

# New Trends of Cognitive Science in Ethical and Legal Reflection

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## I. Introduction

In recent years a particular perspective has increased in importance and now forms a central area in the study of ethics and law, namely, the perspective of cognitive science and the modern theory of the human mind. Yet, there are a number of different approaches within this framework – a fact that should not be overlooked. The most important emerging views include neo-emotivist neuroethics, approaches of evolutionary psychology and a mentalist theory of ethics and law. Neo-emotivist neuroethics identifies morality with emotional reactions that are hard-wired in human cognition,<sup>1</sup> beyond which utility calculations

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<sup>1</sup> See M. Gazzaniga, *The Ethical Mind*, 2005, 167: “A series of studies suggesting that there is a brain-based account of moral reasoning have burst into the scientific scene. It has been found that regions of the brain normally active in emotional processing are activated with one kind of moral judgment but not another. Arguments that have raged for centuries about the nature of moral decisions and their sameness or difference are now quickly and distinctly resolved with modern brain imaging. The short form of the new results suggests that when someone is willing to *act* on a moral belief, it is because the emotional part of his or her brain has become active when considering the moral question at hand. Similarly, when a morally equivalent problem is presented that he or she decides not to act on, it is because the emotional part of the brain does not become active. This is a stunning development in human knowledge because it

reign, while evolutionary psychology takes morality as an evolved optimization device for gene-reproduction.<sup>2</sup> On the other hand, a mentalist theory of ethics and law regards morality and the law as complex, historically and socially embedded constructions on the basis of enabling higher mental faculties, governed by abstract, non-emotional, foundational principles of – among others – justice and altruism that are part of the nature of the human mind.<sup>3</sup>

The purpose of this paper is therefore to explore the relevance of the abovementioned approaches for the study of the philosophy and theory of ethics and law. It will be argued that neither emotivist neuroethics nor evolutionary psychology, but rather a mentalist theory of ethics and law, constitutes the most promising approach to tackling the challenges created by the cognitive revolution. This paper intends to show that some recent studies of the relationship between cognitive science, ethics and law pursuing alternative approaches suffer from a clearly identifiable deficiency. They impoverish the empirical phenomenon to be explained, the human moral and legal world, to a sometimes surprising degree. Accordingly, some efforts will be made to elaborate a descriptively adequate phenomenology of morality by paying careful attention to some core properties of morality. Hutcheson remarked quite rightly 200 years ago: “Some strange love of simplicity in the structure of human nature or attachment to some favourite hypothesis has engaged many writers to pass over a great many simple perceptions which we may find in ourselves”.<sup>4</sup> Every effort will be made in the remarks that follow to pay careful attention to the “great many simple perceptions which we may find in ourselves”, among other relevant observations, to avoid the pitfall of this “strange love of simplicity” in analysing the cognitive foundations of morals and law.

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points the way forward figuring out how the brain’s automatic response may predict out moral response” (emphasis in the original).

<sup>2</sup> Cf. S. Pinker, *The Blank Slate*, 2002, 241 et seq.

<sup>3</sup> See further M. Mahlmann/J. Mikhail, “Cognitive Science, Ethics and Law”, in: Z. Bankowski (ed.), *Epistemology and Ontology*, 2005, 95 et seq.; M. Mahlmann, *Rationalismus in der Praktischen Theorie*, 1999 (2nd edition 2008); J. Mikhail, *Rawls’ Linguistic Analogy: A Study of the “Generative Grammar”*, 2000; J. Mikhail, “Universal Moral Grammar: Theory, Evidence and the Future”, *Trends in Cognitive Science* 11 (2007), 143 et seq.; M.D. Hauser, *Moral Minds*, 2006.

<sup>4</sup> F. Hutcheson, *Illustrations on the Moral Sense*, 1971, 105.

Another aspect should not be forgotten. Morality is not just any phenomenon. Morality is one of our strangest and, at the same time, most intimate and humane properties. Every word about the nature of morality is a word about an essential aspect of our existence. The same holds true for the law. The appearance of the law and of legal work is often one of technicalities and formalities of a profound dryness. But this impression is misleading. The law defines not just technical notions but also the core normative architecture of a society, and, given the development of international law, of the global community in general. Law at its deepest level is a mirror image of humanity's perception of itself. Therefore, I will at the end draw some tentative conclusions for our self-understanding as human beings from the findings of the relationship between ethics, law and the theory of the human mind. They will assess whether the findings of modern cognitive science about the nature of morality and the law add reasons for anthropological melancholy, perhaps even despair, or provide modest grounds for ethical hope.

## II. The Mentalist Starting Point

An approach which is currently explored in the study of morality, law and the mind is a mentalist theory of ethics and law.<sup>5</sup> It tries to reconstruct the idea of human practical reason by using the conceptual tools mainly developed in a certain part of the multi-faceted modern theory of the mind. Of particular importance is the study of language. Modern linguistics have gained an importance way beyond the concrete field of understanding the world of language by providing insights into the general structure of the human mind and its higher mental faculties. Generative Grammar has made plausible the assumption that human beings possess a language faculty with inborn properties – a universal grammar – which determines the possible properties human natural languages may have.<sup>6</sup> The language faculty is the cognitive precondition of the possibility of language. Given the explanatory power of this

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<sup>5</sup> See note 3.

<sup>6</sup> N. Chomsky, *Aspects of the Theory of Syntax*, 1965; N. Chomsky, *The Minimalist Program*, 1995; S. Pinker, *The Language Instinct*, 1994; R. Jackendoff, *Patterns in the Mind: Language and Human Nature*, 1994; M. Baker, *The Atoms of Language*, 2001.

mentalist approach to the study of language, the question has been asked for years whether practical philosophy could be informed by this approach.<sup>7</sup>

The following core hypothesis of this paper is the consequence of the mentalist approach: morality is based on a higher mental faculty, governed by a set of principles universal to the species, that generates moral judgement. This moral faculty is the cognitive precondition of the mental reality of morality just as the language faculty forms the cognitive precondition of the mental reality of language. This theoretical stance is clearly distinguished from other current approaches. It is, however, as will be illustrated, deeply embedded in some of the best traditions of practical thought. Without doubt it raises many fundamental questions. The most important will be considered now, including the implications for a theory of law.

