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978-0-521-37625-9 - The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith

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Excerpt

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CHAPTER ONE

Introduction

The aim of this book is threefold: firstly to argue that Adam Smith developed a number of suggestions from David Hume into a new and original answer to the perennial philosophical question of how legal criticism is possible; secondly, to show how the answer was the basis for Smith's system of natural jurisprudence and as such the core of his political thought; and thirdly, to give a systematic account of Smith's natural jurisprudence.

There seem to have been two obvious avenues open to Hume after he had rejected the existing 'foundation-theories' of morality and law, according to which moral and legal evaluation had an ultimate and validating source in either the reasoning faculty or a moral sense: he could find an alternative 'foundation', or he could shift the problem away from the question of foundations altogether. It may be tempting to understand him in terms of the former strategy, especially in his theory of justice, if one interprets it on proto-utilitarian lines. There are, however, great difficulties in this, as we shall see, partly because of the meaning he gives the term 'utility', and partly because this interpretation would lead directly to the kind of legal positivism which he strongly criticizes. The suggestion to be pursued here, therefore, is that he somehow changes the problem. He does not do so by completely rejecting all talk of foundations, for he puts forward his well-known emotivist theory of the *origin* of evaluation. What changes the situation is his idea that it only makes sense to ask about the validity of evaluation in the particular social contexts which give concrete form to the expression of the emotions behind the evaluation. With the addition of these social and historical dimensions, the problem that emerged was: how are argument and criticism possible within a given moral and legal framework?

The theory of justice is of the greatest importance in Hume and although he never puts forward anything like a system of natural jurisprudence, it is quite clear that natural justice occupies a very central place – if not *the* central place – in his overall theory of politics. This is, however, not part of our interest here; it has recently been treated so thoroughly that it would be impertinent to go over the same ground again.¹ The intention in the following discussion of Hume is simply to present an

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interpretation of the theory of justice in the *Treatise* and in the second *Enquiry* which will make clear the nature of the philosophical task which it set for Adam Smith in his legal philosophy. Accordingly we shall, of course, also renounce the nearly inexhaustible fund of other points of comparison and contrast between the two thinkers – interesting and important though they are.

The subtitle of this book is thus not intended to indicate that Hume and Smith will be treated with equal fullness, but to convey the suggestion that it was Hume's speculations about justice which put the decisive questions in answer to which Smith developed a whole new foundation for a system of natural jurisprudence. As far as the system itself is concerned, Smith was obviously very strongly indebted to the Continental natural law tradition of Grotius, Pufendorf, and others, and especially to the form which this tradition had been given by his teacher, Francis Hutcheson. He was also heavily influenced by Montesquieu and by his old mentor, Lord Kames. But these legacies do not, either individually or collectively, produce the problem situation which gave Smith's jurisprudence its very special character. This derived from Hume's question about the possibility of legal criticism – or of how to avoid a complete relativism – if neither naturally nor divinely given standards were available. It is therefore not blindness to other important influences, but a judgement of priorities which leads us to concentrate on the connection between Hume and Smith in the present study.

While Smith was unhappy with the specific answer which Hume gave to the problem posed, he followed his lead in how to approach it. This approach was basically a matter of finding the principles which make it possible to pursue ordinary human aims in whatever social situation we are dealing with. But in order to formulate such principles in a way which gives them a more than local and momentary importance, we shall need three things: a general socio-psychological theory of motivation, a general theory of the historical process, and specific historical knowledge of the situation in which we are interested. Consequently, we find that Smith's jurisprudence integrates a *history* of law with an *analysis* of the forces which shape law, and that both are presuppositions for the possibility of *criticizing* law. By separating the analytic, the critical, and the historical sides of his argument, and by going through the various branches of the jurisprudential system from each angle, we shall get a full view of how his argument works in practice. At the same time we shall obtain a methodical account of the system.

