

## HOW FACTS BECOME NORMS (PART I)

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**Abstract:** *I argue that it is possible to derive norms from facts. First of all, I refute the suggestion (shared by external moral realists and social scientists) that there are no norms but only facts, and consequently the derivation is of no scientific interest. In the second step, I will focus on theories which proclaim that norms can be derived only from specially qualified facts, e.g. institutional facts. I maintain that these theories are tenable only under condition that the special qualifier of norm-producing facts can be described in non-normative terms and I suggest that this condition is met when the qualifier is described as “permanent human behaviour”.*

**Keywords:** *bifurcation thesis, external moral realism, social science account of normativity, institutional facts, isought problem*

### INTRODUCTION

In my article, which is divided into two separate parts, I will try to find an excuse for breaking Hume’s law. This law states that norms cannot be derived *directly* from facts; that “the ought” cannot be grounded *solely* on “the is”. According to this law it is invalid to think, for example, that a three month old foetus deserves the right to live *just because* its neural system starts to sense pain; it is invalid to claim that we ought to help needy humans *just because* from the evolutionary point of view it is the best strategy to win the struggle with nonhuman species. To think the opposite way demonstrates how easy it is to break Hume’s law. And how hard it is to find a relevant excuse for it.

In the analytic writings from the 20<sup>th</sup> century to date there have been many attempts to show that Hume’s law is not sacrosanct. The first way to do this is to adopt a perspective from which Hume’s law can be *reasonably* ignored. This is the stance of those authors who refuse the dualism between “is” and “ought” because they believe that there is only one world which we can reasonably presume exists or which is susceptible to our investigation, namely: the world of facts. From this monistic perspective the notion of the world as it ought to be is at best a theoretical hypothesis which is not necessary for explaining how things actually go on in the world as it is. Purely factual approaches to normativity may vary. For example Stephen Turner maintains that talk about normativity can be reduced to talk about subjective attitudes of particular people. On the other hand Michael Moore insists that normativity, or rather morality, can be explained by reference to objective moral facts which exist independently of human consciousness. In either of these theories the concept of ought is redundant and therefore the problem of transition from facts to norms does not actually appear as a problem. In this article I argue that Turner and Moore are both mistaken when they do not take Hume’s law seriously, but nevertheless that in his account of normativity Turner is closer to the truth than Moore, since his theory does not impose on participants in normative practice any unnecessary ontological presuppositions.

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Another strategy to cope with Hume's law is to play hide-and-seek. This game usually takes the form of inferential reasoning in which a *specially qualified* fact is posited as the first premise and after a few reasoning steps a norm suddenly pops up as a perfectly valid conclusion. Perhaps the most famous demonstration of this strategy is John Searle's inference of a norm "Jones ought to pay Smith five dollars" from the institutional fact "Jones uttered the words 'I hereby promise to pay you, Smith, five dollars'". Since the meaning of "institutional fact" is usually associated with a normative core, in his demonstration Searle committed *petitio principii*. Although many authors have detected this fallacy, the hide-and-seek strategy goes on. As an example let me use Dennis Patterson's solution of the is/ought problem with special regard to legal practice. Patterson suggests we should look at the factual process of training in rule-following where we will observe that in order to reach the normativity of law, lawyers must learn special "forms of argumentation". Only after successful internalisation of these forms can lawyers show which of their assertions are correct and which incorrect. Again we have here a specially qualified fact from which it is easy to derive a norm, and again we can be reasonably suspicious whether the supposed special qualifier rests solely in its hidden normative core.

What do "institutional fact" and "form of argumentation" have in common? It can be said that the latter is just a special instantiation of the former, but as long as we do not explain what it means for a fact to be "institutionalized" in a non-normative way, it does not help us in solving our problem. In order to eschew recourse to normativity I propose that the specific feature of "institutional facts" is that they are *permanent human behaviour*. This assumption can serve us as a starting point in building a special dispositional theory which shows us how permanent human behaviour can bear upon our normative attitudes. More than a century ago Georg Jellinek noticed that human beings have an inborn disposition to shape their norms according to permanent factual conditions in which they happen to live and he called it the "normative power of facticity" ("*normative Kraft des Faktischen*"). I will try to support his observation by exploiting Leon Festinger's theory of cognitive dissonance, which is regarded as a general theory of attitude change. According to Festinger when an individual experiences a conflict between her (normative) attitudes and her behaviour she can resolve it not only by changing the latter, but also by changing the former. To be a bit more specific: if I participate in a social practice which is contrary to my normative attitudes and with time (and with my active or passive support) this practice gets stable, I can resolve the apparent inner conflict not only by changing my behaviour, but also by changing my normative attitudes. I make "the ought" consonant with my behaviour and apparently also with the behaviour of others. The theory of cognitive dissonance can be used as an explanatory device for solving the is/ought problem, and I think that this device is just what Searle's and Patterson's accounts of the issue were lacking.

