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The Roots of the Tree of Knowledge

VIA EMOTIONS AND SENTIMENTS TO MORALITY

Constitutional norms create the imaginary world of law and political (leadership) order: a story spanning the gap between emotions, sentiments[1] and social order (the 'we'). Emotions and sentiments enable us to assess not only our physical environment and act accordingly, but also to vet our relationships with others, even to value our own thinking and conduct – that is, morality. We now know that moral awareness comes from our social instincts, as Charles Darwin (1809–1882) – the founder of evolutionary biology – demonstrated. They are important for group survival.[2] The social instinct is a biological predisposition which works in roughly the same way as our language instinct.[3] This capacity is still relatively unfixed at birth; it is an

[1] There is a difference between the two: emotions are about the way of feeling; sentiments are the feeling itself.

[2] Darwin 1981 (orig. 1871), p. 96–97 and p. 161–164 (elaboration of his earlier observations in *Origin of Species*, 1859); Cf. Swaab 2014 (orig. 2000), especially Chapter XIV (*Moral Behaviour*).

[3] Pinker 2007a in which Pinker elaborates Noam Chomsky's theories of language as instinct. Cf. Chomsky 2005. Darwin established as early as 1871 that morality works similarly to a social instinct. (Charles Darwin 1981 [orig. 1871], p. 96–97). Modern evolutionary biologists are finding an increasing amount of evidence underpinning this, although not yet conclusively. Marc D. Hauser, author of *Moral Minds* 2006 (New York: Harper Collins) claimed to have found conclusive evidence, but he appeared to have manipulated various parts of his research and received a stern reprimand from Harvard University and other research committees for scientific misconduct and resigned his position as professor at Harvard in 2011. *Moral Minds* was incidentally not one of the publications in question but was, of course, indirectly tainted by the scandal. So, morality is not an instinct after all? It is better not to jump to conclusions. Like Darwin, evolutionary biologists assume in broad lines that morality is innate like a kind of instinct. We do not yet know exactly how it works. Regarding human morality as an innate, biological adaptation – and not a mere learned behaviour – is called 'moral nativism'. Cf. Joyce 2014, especially p. 262 (and other contributions in the series entitled *Behavior*, published in De Waal 2015; Joyce 2006; Dwyer 2006). John Rawls draws a parallel between the basis of human morality and the language instinct ('sense of grammar') in his argumentation. Rawls 1999 (orig. 1971), p. 46–47.

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'instinct' to acquire a skill – an art.[4] Which is not to say you are born a blank slate (tabula rasa):[5] it all depends on what you do with it.

Moral judgments of approval and disapproval, about right and wrong, fair and unfair[6] are individual mental processes that arise from individual impressions and experiences. Our aptitude and imagination allow us to communicate and share judgments of this kind. Seeing or ascertaining other people's emotions and moral judgments can cause resonance behaviour or resonance emotions (seeing people cry makes you sad, cheerfulness is contagious). This can happen spontaneously or be induced by transmitting a representation of an emotion of this kind (as a story or image).[7] Someone other than the person experiencing the emotion can feel it as well thanks to our capacity for empathy.[8] Certain judgments, arising from individual emotions, can be elevated to normative *public* sentiments – shared moral values: public standards on how things should be done. As Sajó puts it:

> Emotional interactions and social narratives about emotions result in widespread and repetitious individual feelings, which become socially observed and recognised as normative public sentiments.[9]

Such public sentiments do not arise overnight. They are often the product of long historical developments and are usually internalised gradually through narrative transfer, long-term imitation (tradition) and reconfirmation.[10] That repetition and recognition can at some point make habits function as law (norms) or that precedents and traditions assume a connective function in society are good illustrations of the process known as *constructive sentimentalism*.[11] It usually takes time for such sentiments to be internalised, but sometimes it can happen quite quickly. Public sentiments and values are sometimes invented right under your nose and presented

[4] 'An instinct to acquire an art' as Pinker calls it. Pinker 2007a, (title of the first paragraph), p. 1.

[5] Pinker 2003.

[6] Prinz 2013, especially p. 3 and p.13. Views differ on whether emotions are part of, precede, or result from a moral judgment. Prinz maintains that moral judgments contain emotions, but longer-standing moral *values* become independent sentiments ('dispositions to feel emotions') preceding moral judgments – they are elevated to the level of the software itself. Prinz 2013, p. 7.

[7] This resonance takes place in mirror neurons. Rizzolatti, Sinigaglia & Anderson 2008.

[8] Cf. Davis 2004.

[9] Sajó 2011, p. 25.

[10] Public sentiments are not universal. According to the latest insights in evolutionary biology, they do not have a fixed, unchanging core (discoverable, say, by self-examination) as conceived by natural law thinkers in the tradition of Hobbes, Locke and Rousseau (and even Rawls). 'It follows that contemporary evolutionary biology cannot be used to arrive at a universally valid definition of the way humans ought to live: today's life sciences are not conceptually suited to become the basis of a "natural law" akin to the theological doctrines of the past.' Gruter & Masters 1986, especially p. 154. As with language, we seem to have a basic aptitude for morality. An innate ability that works like an instinct and is developed by stimulation and learning. Cf. Hauser 2006 and Joyce 2006.