### III. The Ontology of Morality

#### 1. The Basic Questions

The first fundamental question to be addressed is that of moral ontology. There is a long tradition of serious human thought asserting the

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<sup>7</sup> See further N. Chomsky, *Language and Problems of Knowledge*, 1988, 152; M. Bierwisch, "Recht Linguistisch Gesehen", in: G. Grewendorf (ed.), *Rechtskultur als Sprachkultur*, 1992, 42 et seq.; S. Stich, "Moral Philosophy and Moral Representation", in: M. Hechter/L. Nadel/R. Michod (eds.), *The Origin of Values*, 1993, 215 et seq.; J. Mikhail/C. Sorrentino/E. Spelke, "Towards a Universal Moral Grammar", in: M.A. Gernsbacher/S. Derry (eds.), *Proceedings of the 20th Annual Conference of the Cognitive Science Society*, 1998, 1250; S. Dwyer, "Moral Competence", in: K. Murasugi/M. Stainton (eds.), *Philosophy and Linguistics*, 1999, 169 et seq.; R. Jackendoff, "The Natural Logic of Rights and Obligations", in: R. Jackendoff/P. Bloom/K. Wynn (eds.), *Language, Logic, and Concepts: Essays in Memory of John MacNamara*, 1999, 66 et seq.; G. Harman, *Explaining Value*, 2000; J. Mikhail, "Law, Science, and Morality: A Review of Richard Posner's 'The Problematics of Moral and Legal Theory'", *Stanford Law Review* 54 (2002), 1057 et seq.; M. Mahlmann, "Sprache als Spiegel der Praktischen Vernunft", *Zeitschrift für Rechtsphilosophie* (2003), 168 et seq.; Mahlmann/Mikhail, see note 3; M. Mahlmann, "The Cognitive Foundations of Law", in: H. Rottleuthner (ed.), *Foundations of Law*, 2005, 75 et seq. For a discussion of the linguistic analogy see J. Rawls, *A Theory of Justice*, 1999, 45 et seq.

objective reality of moral entities from Platonic theories to versions of modern objective idealism or moral realism of some sort.<sup>8</sup> The alternative view is that morality is not an objective reality or fact, but rather a concept that is subjective and exists within one's mind.

Various approaches link morality to varying extents with a special human faculty – the Socratic *δαιμόνιον* (*daimonion*),<sup>9</sup> Aristotelian *φρόνησις* (*fronesis*),<sup>10</sup> Thomas Aquinas' *Synderesis*,<sup>11</sup> the light of reason of the Natural Law tradition,<sup>12</sup> the intellectual nature of the Rationalists,<sup>13</sup> the Moral Sense of the Scottish Moralists<sup>14</sup> or Immanuel Kant's Practical

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<sup>8</sup> For modern objective idealism see V. Hösle, *Philosophie der Ökologischen Krise*, 1991; for a recent defence of moral realism see D.O. Brink, *Moral Realism and the Foundation of Ethics*, 1989; R. Schafer-Landau, *Moral Realism: A Defence*, 2003.

<sup>9</sup> Platon, *Apology*, 31 d and 41 d. The daimonion, something divine, an inner voice, advises Socrates only to refrain from doing something. There is no explicit connection with morality and there are other issues involved, such as admission of pupils, Platon, *Theaetetus*, 151 a, or the nature of death, *Apology*, 40 a – 42 a. But the context is ethical in important respects – it is Socrates' commitment to virtue, justice and his attempt to preserve them and the laws, id., 31 d – 33 a, 40 a, 42 a. Xenophon, *Memorabilia*, Book I, I, 2, 4; Book IV, VIII, 1, 5: the „deity“ advises Socrates in various matters. The decisive question is, however, what is just and what unjust, id. Book IV, VIII, 4.

<sup>10</sup> Aristotle, *Nicomachean Ethics*, 1140 b. Practical wisdom is one of the dianoetic virtues.

<sup>11</sup> Compare T. Aquinas, *Summa Theologica*, I-II, q. 94, 1: “(D)icendum quod synderesis dicitur lex intellectus nostri, in quantum est habitus continens praecepta legis naturalis, quae sunt prima principia operum humanorum.” (“Synderesis is said to be the law of our intellect because it is a habit containing the precepts of the natural law, which are the first principles of human actions.”).

<sup>12</sup> See H. Grotius, *De Jure Belli ac Pacis*, I, I, X; S. Pufendorf, *De Officio Hominis et Civis Juxta Legem Naturalem*, III, IX – XII.

<sup>13</sup> R. Cudworth, *A Treatise Concerning Eternal and Immutable Morality*, 1996, 20: “To conclude, therefore, things called naturally good and due are such things as the intellectual nature obliges to immediately, absolutely, and perpetually, and upon no condition of any voluntary action that may be done or omitted intervening”.

<sup>14</sup> F. Hutcheson, *An Inquiry into the Original of Our Ideas of Beauty and Virtue*, 1971, xiv.