I am well aware that my excuse for breaking Hume's law is a bit controversial. The reader may reasonably ask me in what way my proposal is different from that of subjectivists like Stephen Turner, who denies that there is any genuine ought. I suggest that the understanding of normativity does not need to be confined to representational semantics. The meaning of an ought-term capable of justifying human behaviour rests in a series of the term's applications. To understand what an ought-term means is to understand the practical consequences it *usually* leads to and hence the crucial point in ensuring the term's objectivity does not rest in its reference to some object outside our language but rather in social

acceptance of inferences drawn from it. However I do not think that in order to keep this kind of objectivity of ought-talk it is necessary to be “committed” or “entitled” to socially settled inferences. The ought-objectivity is not necessarily a matter of commitment but rather a matter of consistency and not only consistency of what we say but also consistency between what we say and what we do. To be true when saying how we ought to behave is *prima facie* simple – we just need to behave like we say we ought to behave.

To sum up, the brief line of my inquiry is dictated by the following questions: I.1)<sup>1</sup> *The is/ought problem*: What kind of inference does Hume’s law forbid us to make? Is every attempt to explain normativity by reference to facts doomed to be fallacious? I.2) *The subject/object problem*: If we accept that normativity can be reduced to facts, then what kind of facts should we rely on? Do ought-terms represent some objective reality or do they represent just our subjective attitudes? I.3) *Hide-and-seek*: If we accept that there is an extraordinary property which enables some facts to produce norms, then is it possible to describe this property in non-normative terms? II.1) *Normative power of facticity*: If it is possible to describe the norm-producing power of facts in non-normative terms, then can we explain this power by reference to some dispositional theory? II.2) *The truth of the ought*: If we accept that we have some disposition to shape norms according to certain facts, then is there any room left for the objectivity of ought-talk?

## 1. THE IS/UGHT PROBLEM

David Hume himself:

“In every system of morality which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not.”<sup>2</sup>

Hume is surprised at how easily moralists of all sorts draw normative conclusions from purely factual (or metaphysical) premises. The source of his curiosity rests in the presupposition that there must be some difference between is-sentences and ought-sentences. Is-sentences are designed to have declarative use; people who use them have an ambition to say something about the real world, about matters of fact. On the other hand, ought-sentences are generally used for expression of commitments, for guiding human behaviour in order to be in conformity with some kind of ideal. So between these two kinds of sentences there is a difference at the level of their pragmatic function as well as their meaning<sup>3</sup> and it is not *prima facie* evident whether this can be bridged without making some logical fallacy.

<sup>1</sup> The Roman numeral indicates the part of my article, while the Arabic numeral indicates the section of the respective article part.

<sup>2</sup> HUME, D. *A Treatise of Human Nature*. 2<sup>nd</sup> Vol. London: Dent & Sons, 1962, pp. 177–178.

If there is any such bifurcation between the representational and expressive functions of language, then we should have a criterion for answering which one of these functions has been used in a particular case. A relevant candidate for this criterion is the standard “direction of fit” test. If we utter a normative claim we get the world to match our words; if we utter a declarative claim, we get our words to match the world.<sup>4</sup> This test relies on the underlying language pragmatics: in the former case the correction of facts in order to be in conformity with a normative claim is contingent on the author’s effort to enforce the norm expressed. In the latter case the correction of a declarative claim in order to be in conformity with facts is contingent on the author’s effort to seek and preserve the truth. Now how should we understand Hume’s law, if we take the direction of fit criterion to be reliable? Is Hume suggesting that is-sentences should be completely ruled out from the domain of moral discourse? Well, it depends on what we mean by “moral discourse”.

Even Hume himself was not reluctant to talk *about* morals in a declarative mode. Although he admits that there is no objective matter of fact which we call “vice”, he nevertheless concludes that if we turn our reflection into our own breasts, we will find a sentiment of disapprobation. This sentiment is likewise “a matter of fact” though susceptible to our feeling, not to our reason.<sup>5</sup> There is no doubt that this claim by Hume is meant to be declarative because its direction of fit is aimed at getting words to match the world. If Hume by chance discovered that the world consists also of objective moral facts, then he would need to change his sentimentalistic foundations of morals for an account which would better fit this new factual finding. So then how can we explain that by positing his moral sentimentalism Hume did not commit the same fallacy he dissuaded other writers from committing? It is because his declarative claim was “*about*”, and not “*of*”, morals. He engaged in *explaining* how morality works in the world that is, not in *justifying* how we ought to behave. If Hume by chance insisted that we ought to behave according to our inner feeling of dis/approbation he would certainly contradict himself. He would have made the mistake which during the 20<sup>th</sup> century came to be known as the “naturalistic fallacy”.<sup>6</sup>

The naturalistic fallacy is widespread even these days, especially in the domain of evolutionary moral psychology and neuroscience. For example, William Casebeer depicts the project of naturalized ethics as a discipline which aims to show us “that norms are natural,

<sup>3</sup> Many philosophers of the 20<sup>th</sup> century acknowledged “the bifurcation thesis”, which claims that language has two different functions: we can either use it as a representation of the external world or as an expression of our internal attitudes. For a current discussion of this topic see for example PRICE, H. et al. *Expressivism, Pragmatism and Representationalism*. Cambridge: Cambridge University Press, 2013. Trivial but evident illustration of mutual interdependence of pragmatics (“function”) and semantics (“meaning”) of our utterances is offered by Weinberger. Let us presuppose that we have contradiction in two propositions  $p$  and  $\neg p$ . If the pragmatic function of two utterances with propositional content  $p$  and  $\neg p$  was irrelevant to the meaning of  $p$  and  $\neg p$  then we would have to conclude that there is also contradiction between two permissions  $Pp$  and  $P\neg p$  or between two questions  $?p$  and  $? \neg p$  which is apparently not the case. WEINBERGER, O. *Alternativní teorie jednání*. Praha: Filosofía, 1997, p. 26.