[11] Prinz 2013, p. 13.

as venerable, historically-developed traditions – therefore worthy to be upheld.[12] A good example is the American Pledge of Allegiance, the custom of expressing allegiance to the United States flag and republic by saluting the flag with the right hand over the heart every morning. The time-honoured custom of the Pledge was only 'invented' in 1892 as part of an advertising campaign to promote the sale of flags to celebrate the fourth centenary of Columbus' landfall in the Americas. Starting out as a gimmick, the Pledge was observed in more and more schools and institutions as a public rite, until it was eventually solemnly adopted by Congress as a long-standing national tradition during the Second World War.[13]

Public sentiments and values can also change quickly and completely within one or two generations, such as the relationship between parents and children or the sexes (or what the sexes are), or how we should behave in the public sphere (violence, smoking, alcohol and driving). They are not fixed and are malleable to some extent. They may even be imposed by norms – such as legal rules – envisaged to change public sentiments and values. As controversial as imposed public morality may be, it does quite often work.

The conversion of legal rules to public morality is no mean feat. But when governments or authorities succeed in elevating legal rules to public sentiment, they have well and truly hit the jack pot, finding a way into the hearts and minds of members of society. Their ideas and policies on morality have become the group members' internalised morality. This is the greatest prize for any modern administrator. Instilling your rules, laws and policies in public sentiments allows you to achieve your goals virtually without cost or effort – you hardly need any policemen, inspections or other institutions to enforce rules that people have made their own.[14] This sounds much

[12] Hobsbawm & Ranger 1984 (orig. 1983).

[13] The pledge reads: 'I pledge allegiance to the flag of the United States of America, and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all.' The original text – based on a pledge version devised by Captain George T. Balch – was composed by Francis Bellamy, giving it the name the Bellamy Salute. The Pledge of Allegiance was actually popularised by a campaign by the magazine *The Youth's Companion* to commemorate the fourth centenary of the European discovery of the Americas by selling Star-Spangled Banners to its subscribers so that public schools across the country would be adorned with American flags on Columbus Day. Even though originally intended as a way of boosting flag sales in 1892, its gravitas increased dramatically in 1942, and even more so in 1954, when Congress became involved. Congress added 'One nation under God' to the original text and congressional sessions since that moment open with the recital of the Pledge by all members, placing hand over hart and standing to attention, as do meetings of many lower tiers of government and private organisations. Recitals are also regularly scheduled in most public schools and are a requirement at naturalisation ceremonies. Recital of the Pledge is so widespread that most Americans know it better than the United States Declaration of Independence or the United States Constitution. See the recent study of 2017 by the Annenberg Public Policy Centre of the University of Pennsylvania 'Americans Are Poorly Informed About Basic Constitutional Provisions' www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/ (consulted 19 November 2019).

[14] Such as our self-evident life with and in the phenomenon 'national state'. Mabel Berezin argues that 'the modern nation-state contains emotions within political institutions', but they

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easier than it actually is because our inner morality works like a mirror. Public morality, expressed in such things as legal rules, and personal morality should not diverge too greatly. There must be some congruence with our own moral intuitions. 'It is prohibitively difficult to sustain law against morality', Sajó comments.[15] And he is right. But neither is it necessary for all rights, as a set of norms and rules on personal, institutional and leadership behaviour, to correspond perfectly to everyone's personal moral intuition. Individual morality is a little malleable. But how and to what extent?

For centuries, philosophers of law have pondered over the relationship between individual morality and (established or constructed) forms of public morality, such as the law. We have not been able to reach a definitive conclusion. A well-known example is the debate between American professor Lon Fuller of Harvard University and British professor Herbert Hart of the University of Oxford. In a famous 1958 article (published in the lion's den, the *Harvard Law Review*), Hart takes the view that there is no evidence of any necessary link between the law and its moral justification; the law knows no minimum morality.[16] The law continues to exist – and be enforced – when it does not correspond to public morality or an individual's sense of justice, Hart observes. Fuller takes a quite different perspective. He considers the law and legal rules not so much as an arbitrary set of norms and rules, but rather as a form of societal organisation. Fuller argues that law is the enterprise of subjecting human conduct to the governance of rules.[17] This requires a legal system meeting certain minimum conditions. An essential precondition for this is the recognition of the rule of law in a society. On top of that, Fuller argues, legal rules must also meet at least eight basic criteria of inner morality to be recognised as such. They must be general, promulgated, prospective, clear, non-contradictory, practicable, durable and actually enforced, and not retroactive.[18] If legal rules fail to meet these criteria, this will lead (in the long term) to social resistance and more and more members of society no longer feeling morally obliged to comply with the norms and rules. Law is a two-way process, according to Fuller. 'The functioning of a legal system depends upon a co-operative effort – an effective and responsible interaction – between lawgiver and subject.'[19]

Who is right? After decades, the jury is still out. At the very least, the debate is living proof of the importance of emotions in law. The exchange of views on these

are almost invisible. 'Emotions of membership are rarely transparent except under conditions of threat from internal or external forces.' External threats can stir up national emotions that may encourage community members to defend their state, or, in the event of internal threats, induce them to put a particular party in charge to achieve domestic order or fair relations. Cf. Berezin 2002, p. 43.

