be then overridden by his duties as a father, whatever description we choose of the conflict situation. But the promising game and its rules constitutive of the “ought” of promises cannot be overridden in a particular situation. “Overridden” is a word not used in the promising game.

To explain a moral conflict, some philosophers⁵⁵ resort to the concept of *prima-facie* obligation. By one interpretation, the first obligation, originated by the promise, only seems to be an obligation (therefore *prima-facie*), but it is not an actual obligation after all. By another interpretation, it is a weaker kind of obligation, opposed to an absolute obligation, which prevails because of its superiority or relative strength in the conflict situation. For our purposes it is enough to note that

⁵⁴ *Ibid.* (p. 181).

⁵⁵ Ross, W.D., *The Right and the Good*, Oxford, Clarendon, 1930, pp. 19 ff; more recently, cf Hintikka, J. “Some Main Problems of Deontic Logic” in *Deontic Logic: Introductory and Systematic Readings*, ed. R. Hilpinen, Dordrecht, Reidel, 1971, pp. 59 ff.

both concepts of *prima-facie* obligation are irrelevant to the institution of promising.

Searle, who disentangles and criticizes the concepts of *prima-facie* obligation, offers an alternative description, implying that the obligation of a promise may be overridden by other kinds of obligations. He makes "a distinction between statements asserting the existence of obligations, duties and other such reasons for acting and statements asserting what one ought to do all things considered".⁵⁶ The moral conflicts would be properly described as opposing different kinds of obligation (and other reasons for acting, such as duties, responsibilities, commitments, etc.), some of which may be, but must not be, moral. He writes: "obligations for various purposes may be divided into or categorized as legal, financial, social, moral, parental, etc. and the classes are not in general exclusive. Often in particular situation our obligations are in conflict with each other and with moral as well as other sorts of reasons for acting."⁵⁷ As every statement of obligation implies a corresponding "ought" statement, there are several kinds of "ought" statements with different meanings. In this way, the conflict may be as well described by using only "ought" statements, i.e., within Searle's second class of deontic statements. This shows that neither "obligation" nor "ought" are univocal. The important distinction is not between statements of obligation and "ought" statements, but of different kinds of obligations. So Searle admits the distinction between the obligation meant by promising and a moral obligation, even if he would destroy the argument we were using for it.

I do not think however that Searle succeeds in explaining the nature of moral conflicts. There can be no moral conflict among obligations which are not moral. But there are many moral obligations with the same content of other kinds of obligation.⁵⁸ So Jones has also a moral and a legal obligation to pay Smith five dollars. But if the promise was made without consideration, it cannot be legally enforced. Now, Jones's moral obligation to pay Smith five dollars because of the promise, conflicts with the moral obligation Jones has to feed his child. The facts of the promise in one case, and of the parental relation in the other, are two sources of moral obligation. They originate moral reasons for acting, which collide in the particular situation. What Jones ought to do, all things considered, must take them into account,

⁵⁶ "Prima-facie Obligations" in *Philosophical Subjects* (Strawson-Festschrift), ed. Z.V. Straaten, Oxford, Clarendon, 1980, p. 249.

⁵⁷ *Ibid.* (p. 246).

⁵⁸ Searle goes too far when he recently claims that "the objection to keep a promise has no necessary connection with morality." *Speech Acts*, p. 188.

together with other relevant features of the situation and (moral) principles of decision of moral conflicts. The scope of the question about what one ought to do all things considered goes beyond the scope of the institutions of promising, social morality and law.

We have seen how the meaning rules constitutive of promises, together with statements descriptive of facts, imply “ought” sentences. The same applies to social morality and as we shall argue, to positive law, which are institutional facts, i.e. facts that cannot be explained nor understood without the help of rules. However, there are no meaning rules which, together with factual statements, imply the “ought” sentences of morals (and of natural law, if we take it to be a part of morals). The meaning-rules of “ought” sentences in morals relate then to an ideal point of agreement between ideal spectators. It may be called an ideal fact, a hypothetical social contract, but it would be better not to call it a fact at all. It merely is the procedure of justification of a kind of philosophical moral. The moral sentences we discuss, are like natural law, fine flowers of our civilization which spread from the mouths of philosophers to the mouths of everybody.

6. *Legal positivism's claim and doing*

Legal positivism has been telling us that positive law exists, that propositions about positive law are true or false according to the facts, and that the true ones are the basis of a descriptive science of law. Shall we say now that legal positivism derives “ought” from “is”, after we have admitted that natural law doesn't (or, at least, must not do it)? Let us see more closely how positivists deal with our problem. I shall concentrate on Bentham and Kelsen, who hold the most distinctive positions about the consequences of Hume's Law for legal theory.