<sup>4</sup> See SEARLE, J. R. A Classification of Illocutionary Acts. *Language in Society*. 1976, Vol. 5, No. 1, pp. 1–23; ANSCOMBE, G. E. M. *Intention*. 2<sup>nd</sup> ed. London: Harvard University Press, 2000, p. 56 and ENG, S. *Analysis of Disagreement with Particular Reference to Law and Legal Theory*. Dordrecht: Kluwer, 2003, p. 304.

<sup>5</sup> HUME, D. *A Treatise of Human Nature*. 2<sup>nd</sup> vol. London: Dent & Sons, 1962, p. 177.

<sup>6</sup> See MOORE, G. E. *Principia Ethica*. revised ed. Cambridge: Cambridge University Press, 2000, p. 62 ff.

and that they arise from and are justified by purely natural processes”.<sup>7</sup> As an example of such a *justification* Casebeer suggests that the plausibility of the Aristotelian virtue theory of ethics may be directly founded on the findings of neurobiology.<sup>8</sup> Following the same footsteps Alex Walter is pretty confident about the prospects of the evolutionary account of morality, and he encourages his colleagues not to be afraid of any Hume’s law. Walter makes an appeal to something like “scientific common sense”, which excludes from scientific scrutiny everything that is behind nature:

“I believe that once evolutionists understand that proponents of the naturalistic fallacy are committed to ethical objectivism – which entails that values are supernatural facts, they will have no more fear of the ethical relevance of brute facts than they fear that creationists will successfully argue that the universe was created by divine providence.”<sup>9</sup>

Without any reference to available sources Walter submits that Hume was not only describing how people based their morals on their sentiments, but also that he was prescribing that moral sentiments *were* good as well. Walter concludes that “if contemporary evolutionary scholars are hesitant to take that last step, they obviously cannot cite Hume’s ‘law’ as the obstacle”.<sup>10</sup>

What would be the proper Humean reaction to this suggestion? Let us suppose that from among all the ethical theories which have been hitherto invented (or just “found”) there is one which is in best accord with the up-to-date findings of the natural or social sciences. Now, what would make us think that the criterion of concordance with nature or society should guide us in solving our every moral dilemma? Is it nature or society itself? I am not asking these questions from the position of a sapping sceptic but from that of a worried citizen who knows that the knowledge of science has been misused many times in history for justifying “wrongdoing”, whereby I mean “wrongdoing” from my personal moral point of view.

This rejoinder shows us how important it is to keep the representational function of ought-language apart from its expressive function. The question “What part of the factual world do our moral claims represent?” leads to a different answer from the question “What do we do by using our moral claims?” In the former instance we are looking for connections between our words and our world and we are doing it because we want to explain our behaviour by reference to its causes. In the latter instance we are looking for connections between our words and our behaviour and we are doing it because we want to justify that behaviour by inference from some presupposed reasons. Before we proceed to the question whether there is any contact place between the causes and reasons of our be-

<sup>7</sup> CASEBEER, W. Moral Cognition and its Neural Constituents. *Nature Reviews Neuroscience*. 2003, Vol. 4, p. 843.

<sup>8</sup> *Ibid.*, p. 845.

<sup>9</sup> WALTER, A. The Anti-naturalistic Fallacy: Evolutionary Moral Psychology and the Insistence of Brute Facts. *Evolutionary Psychology*. 2006, Vol. 4, p. 34.

<sup>10</sup> *Ibid.*, p. 39. For a more modest evolutionist account of morality see GREENE, J. From Neural Is to Moral Ought: What are the Moral Implications of Neuroscientific Moral psychology? *Nature Reviews Neuroscience*. 2003, Vol. 4, pp. 847–850.

haviour, we will discuss a proposition according to which we do not need to look for this place because there are only causes and no reasons; there are only facts and no norms.

## 2. THE SUBJECT/OBJECT PROBLEM

We can solve the is/ought problem by claiming that there is no “ought”. Even the avoidance of a problem can be deemed as its solution if it is well grounded. So upon what ground can we reasonably insist that there is no normativity at all? The common-sense starting point is that we cannot touch it or smell it like we are used to doing with regard to natural phenomena. The factualist (or naturalist) reductionism stems from the presupposition that our words have their meaning in so far as we are able to pick up a piece of our world which these words represent.<sup>11</sup> While it is certainly true that we are not able to back up all our is-sentences by our immediate observation, nevertheless we use them because we believe that this back-up is essentially possible; maybe only after making a few inferential steps back to some “protocol sentence”, maybe only under special laboratory conditions, but still we believe that in the world of facts there must be some truth-maker which gives our is-sentences a meaning. On the other hand ought-sentences are essentially counterfactual; they are supposed to hold even against the factual state of affairs. Moreover, they have an inherently reason-giving nature, so an object which they potentially represent would be, in comparison with objects of natural sciences, simply “queer”.<sup>12</sup> Why not to try to eliminate “the ought” from our vocabulary before we consider bifurcating our semantics?