[15] Sajó 2011, p. 25.

[16] Hart's clear answer to whether the law 'must satisfy a moral minimum in order to be a law' is in the negative. Cf. Hart 1958, p. 601.

[17] '[A] system for subjecting human conduct to the government of rules.' Fuller 1969a, p. 46.

[18] *Ibid.*, p. 41–94.

[19] Fuller 1969a, p. 219.

issues between otherwise impeccably polite and affable legal scholars is punctuated with large words and bitter reproaches. Hart's adherents view Fuller's supporters as dreamers and idealists, slipshod thinkers unable to distinguish between the world as it *ought* to be and as it *is*. The Fuller camp counters with examples of tyrannical law, the horrors of the Second World War and failing legal systems – in short, reproaching Hart adherents for being blinkered when reflecting on the validity of the law.

There is, of course, something to be said for both positions. They are also partly talking at cross purposes. Lon Fuller's wish list is, of course, quite American and specific to his time. And no matter how much Hart tries to steer clear of the question of a requisite minimum in morality for the law to be valid, he cannot avoid facing up to the fact that the validity of the law relies on some form of acceptance by those bound by it. Incidentally, he has an elegant solution to this: the overall acceptance of the entire legal system.

RULES OF RECOGNITION

Hart argues that, from an external point of view, 'the foundations of a legal system consist of a situation in which the majority of a social group habitually obey the orders backed by threats of the sovereign person or persons'.[20] This is sufficient for implementation, but not for validity. For a legal system to be truly *valid* – and be accepted as legitimate – requires a certain degree of internalisation and identification with the legal subjects. Legal systems always depend on a meta rule: a 'rule of recognition' as Hart calls it.[21] This rule of recognition implies overall acceptance that there is such a thing as law – as a system of abstract norms and rules – to which you are bound (whether or not you agree with it), which is generally observed and provides criteria determining which norms and rules are valid (that is, binding) law and which are not.[22] Hart's rule of recognition is rather similar to what Austrian legal philosopher Hans Kelsen famously called a *Grundnorm* (Basic norm). Kelsen also wanted to steer clear of the question of the kind of content law must have before it can really be called law. An unsolvable question in scholarly terms.[23]

THE ELEGANT SIMPLICITY OF POSITIVE LAW

Scholars like Austin, Hart and Kelsen argue that understanding the law and its operation principally requires examination of how the law appears to us as an observable

[20] Hart 2012 (orig. 1961), p. 100.

[21] *Ibid*., p. 100–101.

[22] Hart assumes a union of primary legal rules (with behavioural norms and orders) and secondary legal rules (rules which determine how law is formed, amended, recognised and applied) for the latter aspect. *Ibid.*

[23] Kelsen asserts on the morality of justice: 'No other question has been discussed so passionately; no other question has caused so much precious blood and so many bitter tears to be shed; no

phenomenon: as positive law.[24] Kelsen regards the law as a hierarchically-ordered system of mutually-progressing norms and legal rules to which judicial institutions (offices, authorities, courts) give effect, in the form of sanctions, applications, rulings and the like in in a legal order. The law is what it is. The phenomenon can no longer be studied rationally once you start mixing it with your own judgments of right and wrong because the worlds of what is and what ought to be become entangled.[25] The validity of the law does not depend on whether it meets a minimum standard of morality or justice, but on what we have agreed to. An abstract basic agreement, a basic norm, which recognises the legal order. Kelsen thinks there is no absolute, perennial standard of justice which can be used to measure whether or not the law is good or should be valid.[26]

Neither is Lon Fuller, who assumes that law can have minimum validity requirements, able to avoid the fact that you cannot shop around in law, picking and choosing parts that match your moral tastes or persuasions. A legal system as a whole would have great difficulty functioning if everyone relied solely on their own sense of morality to decide which law they were bound to, even if based on Fuller's 'objective' minimum criteria. To counter this, Fuller posits that legal systems rely on a reciprocity principle according to which:

> […] on the one hand, the lawgiver must be able to anticipate that the citizenry as a whole will accept as law and generally observe the body of rules he has promulgated. On the other hand, the legal subject must be able to anticipate that government will itself abide by its own declared rules when it comes to the judgment of his actions […].[27]

And this is the point at which Fuller, Hart and Kelsen's worlds seem to meet. Reciprocity or (formal) recognition for that matter of the legal system as a whole is a prerequisite for the validity of law. When it comes down to this Hart, Fuller and Kelsen's views are not all that divergent.