While the importance of Smith's ideas of natural jurisprudence have been stressed in recent scholarship,² they have never been the subject of a comprehensive study. This is perhaps not surprising in view of the state of our sources until recently. Although Smith promised a 'discourse' on

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natural jurisprudence fairly early in his career, he was still promising it when he died.³ For over a century after his death the only clues to this part of his thought were his general treatment of justice in Part II of *The Theory of Moral Sentiments*, his very general outline of a system of natural jurisprudence in the final Part of that work, and material scattered throughout *The Wealth of Nations*.⁴ But since the over-all context was missing, the full significance of this material was hard to appreciate. Much was gained when, in 1896, Edwin Cannan published a scholarly edition of a newly found set of student-notes from Smith's lectures on jurisprudence while he was professor of moral philosophy at Glasgow.⁵ These notes have had an appreciable influence on Smith scholarship since, but they seemed too cursory to allow a systematic treatment of the subject.⁶ This was greatly changed when, in 1978, yet another set of student-notes from Smith's lectures was published alongside the earlier set as part of the Glasgow Edition of Smith's works.⁷ Although this set is incomplete in its coverage of Smith's course, leaving out something like a quarter, it is very full and detailed concerning the Justice part of the course – that is, the heart of the system of jurisprudence which we needed to know so much more about.⁸ A small selection from yet another set of lecture notes has recently been discovered.⁹ We shall also find much valuable material in a set of notes from Smith's *Lectures on Rhetoric and Belles Lettres*.¹⁰

Evidence from these student-notes from Smith's lectures must necessarily play a crucial part in the present attempt at interpretation. The risks in this are obviously very great, but they seem inevitable; and the best way to test the value of the notes for the interpretation of Smith is after all to accept them *prima facie* as expressions of his views, unless there are specific reasons not to do so.¹¹

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CHAPTER TWO

Hume's theory of justice

1 One theory or two?

When Hume refused to follow Francis Hutcheson's advice to preach morality at the same time as he explored its foundations,¹ he clearly implied that his task was a factual and descriptive one. But when he added that his own 'Metaphysician may be very helpful to a Moralist',² we can take it that he was aware of the principle that 'ought implies can', and that his view of the 'cans' was highly relevant for what view one should take of the 'oughts'. The roots of the latter are given us by nature in the form of the activating forces in our life, as passions. In this sense the foundation of morality is private and subjective. And yet morality as such is something public and objective: it is that which binds people together and makes a society possible, and in this function it is dependent upon the existence of a common moral language.

Hume's task in his moral philosophy is, therefore, completely analogous to his task in epistemology: to explain how a common world is created out of private and subjective elements. For, as he expresses it, 'twere impossible we cou'd ever make use of language, or communicate our sentiments to one another, did we not correct the momentary appearances of things, and overlook our present situation'; fortunately, 'Such corrections are common with regard to *all* the senses' (T. 582; my italics). In order to fulfil this task Hume takes an approach which is both psychological and social. On the one hand morality is a matter of the passions, and hence to be dealt with within the framework of his associationist scheme of the human mind. But at the same time the mind is seen not just as acting, but as interacting with other minds. For Hume, as well as for Smith, morality is not primarily accounted for in terms of the person acting and the subject of his action, but in terms of the reaction of the *observer* of men's dealings with each other. Morality thus arises out of such triadic relationships.

But before we outline how this happens, it may be useful to say a few words about the relation between Hume's two main texts on moral philosophy, the third book of the *Treatise* and the second *Enquiry*, as far as the fundamental features of his theory are concerned.

It has been argued that the two works are fundamentally different, and

that this shows a significant development of Hume's views.³ In the *Treatise*, it is said, Hume's problem is how morality is *constituted*, that is, what forces are capable of forming morality, and the approach is accordingly psychological. But in the *Enquiry* morality is taken as a given social fact which has to be described and the function of which has to be explained. The approach is therefore distinctly social in the later work, and the whole cumbersome theory of the passions is left out completely. This is taken as a sign that Hume was in difficulties with his original programme and, more importantly, that he was beginning to realize the independence of the various disciplines which had hitherto been integrated in one comprehensive moral philosophy – disciplines such as psychology, morals proper, social and political disciplines, etc.⁴ This alleged change from an interest in the individual and his actions to an interest in the social effects of his actions, is further seen as an important step towards the utilitarianism of Bentham and the two Mills.⁵

There is much to be said for this line of interpretation. First of all, it gives the *Enquiry* an independent value, which is in accord with Hume's own high opinion of it. Secondly, it makes sense of the obvious differences between the two works: the complicated theory of the passions is left out, and is explicitly declared unnecessary.⁶ Accordingly, the concept of sympathy is no longer used in a strictly technical sense, but is now and then used interchangeably with fellow-feeling – although we know from the *Treatise* that it is not a feeling at all – and fellow-feeling seems nearly to include the moral evaluation itself. Finally, the concept of utility seems to be stressed much more strongly in the *Enquiry*.