Reason,<sup>15</sup> to name a few important examples.<sup>16</sup> Depending on the ontological theory, this human faculty can play different roles – it can be the faculty of the cognition of the objective reality of morality or actively create its subjective idea. The first account one finds, for example, in Platonic thought or in the classical Natural Law tradition. A moral judgement is a judgement about what things really are, and not just the illusionary impression of something real.<sup>17</sup> In terms of moral epistemology, a version of a correspondence theory of moral rightness is thus formulated. Truth is given according to this theory if the subjective conceptualisation of a thing somehow matches the thing itself. The thing cognised in the context of morality is the moral quality of an act – say lying – or the value status of an entity – the goodness of virtues like courage, self-control or wisdom, to take some of the examples classical and part of modern virtue ethics is very concerned with. This connection between objective moral facts and the subjective cognition of those facts is often made historically, but is theoretically a contingent, unnecessary connection. This is illustrated by theories which follow the second path, cut the connection between subjective cognition and objec-

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<sup>15</sup> I. Kant, *Grundlegung der Metaphysik der Sitten*, Akademie Ausgabe Vol. IV; I. Kant, *Die Kritik der Praktischen Vernunft*, Akademie Ausgabe Vol. V.

<sup>16</sup> There are of course other concepts of conscience. M. Heidegger, *Sein und Zeit*, 1984, 270 et seq. outlines an existential ontological analysis of conscience against the classical idea that the conscience provides concrete obligations for particular actions in particular circumstances. He denounces this idea as being “vulgar”, id. 269, as or being connected to a horizon of existence that understands life as naked business under rules, id. 294: “Diese Erwartung gründet im Auslegungshorizont des verständigen Besorgens, der das Existieren des Daseins unter die Idee eines regelbaren Geschäftsganges zwingt”. Instead, conscience for Heidegger is the call to authenticity and the witness of its possibility, id. 277: “*Das Gewissen offenbart sich als Ruf der Sorge: der Rufer ist das Dasein, sich ängstigend in der Geworfenheit (Schon-sein-in...) um sein Sein-können. Der Angerufene ist eben dieses Dasein, aufgerufen zu seinem eigensten Sein-können (Sich-vorweg...)*” (emphasis in the original), id. 289. Guilt is accordingly not connected to action against some norms but is primordially based on the nullity of human existence, id. 286. This kind of analysis does not account for any of the most basic properties of moral judgement, as developed below. For further comments cf. M. Mahlmann, “Heidegger’s Political Philosophy and the Theory of the Liberal State”, *Law and Critique* 14 (2003), 229 et seq.

<sup>17</sup> R. Price, “A Review of the Principal Questions in Morals”, in: D.D. Raphael (ed.), *A Review of the Principal Questions in Morals*, 1948, 14: in his view, this subjective account fails to be convincing, because moral judgement must be telling us what things really are.

tive moral facts and understand morality as an original creation of the human mind and the special moral faculty, correspondingly, as the origin of this creation. That is explicitly so in the Scottish Enlightenment; for example, in Hutcheson's thought and his theory of the moral sense,<sup>18</sup> or in Hume,<sup>19</sup> who in his later work was much influenced by Hutcheson's ideas.<sup>20</sup>

## 2. Varieties of Analytical Reductionism

The modern tradition of non-cognitivism seems to be an heir to this second subjective understanding of the reality of the moral law. This is,

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<sup>18</sup> Hutcheson, see note 14, 117 et seq.; Hutcheson, see note 4, 133: "A certain incorporeal form, if one may use that name, a temper observed, a character, and affection, a state of sensitive being, known or understood, may raise liking, approbation, sympathy as naturally from the very constitution of the soul, as any bodily impression raises external sensations". Hutcheson, id. 163, makes the distinction between "(1) the idea of external motion, known first by sense, and its tendency to the happiness or misery of some sensitive nature, often inferred by argument or reason", "(2) apprehension or opinion of the affections in the agent, inferred by our reason", "(3) the perception of approbation or disapprobation arising in the observer". The approbation is held not to be an image of anything external.

<sup>19</sup> "Take any action allow'd to be vicious: Wilful murder, for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call vice. In which-ever way you take it, you find only certain passions, motives, volitions and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You never find it, till you turn your reflexion into your own breast, and find a sentiment of disapprobation, which arises in you towards this action. Here is a matter of fact; but 'tis the object of feeling, not of reason. It lies in yourself, not in the object", D. Hume, *A Treatise on Human Nature*, 1740, Book III, Part I, Section I.

<sup>20</sup> Kant is a difficult case in this respect. But if his doctrine of the moral law, its status as a fact of reason, as a law of autonomy of the *homo noumenon* is to be taken seriously, Kantian practical reason seems to be related to this tradition too. Kant's moral law is not Plato's Idea of Good or the objective *lex aeterna* or *lex naturalis* of Thomas Aquinas – it is a law of reason, and thus situated in the subjective human mind itself. On Kant's implicit moral psychology see M. Muhlmann, "Kant's Concept of Practical Reason and the Perspectives of Mentalism", in: Z. Bankowski (ed.), *Epistemology and Ontology*, 2005, 85.

however, only partly true. From the non-cognitivist position morality is indeed subjective. The problem is that from this point of view morality is really nothing at all if the term ‘morality’ is intended to designate something *sui generis*. Non-cognitivism is in part the expression and consequence of the critique of metaphysics by analytical philosophy and the logical positivists, and is today further nourished by other theoretical schools, including post-structuralism. The research programme of these schools is a twofold de-mystification of morality: first, by pointing out the ontological queerness of a realm of moral facts and a corresponding human faculty cognising them and the stain of metaphysics that makes theories with too little distance to such a realm of moral facts unattractive;<sup>21</sup> secondly, by providing an alternative account of what moral evaluation is really about – namely not the cognition of pre-existing moral qualities or relations but the expression of a subjective emotional approval or disagreement with some act or entity.<sup>22</sup> These emotional attitudes are the mundane stuff morality is made of. The approaches within this theoretical framework vary and are more or less refined. The general approach of non-cognitivists from Russell,<sup>23</sup> Ayer,<sup>24</sup> and Stevenson<sup>25</sup> to contemporary moral sentimentalism of a Rortian type<sup>26</sup> has, however, not changed in general outlook, though the details and the concrete ethical outcome sometimes vary considerably. How powerful the idea is that behind the impressive veil of moral ideas and concepts subjective feelings of approval and disapproval are hidden is illustrated as well by some of the authors who investigate morality in contemporary innateness debates. Here, too, the morality-equals-emotional-preference thesis or its negative variant (morality is an emotional aversion against harm afflicted to others) is clearly a leading

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<sup>21</sup> On the argument from (ontological and epistemological) queerness see J.L. Mackie, *Ethics: Inventing Right and Wrong*, 1977, 38.