So what does the bit of the is-world look like, which is supposed to be represented by our normative terminology, for example by “wrongness”? There are two basic approaches to answering this question. Either we conceive “wrongness” as a representation of some objective property of things as they are or we conceive it as a representation of some subjective attitude of people who think that something is wrong. The former approach is a basic presupposition of moral realism and here I will call it “normative objectivism”, while the latter approach is a basic presupposition of the social science account of normativity and I will call it “normative subjectivism”. Let us start with normative objectivism in the version of Michael S. Moore.

According to Moore the realist thesis that a mind-independent moral reality exists “makes better sense of the experience of us most of the time”.<sup>13</sup> So the thesis that moral entities or qualities such as rights, justice or culpability are somehow built into natural phenomena is supposed to serve as the best scientific explanation of our ordinary moral practice.<sup>14</sup> For demonstration of this thesis Moore uses Harman’s example of two young boys pouring gasoline on a cat and setting it afire. Observing this state of factual affairs we come to the conclusion that the children are doing “wrong”. According to the realist account the wrongness of voluntary cat-burning is an objective moral fact which causes

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<sup>11</sup> PRICE, H. et al. *Expressivism, Pragmatism and Representationalism*. Cambridge: Cambridge University Press, 2013, p. 9.

<sup>12</sup> MACKIE, J. *Ethics: Inventing Right and Wrong*. New York: Penguin, 1977, p. 38 ff.

<sup>13</sup> MOORE, M. S. Moral Reality Revisited. *Michigan Law Review*. 1992, Vol. 90, No. 8, p. 2472.

<sup>14</sup> *Ibid.*, p. 2492.

corresponding moral belief in the human mind. The connection between our observation of the boys' behaviour and our belief that something wrong is happening is mediated through several causally dependent sets of beliefs:

“The wrongness of the boys' act lies in the facts that it was voluntary, unjustified, and causative of a bad state of affairs; that it was voluntary, unjustified, and causally relevant lies in the facts about its volitional character, its failure to cause beneficial effects, and its actual causation of harmful effects; the truth of the last of these facts lies in the fact that the cat did suffer and did die.”<sup>15</sup>

According to Moore wrongness *supervenies* on nonmoral qualities like suffering; this means that wrongness depends like other moral properties “on natural properties in the sense that the moral properties of a thing cannot change without some change in the natural properties possessed by a thing”.<sup>16</sup> The supervenience creates a token-identity between moral property instances and natural property instances and it does not require us to have any special moral sense organ to detect it. So a Moorean realist claims that there is only one realm, the realm of facts, in which moral properties supervene on nonmoral properties and in which we can perceive the former exactly in the same way as we perceive the latter, i.e. by our normal five sense organs.<sup>17</sup> Since Moore denies that the recognition of moral qualities necessarily motivates people to behave morally (the externalist realism), in his account of morality he does not bother himself with “the ought”, with the prescriptivity of morals. For him it is just an “extra feature” of moral terms which is not a part of their meaning.<sup>18</sup>

In apparent contrast to this Moorean realism is normative subjectivism, which claims that normativity is best reduced to the subjective attitudes of particular people. Stephen Turner dives into the controversy over the nature of normativity by introducing two competing explanations of “the ought”. According to *normativism* “the ought” cannot be reduced to the social facts about what people do or say or what they believe in: “The mere sociological fact that people believe a given practice to be obligatory does not make it so”.<sup>19</sup> According to Turner normativists claim that “the genuine ought” has a privileged position in the description of our normative practice;<sup>20</sup> this means that for the accurate picture of normativity it is necessary to use concepts like meaning, obligation, or reason.<sup>21</sup> In opposition to the normativism Turner himself champions the *social science account* of “the ought” which relies purely on empirical (non-normative) facts about normativity. According to this view a normative practice can be understood in wholly empirical terms; we do not need to know what the ought is, we just need to know what particular people believe the ought is. Turner claims that “every time something goes on normatively, something

<sup>15</sup> Ibid., p. 2515.

<sup>16</sup> Ibid., p. 2516.

<sup>17</sup> Ibid., pp. 2517–2519.

<sup>18</sup> Ibid., p. 2473, p. 2524.

<sup>19</sup> TURNER, S. P. *Explaining the Normative*. Cambridge: Polity Press, 2010, p. 5.

<sup>20</sup> Ibid., p. 21 ff.