These points, however, seem to exaggerate the difference between the two works. Firstly, it is a fatal mistake to overlook the fact that morality is already clearly treated from the 'social' point of view in the *Treatise*, and that Hume's whole moral psychology is incomprehensible if the individual is not seen in a social context. This has already been indicated above, and it will become even clearer when we come to treat of justice. Secondly, although it is true that Hume deliberately left out the theory of the passions in the *Enquiry*, this is certainly not a sign of a complete change in the substance of his theory. For in the very first Section of the *Enquiry* he states that his aim is to show the relative roles of reason and sentiment in our moral evaluations; and Section v, 'Why Utility Pleases', and Appendix 1, 'Concerning Moral Sentiment', show clearly that ultimately they are passions. In this fundamental question there is thus no change. And presumably Hume was not all that dissatisfied with the theory of the passions in itself, since he republished it in shortened form, as *A Dissertation of the Passions*, some years after the *Enquiry* had appeared.

But although the neglect of the theory of the passions in the *Enquiry* is real enough, I think that it is a complete illusion to see the later work as

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an approach towards the utilitarianism of a later age. Certainly the word utility is used more frequently, but it means the same as it did in the *Treatise*, and – as will be argued below – this meaning is rather different from what Bentham and the Mills meant. And the verbal change itself is presumably the kind of difference we need in order to distinguish an essay from a treatise.

However, it remains a fact that the theory of the passions is left out in the second *Enquiry*, and that one of the most central concepts in this theory, namely sympathy, seems to lose its original and somewhat technical meaning. This is the most significant clue we have to finding an explanation of the differences between the two works. It is, however, a clue which we cannot fruitfully follow up till much later in the present treatment of Hume's moral theory, for what I wish to argue is that it is in connection with a special group of virtues that Hume's sympathy mechanism fails, namely the artificial virtues.

My tentative conclusion is, then, that Hume came to see that he could achieve his most basic purpose with a theory of morality which did not invoke the full detail of his theory of the passions: he could explain how morality is the cement of social life, in spite of the fact that it is 'merely' a natural growth, and not a set of abstract truths, instituted by the reason of God or man and the subject of a calculating science. Consequently, he emphasized the social perspective at the expense of the psychological for the purposes of the *Enquiry*. And this may well have been reinforced by the difficulty already mentioned as to how sympathy can provide the connecting link between the passions and the artificial virtues. But it is difficult to believe that Hume should have given up completely his theory of the passions and their connection with morality. It seems to me that a false alternative is being presented when Hume is said to be *either* reducing morality (and social life) to psychology *or* innovatively treating morality as a social phenomenon *sui generis* and the object of an independent social science. For the real methodological importance of Hume, as well as of Smith, would seem to be that they began to treat the theory of the human mind, including the psychology of the passions, as part of a social science, the object of which is the individual in his social context. This is the reason why the other person and the spectator, plus their actions and their language, are of such importance in Hume's theory of knowledge as well as in his moral theory.

While the difference between the *Treatise* and the *Enquiry* can thus be taken as a clue to the true nature of Hume's theory of the passions rather than as evidence of its abandonment, it does make the later work less valuable for our present purposes. For when he to some extent disregards the constitution of the various parts of morality, he takes away an aspect which – as we shall see – is particularly important for our understanding

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of justice. The following account is, therefore, mainly based on the *Treatise*, although the *Enquiry* will not be forgotten.

2 Moral evaluation

Whenever we, as spectators, observe other men we have only their actions, their behaviour, to go by, but we take this as a clue to their motives, and we are more interested in their motives because they are more firmly connected with their character or person.⁷ And in the end the objects of our moral evaluations are persons and their permanent characters.