<sup>22</sup> See note 19.

<sup>23</sup> B. Russell, *History of Western Philosophy*, 1999, 117 – 118 and 834. It is an interesting question how this theoretical outlook relates to Russell’s practice of political morality.

<sup>24</sup> A.J. Ayer, *Language, Truth and Logic*, 1956, 107: ethical concepts “pseudo-concepts”.

<sup>25</sup> C.L. Stevenson, *Ethics and Language*, 1959.

<sup>26</sup> R. Rorty, “Human Rights, Rationality, and Sentimentality”, in: S. Shute/S. Hurley (eds.), *On Human Rights*, 1998, 122, “Manipulating sentiment” is the right thing to do in ethical debates, for example through a “long, sad, sentimental story”, id. 133, not some rational foundationalism.



research hypothesis. It is the core of one of the major strands of current reflections of cognitive science on morality and law identified above.<sup>27</sup>

Modern non-cognitivism thus leads us to another path open to answer the formulated fundamental question about the reality of morality. It is an example of analytical reductionism. It does not deny that there is a language of morality and grants that this language expresses something, but proposes to understand this something as quite different from what a standard idea of morality assumes. With this analysis, morality ceases to be a phenomenon *sui generis*. Not only are objective moral entities not “part of the fabric of the world”, as Mackie put it in a classical critique of moral realism,<sup>28</sup> but moral entities as such are not part of what constitutes the world. Instead of the strange entity the traditional accounts in the history of thought were reflecting about, morality turns out to be a set of emotional preferences, not something more and mysterious.

### 3. The Complex Fabric of Morality

The first observation one has to make in this context is that morality has a strong and distinguishing emotional dimension. If one witnesses a massacre one does not just think: “this is wrong” as one does if one hears the proposition “Aristotle lived before Aeschylus”. One feels as a consequence of one’s moral judgement a sometimes very powerful emotional aversion. These moral feelings are distinct from all others. The approbation of a moral act is phenomenologically other than, say, the approbation of a beautiful goal in a football game. The aversion felt on witnessing a massacre is different from that on seeing a rotten dish.<sup>29</sup>

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<sup>27</sup> See Gazzaniga, see note 1, 167. On some examples of such studies and their critical assessment see note 33.

<sup>28</sup> Mackie, see note 21, 15.

<sup>29</sup> S. Nichols, “Innateness and Moral Psychology”, in: P. Carruthers/S. Laurence/S. Stich (eds.), *The Innate Mind: Structure and Content*, 2005, 353 fails to appreciate this difference. He takes the disgust at spitting into a glass of water to be the same as moral disgust. Another example is the question discussed in moral psychology: whether it is “moral” to eat a chicken with which one has previously had sexual intercourse, a question e.g. J. Haidt, “The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgement”, *Psychological Review* 108 (2001), 814 et seq. takes as relevant for

More concretely, at least three distinct spheres of approbation and aversion can be (and have been traditionally) distinguished — the spheres of the instrumental good, of the moral good and of aesthetics. To illustrate, a sofa can be regarded as an instrumental good if it is comfortable and promotes good posture, though its promotion of good posture is not a laudable moral deed and the sofa may be quite ugly.<sup>30</sup> A palace — to take Kant’s famous example — can cause a pleasing aesthetical experience though the knowledge of the suffering caused by the social preconditions and by the very process of its construction by forced labour or onerous taxation is revolting.<sup>31</sup> Thus, the same thing can be aesthetically pleasing but cause moral disgust. To collapse these very distinct reactions into one kind of approbation or aversion means to step back behind very old insights of the history of thought.

These distinctions between the spheres of the instrumental and moral good and of aesthetics lead to another very important observation — judgement in these different spheres depends not contingently on or is supervenient to a different set of facts. In the case of the instrumental good these facts are dependent on the aim the evaluated thing is supposed to serve. In the aesthetical case the core riddle of aesthetics is what these facts are. Whatever the answer to this is, whatever the basis of the perception of beauty is — these facts are clearly distinct from those that cause the moral judgement, as Kant’s palace example illustrates. But what are the morally relevant properties of an evaluated situation? Some are rather straightforward. To take just one very basic example, moral judgements depend on rather intricate notions of agency. One regards it as a moral deed if somebody donates something to the poor. If a one hundred Euro note falls from my pocket into the hat of a beggar this is, in contrast, not an action and not the object of moral evaluation at all. Agency is therefore certainly one of these facts moral judgements depend on. Whatever one’s subjective outlook or cul-

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moral theory. The study of moral judgement is, however, much more well-defined than a “general study of human aversion”.

<sup>30</sup> Hutcheson, see note 14, 117 et seq.: there is an important difference between a “fruitful field”, a “commodious habitation” and a “generous friend” or a “noble character”. He rightly points out, that if that distinction did not hold, one would have the “same Sentiments and Affections toward inanimate Beings” as toward “rational Agents”. This is a non-trivial, empirical observation. A twin earth, where the inhabitants would not make such rather intriguing differentiations, is imaginable.