Certain subjects are best avoided at birthday parties, weddings and evening get-togethers after football matches: taste in music, political preferences and – above all – anything related to law and justice. As an Austrian, Hans Kelsen would have had plenty to explain in a local football club canteen. People have passionate opinions about law and its morality. 'Morality is a subject that interests us above all others',

other question has been the object of so much intensive thinking by the most illustrious thinkers from Plato to Kant; and yet, this question is today as unanswered as it ever was.' Kelsen 1971, especially p. 1.

[24] Kelsen 1967 (orig. 1960 [1934]), p. 67–69.

[25] *Ibid.*

[26] Kelsen: 'If the history of human thought proves anything, it is the futility of the attempt to establish, in the way of rational considerations, an absolutely correct standard of human behaviour […] If we may learn anything from the intellectual experiences of the past, it is the fact that only relative values are accessible to human reason […] Absolute justice is an irrational ideal or, what amounts to the same, an illusion – one of the eternal illusions of mankind.' Kelsen 1971, p. 20.

[27] Fuller 1969b, p. 24 and Fuller 1969a, p. 217 and p. 219.

David Hume wrote in 1739.[28] Little has changed since then. Hart and Kelsen may maintain that law can only be known rationally by studying valid legal norms, but in doing so they miss something: the interaction of individuals (individual morality) and the law (as an expression of some kind of public morality). A 2004 study by Oliver Goodenough and Kristin Prehn shows how people come to normative judgments through emotions and intuition, and that these judgments play a role in how we deal with the law and experience what the law is.[29] The law is not so much 'something' or an 'object', but rather more a 'process'. As a system of 'belonging', the law not only judges us – we constantly judge the legal system. The people applying, interpreting, forming, finding and implementing the law have these emotions and intuitions too. We require that those responsible for administering the law (try to) ignore or resist these emotions and intuitions. We need them to act dispassionately, even if it is nearly impossible. We must prevent, as legal economist Posner puts it: 'dangerous intrusions of emotion into the judicial process'.[30] Be that as it may, we sometimes do try somehow or another to assimilate legal emotions, deep-seated feelings of justice with existing law. A judge, for instance, may every so often 'discover' a legal principle; an existing law may be reinterpreted due to changed (legal) conceptions; or longstanding practices may on occasion be deemed 'law'. And sometimes existing rules even cease to be applied because they are considered obsolete[31] or run contrary to legal principles. Although it is not so that everyone may decide, based on their own moral insights, whether they are bound by the law, we have already seen that there is an interaction between sentiments of justice and the law. Constitutional rules and their messages operate in this sphere, beyond legal positivists' field of vision.

DOES NATURAL LAW EXIST?

Is the imagined world of law based solely on some esoteric sort of formal recognition as Hart and Kelsen argue or is there more to it? Are there deeper roots? Does the validity of a legal system's rules perhaps stem from higher, metaphysical, universal principles or norms beyond the law? Emanations of basic principles, norms and ideas about justice shared by all people at all times. Roman orator, politician and philosopher Cicero (106–43 BCE) thought so:

> There is a true law, a right reason, conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from

[28] Hume 2004 (orig. 1739–1740), Book III (*Morals*), part I, section I.
[29] Goodenough & Prehn 2004.
[30] Posner 1999, especially p. 327.
[31] Obsolete acts – when not repealed – may fall prey to 'desuetude' a doctrine that causes statutes or legal principles to lapse and become unenforceable by a long habit of non-enforcement or passage of time. See, for instance, the Hackney Carriage Act 1879 in India. It was repealed in 2017 but had already been a dead letter for some time. An example from my home country the Netherlands is the 1829 General Provisions Act, which is still in force but no longer observed.

> evil. […] This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation.[32]

Plato before him and an array of thinkers after him (Augustine of Hippo, Thomas Aquinas, Grotius,[33] Hobbes, Locke and Rousseau) assumed the intuitive idea that there are superhuman rules and principles – arising from the cosmic, divine or natural order – which can be known through revelation or reason and precede existing law:[34] *natural law*.

Seventeenth-century philosopher and former captain in the English Civil War, John Locke, thought anyone guided by reason and using common sense could know natural law:

> The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions … [and] when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.[35]

In short, everyone is independent (free) and equal, and the natural law of reason shows that nobody should harm another person and we must protect each other as much as possible. This natural law is to be found in the nature of things and is discoverable to any reasonable and receptive person. It sounds familiar. The whole idea is closely linked to Christian teaching – revelation through prayer (bringing knowledge of God's will). Locke substitutes it with revelation through thinking (uncovering the laws of nature and natural law). Whilst the natural law of gravity discovered in the same period by Isaac Newton is universal and immutable, opinion is very divided about what the state of nature and natural law are. The task of unambiguously establishing natural law has proved to be anything but easy. Even the thinking of Locke's contemporary Hobbes, who also experienced the horrors of the English Civil War, led to radically different insights about the state of nature and natural law. Hobbes concurs that reason makes people sense that there is a right to life, and we have a duty to respect each other's rights,[36] but these rights are constantly under attack. As free individuals in our state of nature, we do not protect each other as allies, but rather are at each other's throats as

[32] (Quote from) Cicero 1841, *Treatise on the Republic*, III, XXII, 33, p. 270; Cf. Cicero 2008, p. 68–69.