<sup>21</sup> Ibid., p. 12.

also goes on causally” and he supports this with the observation that everything normative needs to be learned; that means that the ought consists in “learnables” which are part of the ordinary empirical world.<sup>22</sup> From this Turner does not hesitate to draw the following implications:

“Learning is a causal process – even for the learning of false beliefs. Normative inferential relations, as they are actually operative in the social world, are re-descriptions of, or idealizations of, causal processes. At no point is a special new normative fact inserted into the relevant processes. The same facts are re-described in normative terms. These terms have no special privilege. They do not correspond to an essence. There is a non-normativist alternative description at every step.”<sup>23</sup>

In explaining the trivial fact that people understand each other when they are talking about their obligations, instead of normative terms like rationality and correctness Turner suggests using empirical terms like empathy and feedback. He thinks that normative terminology can do its job only as a transcendental presupposition which may or may not be true. On the other hand empathy and feedback do the proper explanatory work because they are upshots of natural processes; they are facts of social theory and of neuroscience, and through them we can get to what is *evident* to everyone, and hence to the only empirically accessible objectivity of ought.<sup>24</sup>

For some readers it might seem strange to put Michael Moore and Stephen Turner next to each other as authors of mutually competing conceptions of normativity. First of all, they share the view that there is no normativity at all; according to both of them, there is only the world of facts and that is all we need to explain our talk about “wrongdoing”, “correctness”, “rights”, “obligations” and the like. Moore and Turner agree with each other in one fundamental presupposition: our normative language is essentially representational; our normative terms are designed and used in order to grasp some part factual reality. But which part of factual reality do we grasp with these terms? Just this is the point where Moore and Turner diverge. According to Moore moral talk represents mind-independent objects, the alleged moral factual properties which supervene on non-moral factual properties, while according to Turner moral talk represents social science facts about actually held attitudes of people who understand each other by employing their empathy and by responding to their mutual feedback.

In a sense, both of the authors take an externalist approach to normativity. Externalists are spectators of, not participants in, normative practice. Their ultimate goal is to give us reports on how normativity works, not to give us recommendations or orders how we ought to behave. This does not mean that externalists do not take notice of what participants in normative practice think they are doing when they participate. Externalists try to understand the practice of normative justification but without letting themselves engage in the justification itself. At this point I would dare to make a conjecture according

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<sup>22</sup> Ibid., p. 40.

<sup>23</sup> Ibid., p. 147.

<sup>24</sup> Ibid., p. 178, pp. 191–205.



to which Turner's account of normativity is much more suitable for scientific fructification than Moore's one.

First of all, although Moore wants to make better sense of our moral practice, he does not accept any invitation to discuss the motivational force of the moral facts he envisages in his theory. Moore chose this position perhaps because he wanted to avoid encountering John Mackie's "argument from queerness" according to which if there were any facts with justificatory or motivational force, they would be very queer, "utterly different from anything else in the universe".<sup>25</sup> Unlucky for him, when Moore cut off the motivational force from the moral facts, he unwittingly undermined the realist ambition to put morality on rock solid ground. Jeffrey Goldsworthy explains this paradox as follows:

"An externalist moral realist could intelligibly be an amoralist who accepts both that moral properties exist, and that this logically entails that "objective" reasons for action also exist, but who nevertheless denies that those reasons have any practical relevance and therefore ignores them."<sup>26</sup>

Goldsworthy concludes that if we want to take our morality practically, like for example when we want to reach a decision whether to torture or to release a cat, then we need to look for subjective rather than objective reasons for action: "This is because we want to act for the best reasons we can find, and that is possible only in the case of reasons which can motivate us to act".<sup>27</sup>

In comparison with the externalist moral realism the social science account of normativity is much more open to the ought-pragmatics. Inasmuch as actual attitude-holders by and large follow their normative attitudes, there is no theoretical difficulty in admitting that facts (actual holding of normative attitudes) exercise motivational force on people (attitude-holders).

Moreover, the social science account of normativity may enjoy the luxury of avoiding the contentious debate between moral cognitivists and moral non-cognitivists, because social scientists are not committed to exploring whether actually-held normative attitudes are in fact beliefs or desires or something between them. Social scientists may take a cautious stance, admitting that they do not know for sure if there is any ought in itself. What they know for sure is that there is ought in the minds (and acts) of actual people. Why should they bother with the question of what nature the supposed objective ought would be, if they do not need it to carry out their explanatory enterprise? Regarding the belief/desire distinction there is only one important thing for social science: ought in the form of actually-held attitudes is an object of factual beliefs, not of desires, and these beliefs are backed up by observation of ordinary social practice.

I assume that the main virtue of the social science account of normativity is precisely this strict reliance on observable social facts. Unlike Moorean moral facts, social facts about what people do and say are evident, or at least more evident, in the sense that in

<sup>25</sup> MACKIE, J. *Ethics: Inventing Right and Wrong*. New York: Penguin, 1977, p. 38.

<sup>26</sup> GOLDSWORTHY, J. Some Scepticism about Moral Realism. *Law and Philosophy*. 1995, Vol. 14, No. 3/4, p. 367.

<sup>27</sup> *Ibid.*, p. 368.

acknowledging their existence we do not have to rely on quite controversial ontological presuppositions. Indeed, the theory according to which moral beliefs are results of ordinary sensual perception of moral facts is, at its best, only a provocative hypothesis which contradicts to a quite frequent observation that people who agree on what state of affairs factually happened (e.g. Mary underwent an abortion) disagree on how this state of affairs should be morally judged (Mary did/did not commit a murder).

But to subscribe to the representationalist semantics of social sciences does not entail claiming that this semantics is the only possible way to approach the ought. It is simply not true that *all* we can do with the ought is just its “explanation”, because what we usually do with the ought is “justification”. The ought is not only an object of scientific inquiry, but also a source of reasons for our action. The social science view of normativity is not controversial (I myself will take it up in II.1), except assuming that this view is the only one (I will try to refute this assumption in section II.2) But before I proceed to elaborate these issues let me look at another theoretical strategy to solve the is/ought problem.