<sup>31</sup> I. Kant, *Kritik der Urteilskraft*, Akademie Ausgabe Vol. V, 204 et seq.

tural background is – one cannot take the sofa’s promotion of good posture to be a moral deed, though of course you can falsely ascribe agency to an object like the sofa – just as children often do with regard to inanimate objects. Agency, intriguing as the matter is, however forms only the tip of the iceberg. As we will see, a fuller analytical theory of moral judgement shows that some substantive principles can be tentatively identified which seem to guide moral judgement universally and contrary to the widespread assumption of the relativity of moral evaluation. These principles cannot be reduced to an emotional aversion to the harm suffered by others, to some kind of empathy and its emotional dimensions, as philosophical and neuroscientific emotivism would suggest.<sup>32</sup> One of the reasons this cannot be true is that there is inflicted harm that is morally justified – for example the imposition of a sanction of some sort on another person or harm as a means of self-defence. One may feel considerable empathy for such a person but still think that it is justified to inflict this harm on him, applying principles of morality that are – as we will see in more detail – not reducible to an aversion to causing any kind of harm to others but only to inflict any *unjustified* harm to others, which is quite different. Another reason is one of the basic properties of moral judgement: There is no doubt that people have feelings of empathy with the suffering of others and a positive concern for their well-being. There is no problem here. The problem of ethics is, however, that moral judgement consists in a reflective attitude towards feelings and actions. Morality is not just a feeling of empathy leading to corresponding action, but an evaluative judgement about such feelings and actions rendering them “good” or “just” and the like. It can therefore, as just illustrated by the examples of sanctions or self-defence, demand action contrary to such feelings.

Empathy can therefore be best understood as a central heuristic tool for moral judgement. This is the core function of norms like the Golden Rule. It makes the agent understand what is at stake by taking the position of the other. The taking of such position is, however, not a moral judgement in itself. One may perfectly understand that the victim will be suffering as a consequence of a certain act, and still do it because one thinks this suffering (which one fully fathomed by empathy) is exactly what the other deserves (for example, in the everyday situation of punishment). A lack of empathy can make people fail to understand why an

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<sup>32</sup> For a similar argument see J. Mikhail, “Universal Moral Grammar: Theory, Evidence and the Future”, *Trends in Cognitive Science* 11 (2007).

act is bad because they do not vividly see its consequences for others.<sup>33</sup> Empathy is a precondition, perhaps even a necessary precondition, of

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<sup>33</sup> This leads to core problems of recent studies of neuroscience and “neuroethics”. To take some examples: Blair in a series of papers developed the thesis that moral judgement is emotive, because certain people like psychopaths show a correlation between lack of moral judgement and abnormally low responsiveness to distress clues, cf. e.g. R.J.R. Blair, “A Cognitive Development Approach to Morality: Investigating the Psychopath”, *Cognition* 57 (1995), 1; R.J.R. Blair et al., “Is the Psychopath ‘Morally Insane?’”, *Personality and Individual Differences* 19 (1995), 741. The idea is that the moral deficit derives from the affective deficit. Nichols, see note 29, states that harm norms prohibit actions to which we are predisposed to be emotionally averse. Haidt, see note 29, argues that moral judgement and moral action are based on emotional intuitions shaped by socialisation, whereas reason provides post factum rationalizations. The argument about empathy and love as the core of moral orientations is put forward, too, id. 824. If the arguments outlined here are on the right track, things are more complicated than that. This does not, by the way, rule out the possibility of the existence of the kind of social psychological influences Haidt and others investigate, like peer pressure or coherence motives. It does not even rule out the descriptive truth of statements like the following (despite the impoverished understanding of what lawyers do): that in reality, “moral reasoning is not left free to search for truth but is likely to be hired out like a lawyer by various motives, employed only to seek confirmation of preordained conclusion”, id. 822. These influences may, however, contribute not to a theory of moral judgement as such, but to a theory of the distortion of moral judgement. J.D. Greene/R.B. Sommerville/L.E. Nystrom/J.M. Darley, J.M./J.D. Cohen, “An fMRI Investigation of Emotional Engagement in Moral Judgment”, *Science* 293 (2001), 2105 pursue a comparable course: “judgments concerning ‘impersonal’ moral dilemmas more closely resemble judgments concerning non-moral dilemmas than they do judgments concerning ‘personal’ moral dilemmas”, id. 2107. The argument is based on cases like the following: it is accepted that there is an obligation to help an injured man at the roadside even though his blood damages the property of the person helping. There is in contrast no generally accepted obligation to help the poor by donating money to them. The reason for this is taken to be the personal character of the former and the impersonal character of the latter dilemma. Only direct confrontation incites emotion that is decisive for moral judgement, because only this can have evolved in the small groups formed by our ancestors. Greene sums up: “we ignore the plight of the world’s poorest people not because we implicitly appreciate the nuanced structure of moral obligation, but because, the way our brains are wired up, needy people who are ‘up close and personal’ push our emotional buttons, whereas those who are out of sight languish out of mind”, J.D. Greene, “From Neural ‘is’ to Moral ‘Ought’: What are the Moral Implications of Neuroscientific Moral Psychology?”, *Nature Reviews Neuroscience* 4 (2003), 846,

moral judgement, but not the judgment itself, as the case of fully felt but morally justified harm to others illustrates.<sup>34</sup>

These observations show that there is a constitutive cognitive component in moral judgement, at least through the formal preconditions of moral judgment like agency and also through substantive principles which are more complex than an emotional aversion to harm.

Moral judgements therefore consist not in purely emotional connections between moral evaluation and its factual basis, perhaps even purely subjective and contingent.<sup>35</sup> Things are much more complicated than this simple and widespread view assumes.

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849. Greene and Haidt combine their results and state, J. Greene/J. Haidt, "How (and Where) Does Moral Judgment Work", *Trends in Cognitive Science* 6 (2002), 517, 522: that "emotion is a significant driving force in moral judgment", and continue: "reasoning can play an important role in the production of impersonal moral judgements and in personal moral judgements in which reasoned considerations and emotional intuitions conflict". The emerging picture seems to suggest that moral judgements either are emotional (personal) or resemble non-moral considerations (impersonal), apparently utility calculations. Gazzaniga, see note 1, 171 et seq., draws the following picture of moral judgement: There are emotional gut reactions, based on empathy and a post factum rationalisation by the "interpreter" of the reasons for the judgement. Cf. for further argument Mikhail, see note 32.