[33] For Grotius, much of Roman law also expressed natural law. Cf. Strautman 2015.

[34] Which is why it is also called 'prepositive'.

[35] Locke 1689, § 6.

[36] Hobbes considers the 'law of Nature' (*lex naturalis*), the first law, to be: 'a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved.' Hobbes 1651, chapter XIV, p. 80.

opponents. Hobbes famously argues that the state of nature is not paradise but hell on earth, with:

> no knowledge of the face of the earth, no account of time, no arts, no letters, no society, and which is worst of all, continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short.[37]

This unsustainable situation inevitably impels people into a political community united under a leader: the Leviathan. A community (commonwealth) with a strong leader is able to do what free individuals' selfishness precludes: provide protection. In exchange, members accept the ruler's dominion (therefore relinquishing some freedom), albeit conditionally.[38] Whereas Locke's natural law holds that free individuals compel each other to recognise and protect each other's rights in order to remain free, Hobbes's natural law does not signify much more than a fearful trust construction to secure the individual's right to life through a community – a misanthrope's world view.

Diametrically opposed to these ideas is the eighteenth-century Franco-Swiss prodigy Jean-Jacques Rousseau's conception of the state of nature and natural law. His state of nature is truly a paradise. People were free and good in that state; we would return to it like a shot, given half the chance. He finds 'proof' for the actual existence of the state of nature in the lives of the primitive tribes Western Europe had just discovered around the world at that time. 'The example of savages', Rousseau writes, 'who have almost all been found at this point, seems to confirm that the human race was made to remain in [a state of nature] always; that this state is the veritable prime of the world; and that all subsequent progress has been in appearance so many steps toward the perfection of the individual, and in fact toward the decrepitude of the species.'[39] So living in large communities has literally corrupted us. Rousseau's idea of the state of nature and the life of primitive tribes is, of course, highly idealised and romanticised – despite quite a number of people in back-to-nature movements today who still strongly believe in it. Yet, it is as unrealistic as Hobbes' unremitting anarchy. There never was a state of nature in which we

[37] Hobbes 1651, chapter XIII (*Of the Natural Condition of Mankind as Concerning their Felicity and Misery*), p. 78.

[38] Hobbes expresses this conditionality as a second law: 'that a man be willing, when others are so too, as far-forth as for peace and defence of himself he shall think it necessary, to lay down this right to all things, and be contented with so much liberty against other men as he would allow other men against himself. For as long as every man holdeth this right of doing anything he liketh, so long are all men in the condition of war. But if other men will not lay down their right as well as he, then there is no reason for anyone to divest himself of his; for that were to expose himself to prey, which no man is bound to, rather than to dispose himself to peace. This is that law of the Gospel: "whatsoever you require that others should do to you, that do ye to them." And that law of all men, quod tibi fieri non vis, alteri ne feceris.' Hobbes 1651, chapter XIV, p. 80–81.

[39] Rousseau 1755, volume 2, p. 65.

lived freely and independently as individuals and which we voluntarily left, on some kind of contractual basis, to enter a community that was supposed to guarantee our natural rights.[40] In the words of Francis Fukuyama:

> Everything that modern biology and anthropology tell us about the state of nature suggests the opposite: there was *never* a period in human evolution when human beings existed as isolated individuals […] Human beings do not enter into society and political life as a result of a conscious, rational decision. Communal organisation comes to them naturally, though the specific ways they cooperate are shaped by environment, ideas and culture.[41]

There was no state of nature – neither an idyll nor a hell. No more than there is natural law 'etched' somewhere, like some law book packed with universal rules of life, on everyone's mental bookshelf. There is simply no such thing as innate knowledge of universally applicable natural law in the form of a set of cognisable, concrete norms and rules that can serve as a moral compass and frame of reference for our decisions. Legal behavioural researchers Gruter and Master observe that:

> contemporary biology cannot reveal a universally valid "natural law" to guide our legal and political decisions and institutions.[42]

Observations of this kind vex people who strongly believe in universal 'natural' values, such as universal human rights. It just cannot be true! It is yet more proof of how modern science assumes a kind of omniscience. 'Scientism', Simon sniffs in his book *Universal Rights and the Constitution*[43] – a misguided, excessive belief in science. Anybody can see that there are universal rights, scholars like Simon will point out. Just take the Universal Declaration of Human Rights, or any other of the myriad international Human Rights Treaties currently in force. The existence of these omnipresent rights flows from the moral (and actual) imperative to hold the ever-present threat of barbarism at bay. Such arguments may not in themselves prove that everyone is born with an in-built natural law manual, but rather that 'all men are born natural-law jurists', as Rommen puts it.[44] The existence of natural law, the essence of universal