Our reactions to our fellow men and their activities can be divided into two broad categories of negative and positive reactions; the first reaction being pain, the second pleasure. This of course also applies when we 'observe' our own behaviour. Pleasure and pain are impressions, and they give rise by association to some impressions that resemble them. The new impression is pride, if the original impression was one of pleasure, *and* if the person concerned, that is, the *object* of the passion, is oneself. If the object is someone else, the new impression is love. And if the original impression was one of pain, the new impressions are humility or hatred, respectively. Finally, an association of ideas takes place between the idea of the original *cause* of pleasure or pain, and the idea of the *object* of pride or humility, love or hatred – that is, between the quality judged of, and the person concerned (oneself or some other person).

Pride and humility, love and hatred, belong to the so-called indirect passions, and their formation by means of pleasure and pain is one of the necessary links in the chain of causes which forms our moral feelings of approval and disapproval. Another vital ingredient is a certain natural *rapport* between men, a mechanism by which they come to take some interest in their fellow men. Unless such a thing exists, it is impossible to understand how that 'objectivity', in the sense of 'inter-personality', which is a distinguishing characteristic of morality, can come about. This is what Hume calls sympathy, which is *not* a passion, but a 'principle of communication'.⁸ The central feature of sympathy is the conversion of an idea into an impression. Whenever the behaviour of some other person gives us an idea of his present feelings, this idea is liable to be turned into an impression, that is, into an actual feeling of a kind similar to the other person's. This conversion is liable to happen because we always have a strong and lively impression of our own self; and any feelings of which we have initially nothing but an idea are therefore easily connected with the self and made our own, that is, turned into impressions. It is, however, important to understand the place of sympathy in Hume's account of our evaluation of people: sympathy does not convey to us the motive or character trait of the person who is the object of our evaluation; what we

sympathize with is the *effect* which this motive tends to have on other persons (or on the person himself). This effect, or tendency to have certain effects, is the *utility* (or disutility) which Hume stresses as a main determinant of our evaluations – and which is particularly dominant in the second *Enquiry*. It is thus sympathy with the utility, that is, the tendency, of a quality of a character that is the *cause* of the passion which constitutes our evaluation; but it is the person with the quality who is the *object* of the evaluation.

This concept of utility is obviously of great importance for our understanding of Hume's moral theory. It is, however, more easily understood in the context of his theory of justice, where it becomes even clearer that it is significantly different from the idea of utility which we find in the later utilitarians.

It is not sympathy with utility, in the sense given above, that as such creates moral approval. There are further complications. Thus, although it is normally the *actions* of a person, the actual *effects* of his personal qualities, that bring about our sympathy, this is not a necessary condition. We can sometimes sympathize with the *imagined* effects of such qualities, although they may never be allowed to show themselves in *action* because of external hindrances. Our imagination is able to tell us what the effects of the qualities in question would have been, if the hindrances were removed; this starts the machinery of sympathy, and that again creates our evaluation of the qualities concerned. But although it is possible in this way to judge a person independently of his actual action, or lack of action, it would in practice be extremely difficult for men to do so to any large extent, if they were not supported by general habitual *rules* about the connection between motives and behaviour. Such general rules are amongst the most important means of creating an objective and inter-subjective morality, which is independent of the accidental features of the given situation.⁹

The other important accidental influence on our evaluations – and indeed on all our impressions and ideas – is the particular situation in which we happen to be. As with all the senses, we have to make allowance for our particular and limited perspective when we judge morally. We are naturally inclined to have a more lively sympathy with those close to us in some respect than with other people. But we must remember that human nature is essentially uniform, and it is therefore possible to sympathize with any given person. It is this side of sympathy that is the foundation for our ability to learn how to judge objectively, in the sense of inter-personally. For experience will soon teach us, not only that the same thing appears different to ourselves at different times and from different viewpoints, but also that our own evaluations vary from those of others, and that unless we approach each other's standpoints, it is difficult or impos-

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sible to communicate. Under pressure of the influence of actual spectators, everybody is thus forced to approach the standpoint of an independent spectator, or a general rule – and this even applies to our judgement of our own behaviour.¹⁰

I think this account is sufficient to enable us to state the essentials of Hume's ideas of moral approval and disapproval, vice and virtue. Moral virtues and vices are those qualities in a person which have a tendency to create such effects as by means of a sympathy, unbiased by the actual success of or personal relation to the person judged of, cause a pleasure or pain in the observer – a pleasure or pain which by association of impressions calls forth *calm*, as opposed to violent, versions of love or hatred; and the *idea* of the person with those qualities, by association of ideas from the idea of the cause of our pleasure/pain, is called forth as the *object* of those two calm passions just mentioned; and those two passions are what is properly called moral approval or disapproval, according to Hume.