Bentham was certainly eager to point out the facts that lie behind the law. These were to him the truth of the law. They allow us to reduce the sentences we find in the law and about the law to meaningful factual propositions, or to repudiate the irreducible sentences as meaningless. The relevant facts are: the commands of the legislator, the decisions, i.e., the individual commands of judges, the sanctions of punishment and reward, the acts of obedience to the sovereign and the corresponding habit of the people. In the *Fragment* Bentham gives us two alternative analyses of legal “ought” sentences. He says one time that an action is a point of duty (or obligation) if it is the subject of a command of the legislator (or of a quasi-command of the common law), and another time that an action is a point of duty if it is probably followed by punishment. A rational reconstruction of

Bentham's thought has to accommodate these definitions with further developments: that namely there are laws backed by rewards and laws without political sanction, i.e., pain or pleasure at the hands of a political superior, such as the laws limiting the supreme powers within a state. But if the probability of a specific sanction is not necessary to the existence of a legal obligation, a system of sanctions backed by force and reinforced by obedience is needed to explain the superiority of the sovereign implied in the notion of a command.⁵⁹ It may be disputed if Bentham reduces after all the law to propositions about the will of the legislator or of the judge, as he was able to notice that "the use of a mandate is determined by the nature of the act or mode of conduct which is the object of it: and where can be no difference in the conduct of the subject it is no purpose to mark out any difference in the mind of the legislator".⁶⁰ Nevertheless, Bentham did not see the full significance of his own words, as he continued apparently attached to a theory of language which considered commands to be complex propositions of the type: "it is the will of *s* (a superior person), that *x* does A." He expressly equates "to express something" and "to assert something about the mind of the speaker".⁶¹ He remains therefore a psychologist and misses the point of Hume's Law. But his sharp distinction between what the law *is* and what the law *ought to be* is untouched: the facts on which positive law depends are clearly distinct from the prospective pleasure and pains which should allow him to calculate the contribution of the best possible law to general happiness. The argument does not rely upon a correct view of the nature of the relation between the law and the facts which determine its content.

Kelsen was the first legal positivist to retire all the consequences of Hume's Law. That is why he does not use the is-ought distinction to separate law from morals or from natural law. All three are normative systems, systems of "ought" sentences, which are only to be differentiated because they have a different source of validity, a different basic norm. The is-ought distinction marks in Kelsen the difference between such normative systems and causal laws and as a consequence, between the theory of law and both natural science and sociology of law. In his posthumous book on the *General Theory of Norms* Kelsen, whose thought was certainly not directly influenced

⁵⁹ Cf. my article: "Retire Bentham. A propos de l'edition de 'Of Laws in General' de Bentham par Hart", *Archives de Philosophie du Droit*, 17 (1972), pp. 465 ff.

⁶⁰ *Of Laws in General* (C.W., ed. Hart), p. 98.

⁶¹ *An Introduction to the Principles of Morals and Legislation* (C.W., ed. Burns, Hart), p. 299.

by Hume, but certainly influenced by Kant, is happy to notice his full accordance with Hume's views. He says: "in respect to the relation between "is" and "ought" is Hume more consequent than Kant. For him there is no practical reason."⁶²

Kelsen would not have been a positivist if he had not made the content of the law depend on facts. He does: "in being so established and in. . . the efficacy as a condition of validity lies the positivity of morals and of law."⁶³ These are the two matters of fact ("*Seins-Tatsachen*"), which are conditions of the validity of a norm. The efficacy consists in that the norm is in most cases followed and if not followed is in most cases applied, i.e., in most cases either one does what the law intends one to do or the sanction for non-compliance is applied. But Kelsen also says that the validity of each norm depends on the efficacy of all other norms which constitute the normative system.⁶⁴ I take these conditions together to give an alternative formulation for Kelsen's basic norm: if the norms which have been established in a normative system are efficacious, then each norm of the system is valid. As every norm established in a certain legal system derives its validity from the first historical constitution, the basic norm also reads: If the norms originated by the first historical constitution are efficacious, the first historical constitution is valid. Would Kelsen have understood what we are now able to understand in Hume, he would have said, I think, that the basic norm is the meaning rule which explains the meaning of the "ought" sentences of an institutional fact like law or social morality. The institutional difference between law and social morality is explained by the different kinds of sanctions in which the efficacy also depends: coercive acts or social approval and disapproval.

This could be and should be Kelsen but it is not. Kelsen says that the meaning of "ought" (and of "is") cannot be explained further. So he is not able to see how the *Grundnorm* is his own definition of law. As a positivist, however, he can not dispense with it. So he finishes in his last writings by saying that it is a feigned norm, a norm of an authority which does not exist, a self-contradiction: "the admission of a basic norm —e.g. the basic norm of a religious moral system: 'one ought to obey God's commandments' or the basic norm of a legal system: 'one ought to do as the first historical constitution

⁶² *Op. cit.*, p. 68.

⁶³ *Op. cit.*, p. 114.

⁶⁴ *Reine Rechtslehre*, 2d. ed., Wien, Deuticke, 1960, p. 218; "Professor Stone and the Pure Theory of Law," *Stanford Law Review*, 17 (1965), p. 1139.

says'— contradicts not only reality, because there is no such norm as the meaning of a real act of the will, but it is self-contradictory, because it empowers a highest moral or legal authority, and so originates in an authority which is above even the last one —however only feigned.”⁶⁵

In this way Kelsen not only finishes saying absurdities, but he forgets his own conditions of validity, forgetting positivism for a while. He cannot explain how the same sentence “A ought to marry B” (to use one of his examples) means different norms as the consequence of a promise, as a moral conclusion and as a moral obligation. Finally, he does not see the different relation to facts that holds for the law and other institutional facts on one hand, and the natural law on the other hand. This is also an important consequence, though not of Hume's Law, of Hume's pains to cope with it.

⁶⁵ *Allgemeine Theorie der Normen*, pp. 206-7.