[40] Although we now know that people never lived solitary lives and did not negotiate a cohabitation contract in some kind of marketplace, the contract thinkers did understand – intuitively – how the biological mechanism of mutual altruism worked. Pinker argues that: 'reciprocal altruism, in particular, is just the traditional concept of the social contract restated in biological terms. […] Of course, humans were never solitary (as Rousseau and Hobbes incorrectly surmised), and they did not inaugurate group living by haggling over a contract at a particular time and place. Bands, clans, tribes, and other social groups are central to human existence and have been so for as long as we have been a species. But the *logic* of social contracts may have propelled the evolution of the mental faculties that keep us in these groups.' Pinker 2003, p. 285.

[41] Fukuyama 2011, p. 30.

[42] Gruter et al. 1986 p. 153.

[43] Simon 2014, p. 118–119.

[44] Rommen 1947, p. 266.

human rights, is based on faith[45] rather than facts.[46] Law and human rights are neither innate nor the product of metaphysical revelation: they are a product of human conception. Modern legal theory too – even in an era that appears to attach such importance to universal human rights – seems to have abandoned the natural law approach to law. Influential philosopher of law Ronald Dworkin (1931–2013) explains why it has become de rigueur for legal scholars to no longer take natural law seriously:

> [N]o one wants to be called a natural lawyer. Natural law insists that what the law is depends in some way on what the law should be. This seems metaphysical or at least vaguely religious. In any case it seems plainly wrong. If some theory of law is shown to be a natural law theory, therefore, people can be excused if they do not attend to it much further.[47]

UNIVERSAL MORALITY?

Does this ring the death knell of natural law as an inspiration for law, and a source of constitutional rules and, more generally, of law? Perhaps not quite.[48] Enlightenment thinkers' assessment of 'nature' might not have been correct, but modern insights into human nature show that Hobbes, Locke, Rousseau and other thinkers of their ilk had a decent intuitive conception of human nature.[49] The keystone of natural law – that people have a universal, shared morality – is a plausible idea, recent cognitive studies show. As elucidated in Chapter 3, our morality does not appear to be extraneous; people seem to have an innate aptitude, a social instinct,[50] for morality.[51] Roughly analogous to our linguistic ability, this hereditary trait is an aptitude trained by learning.[52]

[45] Stephen Hopgood already regards (international) human rights as a form of *secular belief*: 'derived from natural law principles sanctified in a moment of creation, of "constitution", when an "unmoved mover", an unquestionable authority, a secular god, authorises all subsequent rules.' Hopgood 2013, p. 122.

[46] Legal philosopher Jeremy Waldron warns us that it is also unwise to try to base human rights on – indisputable – universal natural law claims: 'the shift from "natural rights" to "human rights" marks a loss of faith in our ability to justify rights on the basis of truths about human *nature*.' Waldron 1987, p. 163.

[47] Dworkin rejects this simplistic argumentation, a consequence of labelling, later in the article. Dworkin 1982, quote from p. 165.

[48] Cf. Dworkin, who gallantly admits that: 'if [it] is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law.' *Ibid*.

[49] Cf. Pinker 2003, p. 285 and Pinker 2018, p. 10–14.

[50] This instinct is related to our capacity for empathy: we can empathise with someone else – put ourselves in their situation. Empathy not only enables us to imagine what it is like to be in someone else's shoes, it can also inspire compassion and sympathy – wanting to help or comfort the other person. De Waal 2019, p. 88–93.

[51] There is still a lack of consensus on this matter, with debate between 'moral nativists' who argue that morality is a biological adaptation and 'spandrel theorists' who counter that it is merely a by-product of our psychological faculties. The former seems to be slightly in the ascendant. Cf. Joyce 2014, especially p. 262–266; Suhler & Churchland 2011; Murrow & Murrow 2013.

[52] Joyce 2006; May 2018, p. 78–80.

The process is fairly automatic and intuitive; little training is needed to be able to make moral judgments. John Mikhail, professor at George Town Law School, contends that every normal person is innately endowed with moral grammar rules.[53] His colleague and fellow-American John Rawls (1921–2002) had anticipated this.[54] This inborn grammar explains our amenability to norms, such as how things should be. Legal norms – norms telling us how to behave – adroitly exploit this aptitude: our moral grammar rules enable us to easily understand the message of law and legal norms. Mikhail thinks that this basic aptitude[55] is fertile ground on which to establish a legal system:[56]

> Ordinary individuals are intuitive lawyers, who possess tacit or unconscious knowledge of a rich variety of legal rules, concepts, and principles, along with a natural readiness to compute mental representations of human acts and omissions in legally cognisable terms.[57]

THE GOLDEN RULE

Moral judgments are a product of our emotions, as we saw. Influenced by imitation and social narratives,[58] they can become so widespread that they grow into socially recognised, normative public sentiments. The process is clear, but is this morality also substantive? According to the biological laws, our human social instincts are subject to, it is. Charles Darwin said on this subject:

> […] the social instincts […] with the aid of active intellectual powers and the effects of habit, naturally lead to the golden rule, 'as ye would that men should do to you, do ye to them likewise';[59] and this lies at the foundation of morality.[60]

[53] Mikhail 2017, chapter 5 (*The Moral Grammar Hypothesis*), p. 101 ff. Pinker 2003, p. 166.