<sup>34</sup> This is how the roadside-vs.-third-world-donation example, see note 33, can be explained: the different behaviour is a question of heuristics, of performance, not moral competence. This is because a vivid understanding of what a donation means creates a moral obligation to help, as illustrated by the global wish to help e.g. after the Tsunami in eastern Asia. Apart from other problems, not considering this is one of the reasons why some studies involving patients suffering from damage to the prefrontal cortex remain inconclusive, cf. e.g. M. Koenigs/Y. Young/R. Adolphs/D. Tranel/F. Cushman/M. Hauser/A. Damasio, "Damage to the Prefrontal Cortex Increases Utilitarian Moral Judgements", *Nature* 446 (2007), 908 et seq.

<sup>35</sup> See note 33.

#### 4. The Theory-Dependence of Interpretations of Neuro-Imaging Studies

Recently, moral cognition has become the object of very interesting brain imaging studies.<sup>36</sup> There are, however, many methodological problems involved in these studies arising from the limited understanding of brain functions and the development of the technical means of investigation. If one accepts that, despite these problems, certain brain areas, at least some of which are particularly connected with emotional activity, are activated by moral judgement, it does not follow that moral judgement is – at least in core areas – nothing but an emotional approval of some sort deprived of cognitive content. The reason is the phenomenology of morality just outlined, which indicates that this cannot be true. The fact that important elements of moral judgement are not yet located in brain imaging studies does not mean that they do not exist – as the fact that the neurological substrate of consciousness is unknown does not mean that consciousness does not exist. On the contrary, a careful phenomenology of morals (as of consciousness) tells neuroscience what to look for. It is especially important in this context to remember the theory-dependence of the interpretation of data. If people show less brain activity in parts of the brain connected in recent research to emotions if faced with some moral dilemmas rather than others this shows only that moral judgement is purely emotional if you interpret these data in an emotivist framework. Otherwise, it shows only that if there is moral judgement there is emotion involved. Whether these emotions are causes, consequences or a matter of heuristics of moral judgement cannot be conclusively established by the studies undertaken so far. Moreover, the data do not rule out the possibility of many other additional cognitive processes, being realized in any parts of the brain in whatever manner beyond emotions – processes that clearly play a role, as a phenomenologically adequate account of morality indicates.<sup>37</sup>

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<sup>36</sup> E.g. Greene/Sommerville/Nystrom/Darley/Cohen, see note 33, 293; Greene/Haidt, see note 33; H.R. Heekeren/I. Wartenburger/H. Schmidt/H.P. Schwintowski/A. Villringer, “An fMRI Study of Simple Ethical Decision-Making”, *Neuroreport* 14 (2003), 1215 et seq.; J. Moll/R. Zahn/R. de Oliveira-Souza/F. Krueger/J. Grafman, “The Neural Basis of Human Moral Cognition”, *Nat. Rev. Neuroscience* 6 (2005), 799 et seq.; Koenigs/Young/Adolphs/Tranel/Cushman/Hauser/Damaiso, see note 34.

<sup>37</sup> Another problem is that the lack of emotive response to certain cases may be caused by a lack of cognitive understanding of the wrongness of an act, with

## 5. Mentalism and Metaphysics

Does this mean that one is led back to a metaphysics of morals? The answer is no. A door to a different and promising solution is opened if one becomes aware of the following property of moral evaluation. The goodness of an action bears a different relation to the outside world than does the height of a tree to this object. Moral judgement ascribes to actions or entities a moral value or deontological status, but it does not mirror something existing in the outside world. The goodness of the act of helping the poor is ascribed by the human mind to this act while it perceives this act. A promising theory of morality thus takes morality ontologically as an original creation of the human mind. This step leads not necessarily to a subjectivist standpoint, in the sense that the content of morality is different in every individual as it does not imply that the creation of morality by the human mind is different in every individual human mind. If it is true, its only – though important – consequence is that morality may be relative to human beings. Among human beings, however, it can well be universal, not despite but because of its origin in the human mind – a question to which we will return.

The background to this subjective ontology is a representational theory of the human mind as pioneered by Descartes,<sup>38</sup> and pursued by others, in metaphysical terms by the Cambridge Platonists and, at least in some interpretations, by Kant.<sup>39</sup> It forms the most promising general frame-

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the consequent lack of moral feelings (guilt, shame, remorse, etc.). Thus the affective deficit could turn out to be (partly) the result of a lack of moral judgement and not vice versa.

<sup>38</sup> The theory of vision was important in this context. The classical Aristotelian conception of vision was that sense organs naturally display the nature of the world. It was assumed that the perceptual image of the world exactly matches the world as it is. This point of view was increasingly hard to defend when first insights into the structure of vision were gained, e.g. through Kepler's work on the retina and the inversion of pictures on it. It was a major insight on Descartes' part to realise that visual perception involved representation arising in preformed ways from inborn cognitive systems stimulated from outside. In this view, visual perception is created by the mapping of the sense impression by a cognitive system into a visual experience, see S. Gaukroger, *Descartes*, 1995, 276.

<sup>39</sup> P. Strawson, *The Bounds of Sense*, 2004, 19, summarised (appropriately) what he took (presumably mistakenly) as a fundamental flaw in Kant's theory as follows: "It is true that Kant thought of himself as investigating the general structure of ideas and principles which is presupposed in all our empirical

work for a modern theory of the human mind and is consciously pursued in contributions to Cognitive Science from a mentalist perspective.<sup>40</sup> From this point of view our world picture, taken as the totality of entities of our consciousness, is the creation of the human mind by its internal, often unconscious and to a certain extent innate resources triggered and occasioned by sense experience. These entities are no less part of the “fabric of the world” because they are mental. The “fabric of the world” is taken ontologically to encompass such entities as well.<sup>41</sup>

Morality fits neatly into this picture: morality is a real *sui generis* phenomenon of a complex cognitive, emotional and – as we will see - volitional fabric that is a creation of the human mind from its internal resources, triggered and occasioned by certain properties of objects of moral evaluation.