### 3. HIDE-AND-SEEK

Some authors think that if we cannot infer norms from facts in general, maybe we can do it at least in very special cases. But what special cases? If we wanted to proceed this way we would need to bifurcate the whole set of facts into two subsets – ordinary facts and extraordinary facts – and claim that norms can be inferred only from one of them, the “special” one. The principal objection to this method comes from the suspicion that behind the supposed extraordinary property of certain facts there might be concealed some normative component and in that case the inference of norms from these “facts” would suffer from *petitio principii*. At first glance the “extraordinary facts strategy” might resemble a game of hide-and-seek: a norm hides behind an extraordinary fact, smuggles itself into a crowd of ordinary facts waiting to be discovered, and we, in an urge to validate the suspicion just mentioned, have to seek it out. At very least I assume that this strategy can show us the way out; all we need is just to take extra care to demonstrate that the supposed extraordinary property of certain facts is delimited solely in non-normative terms.

By way of illustration, perhaps I can start with an interesting suggestion by Bebhinn Donnelly.<sup>28</sup> Donnelly finds implicit awareness of the is/ought problem as well as attempts to solve it already in traditional natural law theory. According to him the “oughts” of traditional natural law were somehow built into nature, and the task of natural lawyers was to find them. If they wanted to succeed, they would have to find and pick out only those parts of the natural world behind which some normative core was hidden. Among these parts classical natural lawyers counted the essentials of our natural conditions of life, such as existence, communality and reason. Donnelly depicts the view of traditional natural lawyers like this:

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<sup>28</sup> DONNELLY, B. The Epistemic Connection between Nature and Value in New and Traditional Natural Law Theory. *Law and Philosophy*. 2006, Vol. 25, No. 1, p. 4.

“The moral ought can be derived from the is of theoretical truth simply because good consists in that, same, is; the essential is’s embody moral norms for they are, at its foundation, what morality is. For this same reason Aquinas’ principles of practical reason whilst normative are reducible to a definition of the human self, an existing, rational, communal, animal.”<sup>29</sup>

So the way we, humans, happen to exist, determines the content of law which guides our behaviour. Of course, not all parts of our ordinary life create the content of our natural law, but only those which can be deemed to be our “essentials”. So we have here ordinary facts about human nature, but we have here also essential facts about our nature and just these latter ones are specially qualified to produce the only universally valid and ever-lasting ought. But what would make us think that certain facts about human nature are not “essential” only because of the normative core which is possibly hidden behind them? How can we exclude the possibility that classical natural lawyers did not want to make us play their hide-and-seek game?

We could ask similar questions of Dennis Patterson. He insists that the problem of normativity is not related to mind, but to action.<sup>30</sup> Inspired by Wittgenstein he suggests that the key to normativity is to be found in the causal process of training rule-following. Why is this training crucial for explaining normativity? Patterson thinks that rule-following is based on a special kind of social agreement; agreement understood as a “regularity in reaction to use”, as “harmony in application over time”.<sup>31</sup> With specific regard to normativity in law, Patterson suggests that this regularity and harmony can be sustained by training “forms of legal argument”:

“The forms of argument are the ways in which we make meaning with rules (or do meaningful things with rules). The forms of argument make it possible for us to engage in the myriad activities we call “law” (e.g. arguing, asserting, deciding). The forms are the very thing that gives law its normativity, for they enable us to show how assertions are correct and incorrect, true and false. The forms are the grammar of law.”<sup>32</sup>

Patterson concludes that legal norms are objective “to the degree the forms of argument continue to be recognized as legitimate forms of legal justification”.<sup>33</sup> As was the case with “essential human nature”, here too we can ponder why the “forms of legal argument” are so specific that they produce genuine normative standards. Patterson draws our attention to ordinary training in rule-following, but how can we be so sure that we usually train just the right pattern of conduct? Indeed, it might be possible that we train those patterns of conduct which only our trainers deem to be right, but which are nevertheless wrong.<sup>34</sup>

<sup>29</sup> Ibid., p. 17.

<sup>30</sup> PATTERSON, D. Normativity and Objectivity in Law. *William and Mary Law Review*. 2001, Vol. 43, No. 1, p. 328.

<sup>31</sup> Ibid., p. 348.

<sup>32</sup> Ibid., p. 355.

<sup>33</sup> Ibid., p. 356.

<sup>34</sup> Cf. TURNER, S. P. *Explaining the Normative*. Cambridge: Polity Press, 2010, p. 25.