[54] In *A Theory of Justice*, 1971. Rawls 1999 (orig. 1971), p. 47.

[55] Mikhail 2017, p. 307 ff. It is in effect a new kind of evidence for the assumptions underpinning the ideas of natural law and universal human rights. Mikhail: 'Linguists and cognitive scientists have argued that every normal human being is endowed with innate knowledge of grammatical principles – with a specific genetic program, in effect, for language acquisition. Both the classical understanding of the law of nature and the modern idea of human rights […] rest at bottom on an analogous idea.' Mikhail 2017, p. 317.

[56] Michael Guttentag, professor at the Loyola Law School in Los Angeles goes a step further. 'Is there a Law Instinct?' he wonders in an eponymous article in 2009. He thinks there is: 'the neuroanatomy of human social behaviour all suggest that humans have an innate predisposition to rely on legal systems to organise their social behaviour. Evidence from the historical and anthropological records and considerations of the evolutionary viability of a law instinct are consistent with the law instinct hypothesis.' Guttentag 2009, quote from p. 328.

[57] Mikhail 2017, p. 101.

[58] 'Narratives' refers here to the narrative nature of human communication in which we simultaneously give meaning to and explain actual or imagined events. 'Narrative explanation does not subsume events under laws. Instead, it explains by clarifying the significance of events that have occurred on the basis of the outcome that has followed. In this sense, narrative explanation is retroactive.' Polkinghorne 1988, p. 21 and Czarniwska 2014, p. 7–8.

[59] *King James Version*, Luke 6:31.

[60] Darwin 1981 (orig. 1871), p. 106.

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Our social instincts of self-preservation and reciprocal altruism bring us to a form of basic rational morality,[61] which develops into a habit and becomes 'hereditary' over generations.[62] Memes, as these phenomena are known, were already discussed in Chapter 2. As nice and comforting as the idea is that humanity has some kind of common-sense basic morality, it does not entail any such thing as timeless or objectively cognisable moral values. Doubting Thomases, including what are called *error theorists* (an easily misread term), argue that acknowledging the existence of common-sense morality essentially implies acknowledging objective moral values.[63] This flies in the face of human history and our present condition which prove that there are no such timeless, universal values, or at least none that can be objectively established.[64] The content of public values varies from time to place. Ethicist John Mizzoni wonders in a 2009 article what Charles Darwin would have made of this postmodernist, false-theoretical objection that 'objective values are not cognisable'.[65] Mizzoni argues that Darwin would likely have said that we probably cannot know these values objectively or empirically, but that we do *feel* them. We can discern these values with our emotions. It is in large part our moral sense that tells us what we should do, even though we do not always do so.[66]

MORALITY UNDER HUME'S GUILLOTINE

That the aptitude for morality does not produce the same results everywhere would not have come as a surprise to Darwin. The aptitude for language, our language instinct, has not led us to all speak the same language. For Darwin, morality may come from our social instincts, but it is formed and given substance by our intellectual abilities and habits. It is an aptitude that is trained and practised until it is internalised. This is also how public, shared morality comes about – rather like a shared language: acquisition, practice and habit. As András Sajó pointed out above, public sentiments, as a set of values and guidelines for action, can only really arise through observance and compliance. Normative frameworks arise from long-term habits, or ways of doing things.

A classic phenomenon in law is that norms and legal rules can arise from customary practices. Common law, derived from traditions and time-honoured customs, is considered an important source of law in almost all legal cultures. You can use

[61] Hoffman: 'Reciprocal altruism is itself a kind of pre-moral sentiment, requiring the ability to give and accept benefits with an anticipation of a promised return.' Hoffman 2011, quote from p. 487.

[62] 'Habits, moreover, followed during many generations probably tend to be inherited.' Darwin 1981 (orig. 1871), p. 164. Cf. Gommer 2011, p. 54–60, paragraph 2 of chapter III (*Deriving norms from facts*).

[63] Joyce 2001, p. 60–61 and chapters 1, 2 and 6.

[64] Mackie 1977.

[65] Mizonni 2009, especially p. 131.