These theses make it plausible that there is a third ontological way between the assumption of odd metaphysical moral entities in the world and kinds of reductionism, thus between moral realism in the classical sense and non-cognitivism. This is the first interesting result of a mentalist theory of ethics and law.

## IV. The Reasonableness of Moral Judgement

### 1. *Ethics and the Limits of Reason*

The remarks so far have led us to a point where one can formulate another perennial problem of ethics more precisely from a mentalist perspective. This problem concerns not the ontological, but the epistemological, status of moral judgements. Are moral judgements rational or, to use a traditional term, reasonable, and, if so, in what sense? Or are we just exchanging persuasive definitions, are we using performative,

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knowledge; but he thought of this investigation as possible only because he conceived of it also, and primarily, as an investigation into the structure and working of the cognitive capacities of beings such as ourselves. The idiom of the work is throughout a psychological idiom. Whatever necessities Kant found in our conception of experience he ascribed to the nature of our faculties”. See note 20 on the question of Kant’s moral psychology.

<sup>40</sup> N. Chomsky, *Language and Thought*, 1993, 36.

<sup>41</sup> On the mind-body problem and the ontology of mental entities see N. Chomsky, *On Nature and Language*, 2002, 45.



discursive violence, as Derrida<sup>42</sup> proposes, if we engage in debating moral issues or are we pursuing emotional manipulations, as Rorty asserts,<sup>43</sup> and as it seems to follow from neuroethical emotivism?

It is a standard argument in ethics that ethics fails to match scientific standards of rationality and truth. It is argued that there are no objective empirical facts that can falsify (let alone verify) moral judgements.<sup>44</sup> It is rightly pointed out that ethics is about an ought, not an is. This is taken as another indication that truth in ethics does not exist, as truth is connected to propositions about facts, not normative judgements of ought: “As true conclusions argue no virtue in the agent, so false argue no vice”.<sup>45</sup> In addition, theoretical judgements have no motivational force. Only emotions of some kind can be a factor of motivation. As moral judgement does influence human motivation, it can consequently not be a true/false-statement that has no such power.<sup>46</sup>

Finally, reason cannot determine an ultimate end, only subordinate ends. Ultimate ends are chosen because of given desires and prefer-

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<sup>42</sup> J. Derrida, *Force of Law*, 1992, 13: “Its very moment of foundation or institution (...) the operation that amounts to founding, inaugurating, justifying law (*droit*), making law, would consist in a *coup de force*, of a performative and therefore interpretative violence that in itself is neither just nor unjust and which no justice nor previous law with its founding anterior moment could guarantee or contradict or invalidate. No justificatory discourse could or should ensure the role of meta-language in relation to the performativity of institutive language or its dominant interpretation”.

<sup>43</sup> Rorty, see note 26, 133.

<sup>44</sup> Hume, see note 19, Book III, Part I, Sect. I.

<sup>45</sup> Hutcheson, see note 4, 150.

<sup>46</sup> Hume, see note 19. On his later, more differentiated views compare D. Hume, *Enquiry concerning the principles of morals*, 1898, Sec. I: “The final sentence, it is probable, which pronounces characters and actions amiable or odious, praise-worthy or blameable; that which stamps on them the mark of honour or infamy, approbation or censure; that which renders morality an active principle and constitutes virtue our happiness, and vice our misery: it is probable, I say, that this final sentence depends on some internal sense or feeling, which nature has made universal in the whole species. For what else can have an influence of this nature? But in order to pave the way for such a sentiment, and give a proper discernment of its object, it is often necessary, we find, that much reasoning should precede, that nice distinctions be made, just conclusions drawn, distant comparisons formed, complicated relations examined, and general facts fixed and ascertained”.

ences.<sup>47</sup> It follows from the preceding remarks on the ontology of morals that it makes indeed no sense to apply the truth standards of the natural sciences to ethics. The conclusion, however, that if that is so, no standards of reasonableness exist is too rash. The make-up of the human mind and its relation to the world could be too complicated for that. It is far from clear, and certainly not a priori given, that the only alternative to falsifiable theoretical propositions about external objects is subjectivist irrationalism. Perhaps there is again (as in the case of moral ontology) a third way beyond the extremes that may be worth considering. After discussing this point, I will address the problem of motivation and of ultimate ends.

## 2. Frameworks of Moral Argument

There is a first sphere of ethical reasonableness that concerns the non-moral preconditions of moral judgement. X and Y may – to take a simple example – agree that helping the poor is a morally laudable act, though they disagree about the means to do so. This trivial example shows that the issues raised by non-moral preconditions of moral acts can be very complex if issues of socio-politics are in question. One can, for example, draw very different conclusions about what helping the poor means if one thinks that a neo-liberal economy is better for the public at large than a mixed economy with an active state sector.<sup>48</sup> These questions of the non-moral preconditions of moral judgements, however, cause no special epistemological problems other than the usual one of how to construct theories about the world. The reasonableness of the non-moral preconditions of moral judgement therefore forms the first important aspect of the reasonableness of moral judgement in general.<sup>49</sup>

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<sup>47</sup> Hutcheson, see note 4, 120; Hume, see note 19, Book III, Part I, Sect. I.

<sup>48</sup> The questions get even more complicated if one thinks of such problems as the nature of human beings – a particularly important non-moral precondition of moral judgement as the concept of humankind evidently determines moral judgement, though it does not itself provide normative principles. For some comments on human nature and a social vision see J. McGilvray, *Chomsky*, 1999, 248.