There are, of course, innumerable qualities in persons that are subject to moral evaluation, but they can all be reduced to four broad, non-exclusive groups: those which are immediately *agreeable* to ourselves (that is, to the person with the quality), or to others; and those which are *useful* to ourselves, or to others.¹¹ Hume is not in doubt as to which are the most important: 'I am . . . of opinion, that reflexions on the tendencies of actions have by far the greatest influence, and determine all the great lines of our duty.'¹² The last group of qualities, those useful to others, is especially important, because it comprises the so-called artificial virtues, including justice.

3 The motive for justice – a dilemma

As already noted, actions have a strong influence on men's moral evaluations, but ultimately they refer to the motive, and through the motive to the person, behind the action, as the real object of evaluation. This doctrine of Hume's means that any action at least partly derives its moral quality from the motive behind it, and he must therefore be able to show in each individual case what the motive is, and that it is subject to moral approval or disapproval, in the manner described above. This task leads to some *prima facie* difficulties with certain actions that are normally characterized as virtuous. Those are the virtues Hume – for reasons to be explored later – calls artificial. They constitute an enormous complication of his moral theory, and the explanation of what at first sight seemed an exception, becomes an outgrowth that dominates the rest of the tree.

Hume clearly indicates the importance of the artificial virtues, and especially of justice. The treatment of them takes up more than half of the third Book of the *Treatise*, and in the *Enquiry* he virtually uses them as an

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introduction to the whole of his theory of the Principles of Morals; and the second Part of *Treatise*, Book III, deals with all of the artificial virtues, but it is called 'Of Justice and Injustice'.

Hume opens his treatment of justice¹³ as we would expect him to, given the background of his general moral theory, by asking what the motive behind just acts is. For since we commonly regard such acts as virtuous, there must be a motive behind which is the real object of our judgement (or rather, which makes us judge the person with the motive virtuous). The most common motive referred to is, of course, a sense of duty or honesty and Hume explicitly allows that that *is* the common motive.¹⁴ But as duty can only be understood in terms of justice, and thus presupposes that justice *is* a virtue, it is a circular justification of justice: we are back where we started, looking for a motive which has such a tendency as will, by means of sympathy with its supposed beneficiaries, give rise to moral approval (and its absence, disapproval).

Hume considers various alternative kinds of motives as possibly underlying just behaviour – and he rejects them all. They are: self-love; regard to public interest; benevolence towards mankind as such; and finally, benevolence towards the person to whom justice is being shown. Let us take them one by one.

First, it is clear that self-love *per se*, or unregulated, is directly contrary to justice. Or, as Hume has it, 'tis certain that self-love, when it acts at its liberty, instead of engaging us to honest actions, is the source of all injustice and violence'.¹⁵ As to a regard to public interest, this is ruled out as a motive to justice by the following three arguments. First, that there is no *natural* connection between public interest and observance of the rules of justice; they are only connected, as Hume says, 'after an artificial convention for the establishment of these rules'¹⁶ – though what exactly is meant by that can only be seen at a later stage of the argument. Secondly, many acts of justice are only a matter between individuals, without any public interest involved at all. Hume's example is a secret, private loan.¹⁷ Thirdly, it is a matter of fact that men only rarely have the public interest in mind, 'when they pay their creditors, perform their promises, and abstain from theft, and robbery, and injustice of every kind'.¹⁸ It may be remarked that this last argument seems somewhat beside the point; for although public interest may not be the motive behind acts of justice in a society, where you can already talk of creditors, promises, etc., it might still in some sense be an original motive to justice.

The idea of a regard to public interest will not carry the weight of being the original motive of just behaviour even if we broaden the idea to one of general benevolence towards mankind – for the simple reason that there is no such thing as a benevolence to mankind. Hume here introduces a useful distinction between sympathy with mankind, and sympathy with