[66] *Ibid*.

customary law to build upon earlier generations' insights and wisdom. Such tried-and-tested formulae provide purchase. People are creatures of habit, trusting the familiar and depending on routines.[67] This propensity, coupled with our innate sense of morality, makes us regard traditions or habits as how things ought to be in a relatively short time. German sociologist and scholar of civilisation Norbert Elias published a seminal work on the subject in 1939. Taking Desiderius Erasmus's 1530 etiquette handbook,[68] Elias demonstrated that some habits and customs, regardless of their origins, start functioning as norms and the rules of etiquette for civilised behaviour at a certain point. One example is table manners, like not eating the bread someone else has already taken a bite of, not gulping wine before wiping your greasy lips, not playing with your knife, not spitting or emitting any form of body fluids or gases for that matter, and so forth. These rules originally developed at more well-to-do tables for health reasons or conflict avoidance.[69] Elias dubbed this process 'sociogenesis'.[70]

It might be commonplace for customs to become norms, but the phenomenon is controversial in the law, or even a bone of contention known as the *is-ought problem* or Hume's guillotine.[71] Logically, what 'ought to be' does not automatically follow from what 'is'. In his book *A Treatise of Human Nature* (1739), the Scottish philosopher David Hume expressed his amazement that so many of his colleagues seemed to make this logical error. Taking an existing situation – an empirical statement about what is – they deduced what ought to be.[72] Which is, of course, a fallacious. The fact that it is raining does not mean it ought to rain. Or the fact that Brazil had 2093 million inhabitants in 2019 does not automatically mean it ought to have this number of inhabitants (or more, or less). Even if someone thinks the country is full or overpopulated[73] they will know that this cannot be deduced from the present size of the population. These are easy examples. But can the Swedish habit of shaking hands also mean that people ought to shake hands in Sweden?[74] What if you are a devout Muslim and your faith bars you, as a woman, from shaking a man's hand – even at a job interview? At this point it becomes more difficult for many people to separate the worlds of 'is' and 'ought' with Hume's guillotine. Indeed, these worlds have a great deal to do with each other. 'The "is" can sometimes inform the "ought," according to American judge and behavioural scientist Morris Hoffman.[75] How

[67] Amodio, Jost, Master & Ye 2008 and May 2018.
[68] Desiderius Erasmus, *On Civility in Children*, 1530.
[69] Elias 2000 (orig. 1939), p. 48–60 and p. 99–109.
[70] *Ibid*., p. 109 (for the definition) and – for the preliminary treatise – chapters 1 and 2 of part I (*On the Sociogenesis of the Concepts of "Civilization" and "Culture"*).
[71] Also known as the naturalistic fallacy.
[72] Hume 2004 (orig. 1739–1740), Book III (*Morals*) part I, section I.
[73] Navneet, K., 2014, 'Overpopulation and Sustainability Crisis in Brazil', https://crisisinbrazil.weebly.com/population.html (consulted 8 October 2018).
[74] See www.nytimes.com/2018/08/16/world/europe/sweden-muslim-handshake.html (consulted 8 October 2018).
[75] Hoffman, 2011, p. 501.

things ought to be shapes the world around us: we colour steak (grey-brown) and tomato juice (brownish) red because we believe they should be red. To say nothing of our appearances. What is and ought to be may be logically distinguishable, but they are intertwined in our emotional minds. We can hardly perceive without emotion or judgments: normativity, judgments and values are closely linked to our perception, they are difficult to separate and study separately.[76] This can get in the way of and blur any attempt to look for common 'basic' values or 'shared normativity', as you try to do in a constitution.

ARE CONSTITUTIONAL RULES REFLECTIONS OF BASIC MORALITY?

Sajó argues that groups' public sentiments lead to moral judgments and 'normative, moral frames' of how leadership should be organised and how group members should relate to each other. As he puts it:

> These moral frames, which animate the moral solutions of constitutional law, reflect moral emotions.[77]

Interactions of individual moral judgments inspire public sentiments – especially trust and recognition. Constitutions are based on specific public sentiments – constitutional sentiments. Determining them is not a simple matter of a show of hands or counting heads.[78] Neither are they the result of calculating the greatest good for all, utility maximisation, or pursuing a constant Pareto optimum in which no one in society can improve her position at the expense of someone else. Moral judgments are individual judgments that become public sentiments and group judgments. This process involves a leap of faith – which is notoriously difficult to nail down or predict. Public sentiments must be recognisable; otherwise group members' moral judgments may cause them to cease identifying with them and even resist them at some point. The matter is complicated by public sentiments not being a simple reflection of a universal basic morality – sentiments and values develop. They can totally change over time. Take, for instance, the idea of the equality of all humans. It would have been dismissed out of hand as absurd and ridiculous in the Roman Empire,[79] whereas it is lauded as a 'universal' principle nowadays.

[76] Elqayam & Evans 2011.

[77] Sajó 2011, p. 25.

[78] Mila Versteeg shows in a recent article how countries' most highly prized public values (measured by questioning more than half a million respondents) are not reflected in constitutional choices and norms (the public sentiments). 'The link between nations' specific constitutional choices and their citizens' values has generally been weak or nonexistent [sic].' Cf. Versteeg 2014, p. 1.

[79] Cf. McLynn 2010.

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