One of the most famous applications of the hide-and-seek strategy is John Searle's distinction between "brute facts" and "institutional facts". Searle suggests that it is perfectly intelligible to derive a sentence "Jones ought to pay Smith five dollars." from the sentence "Jones uttered the words I hereby promise to pay you, Smith, five dollars."<sup>35</sup> Searle explains the possibility of this derivation by pointing out that the factual premise does not represent a "brute fact", but an "institutional fact". By saying the words "I hereby promise" a speaker invokes the institution of promising. According to Searle, institutions are systems of constitutive rules of the form "X counts as Y in context C".<sup>36</sup> So in the present example, invoking the institution of promising means invoking the rule according to which in a certain context the words "I hereby promise" count as "I place myself under obligation to do something". According to Searle, this constitutive rule "is a meaning rule of the descriptive word promise".<sup>37</sup> If we understood the factual premise only as a representation of a brute fact, i.e. if we believed *only* that somebody called "promisor" had uttered some words called "promise" in a given situation, then we would not understand the words "I hereby promise" in its literal sense. Searle claims that it is simply a linguistic fact that promising is by definition undertaking an obligation to do something.<sup>38</sup> In order to exclude the suspicion that words representing institutional facts are just disguised evaluative statements, Searle stresses that understanding these words in their literal sense does not presuppose approval of the institutions they represent: "It is perfectly possible for someone who loathes the institution of promising to say quite literally, Jones made a promise, thus committing himself to the view that Jones undertook an obligation".<sup>39</sup> This is the reason why Searle believes that institutional facts are still facts, and not disguised norms. He believes that in his solution of the is/ought problem he did not employ the hide-and-seek strategy. Nevertheless, he did.

In a standard account, the concept of institution is usually associated with the concept of norm. Thus according to John Mackie an institution has rules or principles with a normative content which guides the actions of the participants in the institution.<sup>40</sup> According to Neil MacCormick participation in an institutional practice means doing something which each of the participants understands as norm-governed.<sup>41</sup> Similarly, Ota Weinberger claims that institutions also embrace normative rules, which means *inter alia* that these rules can be either observed or violated.<sup>42</sup> Even Searle himself, when explaining the concept of institution, recurses to normative terminology, although his position is a bit trickier. Searle does not straightforwardly admit that institutional facts have any normative

<sup>35</sup> Searle's derivation in its complete form looks like this: "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." SEARLE, J. R. *Speech Acts: An Essay in the Philosophy of Language*. Cambridge: Cambridge University Press, 1970, p. 177 ff.

<sup>36</sup> *Ibid.*, pp. 51–52.

<sup>37</sup> *Ibid.*, p. 185.

<sup>38</sup> *Ibid.*, p. 193.

<sup>39</sup> *Ibid.*, p. 195.

<sup>40</sup> MACKIE, J. *Ethics: Inventing Right and Wrong*. New York: Penguin, 1977, pp. 80–81.

<sup>41</sup> MACCORMICK, N. Norms, Institutions, and Institutional Facts. *Law and Philosophy*. 1998, Vol. 17, No. 3, p. 322.

<sup>42</sup> MACCORMICK, N., WEINBERGER, O. *An Institutional Theory of Law: New Approaches to Legal Positivism*. Dordrecht: D. Reidel Publishing Company, 1992, pp. 23–24.

core. When talking about them, Searle wants to stay at the level of description; he just wants to report how we use our language in special contexts of human interaction. However in his explanation he uses the concept of constitutive rule, and it is not *prima facie* evident if it is meant wholly descriptively.<sup>43</sup> Searle calls the constitutive rule of promising a “meaning rule”, so it is a rule which looks like a definition. However definitions, even the custom-based ones, need not be only descriptive.<sup>44</sup> If we take the constitutive rule of promising as a special case of normative definition, then we can reinterpret it like this: When somebody utters “I hereby promise” we should infer that he places himself under an obligation. In sum, the constitutive rule of an institutional fact can be plausibly understood in a normative conceptual framework and consequently the derivation of a norm from an institutional fact suffers from *petitio principii*.

I assume that even if Searle conceded that constitutive rules are susceptible to normative interpretation, he would refuse to conclude that this interpretation is necessary for successful derivation of ought from is. According to him the derivation can be just a matter of reporting the respective normative component in our language usage (“meaning rule of promising”), but not necessarily a matter of endorsing it. The main criticism of Searle’s solution of the is/ought problem was centred precisely on the issue of whether the inference “he ought” from “he promised” holds only for the participants in the institution of promising or also for its observers.<sup>45</sup> In order to keep his descriptive way of talk, Searle claimed that the inference held for both, even for an observer who incidentally happened to loathe the institution. According to Searle even this loathing observer was “committed” to say that promises produce obligations. I suppose that even if Searle was right in this matter, he could not have based a solution of the is/ought problem on it. My point is that the “commitment” to say something on the part of the loathing observer is not just a matter of reporting some institutional practice. In the eyes of the loathing observer people are committed to derive “he ought” from “he promised” only in the course of their scientific observations, but not in the course of their other life activities. If the loathing observer just observes, the only behaviour she needs to keep justified is the observation itself. As an observer the only commitments she could possibly hold during her observation come from the constitutive rules of science, for example from the rule according to which linguistic facts exercise constraint over what she might publish in a scientific journal.<sup>46</sup> On

<sup>43</sup> See complaints about the vagueness of the concept of constitutive rule in RAZ, J. *Practical reason and norms*. New York: Oxford University Press, 2002, pp. 108–111. Enrico Pattaro suggests that “constitutiveness” is not a feature of rules, but a feature of types: “Types are constitutive of the possibility of being instantiated by actual tokens, and it does not matter to this end where a type is set forth: It could be in a rule, a deontic sentence, a norm, an apophantic sentence, or a question, or anywhere else.” PATTARO, E. *The Law and the Right – A Reappraisal of the Reality that Ought to Be*. Dordrecht: Springer, 2005, p. 18.

<sup>44</sup> The concept of custom-based normative definitions is clarified by Svein Eng. He suggests that these definitions have a qualification modality, not a duty modality. It means that “they qualify what is to be regarded as correct use of the words and expressions of the language” but they are not accompanied by the “you must/must not”. If one violates them, he just risks not being understood. ENG, S. *Analysis of Disagreement with Particular Reference to Law and Legal Theory*. Dordrecht: Kluwer, 2003, pp. 110–111.

<sup>45</sup> See for example MACKIE, J. *Ethics: Inventing Right and Wrong*. New York: Penguin, 1977, pp. 67–68; WITKOWSKI, K. The Is-Ought Gap: Deduction or Justification? *Philosophy and Phenomenological Research*. 1975, Vol. 36, No. 2, p. 236 ff and SEARLE, J. R. *Speech Acts: An Essay in the Philosophy of Language*. Cambridge: Cambridge University Press, 1970, p. 190.

the other hand, when the loathing observer engages in some other activity than observing the loathed institutional facts, for example when she tries to excuse her wrongdoing before the tribunal of her own conscience, then it would be strange to insist that in this cause she is committed or entitled to invoke the institution which she loathes. I suppose that if she was accidentally undergoing “the Last Judgment”, she would certainly not be committed (or entitled) to tell to her judge that “You ought to X because once you uttered into my face I hereby promise you X”. Why not? Because as one who loathes the institution of promising, she by definition cannot regard promising as an ultimately valid reason for human behaviour. So as a human observing promises, she should claim that promises produce obligations, but as a human loathing promises, she should deny it. How could we possibly explain this change in perspectives, if they were not underlain by the normative component of the respective constitutive rules?

Despite the objections, let us suppose that the extraordinary property which enables certain facts to produce norms can be described in non-normative terms. Do the “essentials of human nature”, “forms of legal argument” and “institutional facts” have something non-normative in common? I suggest that they do. They are *relatively permanent human behaviour*. When Patterson spoke of rule-following backed up by social agreement, he mentioned “regularity in reaction to use” and “harmony in application over time”. Institutions are likewise depicted in similar terms. According to Mackie “an institution is constituted by many people behaving in fairly regular ways”; he insists that an institution is not only an abstract game of rules and concepts, but also a “traditionally maintained” and “persisting social practice”.<sup>47</sup> According to MacCormick institutions are not only about norms, but also about “recurrent instances of ordered practice” imputable to them.<sup>48</sup> In classical natural law theory this “extraordinary” feature was absolutized to the extent that essential facts of human nature were not regular, but eternal.<sup>49</sup> In any case, what we understand by the expression “persistent human behaviour” can be described in non-normative terms. It is everything that we repeatedly say and repeatedly do in repetitious situations. Can this laconic description of the extraordinary property we have been looking for help us to demonstrate how facts produce norms? In the next part of my article I will try to prove it can.

#### 4. PRELIMINARY CONCLUSIONS

1. Hume’s law forbids us to jump from the level of explanation to the level of justification in the sense that our normative claims cannot be grounded solely on our factual claims.

<sup>46</sup> “Linguistic facts as stated in linguistic characterizations provide the constraints on any linguistic theory. At a minimum, the theory must be consistent with the facts; an acceptable theory would also have to account for or explain the facts.” SEARLE, J. R. *Speech Acts: An Essay in the Philosophy of Language*. Cambridge: Cambridge University Press, 1970, p. 193.

<sup>47</sup> MACKIE, J. *Ethics: Inventing Right and Wrong*. New York: Penguin, 1977, pp. 80–81.

<sup>48</sup> MACCORMICK, N. Norms, Institutions, and Institutional Facts. *Law and Philosophy*. 1998, Vol. 17, No. 3, p. 324.

<sup>49</sup> “Traditional natural law theory was concerned, first, with the human nature that was beyond modification, with only the facts that made man, man, and would withstand any type of evolution.” DONNELLY, B. The Epistemic Connection between Nature and Value in New and Traditional Natural Law Theory. *Law and Philosophy*. 2006, Vol. 25, No. 1, p. 15.

2. It is scientifically expedient to explain our normative terminology in representationalist language and thus to understand our ought-terms as representations of facts. It is more plausible to adopt the social science account of normativity than the moral realism account of normativity, since the latter one relies on fairly controversial ontological pre-suppositions. However adopting the social science account of normativity does not make us assume that it is the only approach towards the ought. Beside the position of an observer who just explains there is still the position of a participant who justifies.

3. According to some theories there are extraordinary facts which enable us to draw normative consequences from factual premises. However in order to avoid *petitio principii* the supposed extraordinary feature of these norm-producing facts has to be described in non-normative terms. I suggest that this feature can be described as *permanent human behaviour*.

In the next part of this article I will try to prove that permanent human behaviour produce subjective normative attitudes and that these attitudes, settled in regular inferential practice, can be understood as the genuine ought.<sup>50</sup>

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