<sup>49</sup> W. Frankena, *Ethics*, 1963, 13: “I think that moral philosophers cannot insist too much on the importance of factual knowledge and conceptual clarity for the solution of moral and social problems. The two besetting sins in our prevailing habits of ethical thinking are our ready acquiescence in unclarity and

Another issue of the reasonableness of ethical arguments concerns what one may call the ideological function of moral arguments. Often there are very fierce moral debates where at least on one side no real moral issue is at stake, but rather some non-moral interests camouflaged in moral terms. It is another important part of a rational moral argument to make these influences transparent. If that happens, the moral issues often disappear.

### 3. Grundurteile - The Core of Moral Reason

A final aspect of the reasonableness of moral judgement to be mentioned is the role of what can be called in German *moralische Grundurteile* – foundational judgements of morality. These judgements form the ultimate yardsticks of moral debate. They are the reason the subjective basis of moral judgement does not in principle rule out the possibility of yardsticks of legitimacy, as we will see now.

If one takes a step back and considers the history of moral philosophy and ethics from a distance one finds that behind the veil of diversity, which is sometimes taken as very the essence of it, is hidden some interesting convergence. The closer scrutiny of the many ethical systems developed and their explicit or implied basis shows, that two principles are candidates for the content of such *Grundurteile* or foundational judgements.

First, the principle of altruism. According to the positive part of this principle, it is morally good to intend to foster the well-being of feeling beings without concern for the non-moral interests of the agent, and to act with this intention and beneficial effects. Conversely, it is morally bad to intend to harm somebody and to act accordingly with harmful effects. This is the *neminem laede* formula.<sup>50</sup> These are, of course, *prima facie* or *ceteris paribus* principles. But without much exaggeration, concern for the interest of others, the conditions under which these inter-

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our complacence in ignorance – the very sins that Socrates died combating over two thousand years ago”. Therefore he rightly states: “It is not enough to show that people’s basic ethical judgements are different, for such differences might all be due to differences and incompletenesses in their factual beliefs”, id. 110.

<sup>50</sup> The *neminem laede* formula does not follow analytically from the goodness of altruism. Altruism could be morally good; harm, however, morally neutral.

ests take precedent over the interests of the agent and the moral reprehensibility of harming others are something like the core of the concept of morality in general. These kinds of principles have many times been formulated in history as the heart of ethics.<sup>51</sup>

Secondly, the justice-as-proportional-equality principle, or basic principle of justice. According to this principle, justice consists of proportional equality in two dimensions. First, proportional equality has to be maintained between the treatment X of agent B by agent A and the given quantity of the entity that occasioned the treatment. Secondly, proportional equality has to be maintained between the treatment X of B in situation S by agent A and the treatment Z of C in situation T by agent A if the patients B and C and the situations S and T are sufficiently similar. To take a simple example, if a cake is distributed according to need, it seems just that a child who was ill and has to recover will get a bigger piece than others. Proportional equality is maintained between the treatment of the child by the distributor, the allocation of a quantity of cake to the child and the given quantity of the entity that occasions the treatment – here the need of the child. Other examples are the grading of exams which has to be proportional to the achievement of the student in order to be just or the measure of criminal punishment, which has to be proportional to guilt. If there is no reference point for the apportionment of the treatment, the second variant becomes relevant as a kind of default principle – if there are no special reasons to do otherwise, the equal distribution of a cake is, for example, a just distribution. Note that it is not an analytical truth that equals ought

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<sup>51</sup> For e.g. Kant, the fostering of the happiness (*Glückseligkeit*) of others was the central duty of virtue apart from self-perfection: I. Kant, *Metaphysik der Sitten*, Akademie Ausgabe, Vol. VI, 388: “Wenn es also auf die Glückseligkeit ankommt, worauf als meinen Zweck hinzuwirken es Pflicht sein soll, so muß es die Glückseligkeit *anderer* Menschen sein, *deren* (erlaubten) *Zweck ich hiemit auch zu dem meinigen* mache. Was diese zu ihrer Glückseligkeit zählen mögen, bleibt ihnen selbst zu beurtheilen überlassen; nur dass mir auch zusteht manches zu weigern, was *sie* dazu rechnen, was ich aber nicht dafür halte, wenn sie sonst kein Recht haben es als das *Ihrige* zu fordern“ (emphasis in the original). On the lack of self-interest in the observer see Hutcheson, see note 14, 111: “The Word Moral Goodness, in this Treatise, denotes our Idea of *some Quality apprehended in Actions, which procures Approbation, and Love toward the Actor, from those who receive no advantage by the Action.* Moral Evil, denotes our Idea of a contrary Quality, which excites Aversion, and Dislike toward the Actor, even from Persons unconcern’d in its natural tendency” (emphasis in the original).

to be treated equally. There is no contradiction implied in imagining a world where one ought to treat equal things unequally or every second equal thing equally. It is therefore an interesting fact about human moral judgement and the principles that direct moral judgement if the foundational role of these principles in moral reasoning is demonstrated. They are the inescapable, if often hidden or even denied, backbone of any plausible moral argument.

#### 4. Yardsticks of Practical Reason

The consequence of this argument is that, given the importance of the non-moral preconditions of moral judgements, the role of non-moral interests in moral dispute and the plausibility of the assumption of *Grundurteile* or foundational judgements guided by something like the formulated principles, there are yardsticks for criticising ethical systems. The subjects of moral debate are certainly in many cases very difficult and perhaps beyond clear answers, especially when major social issues are at stake. Given these factors determining concrete ethical evaluation there are, however, some standards of practical reasonableness that we should not forget or weaken through theoretical reflection. There is no reason to accept, for example, that the assertion “Jews may be killed” is as reasonable as its critique. That is the second not just interesting, but encouraging result.

#### V. Moral Reasons and Moral Motives

Given these findings, the problem of the relationship between moral reason and motives can perhaps be understood more clearly. If thoughts so far were on the right track, moral reasons are derived from complex moral arguments in which non-moral preconditions of moral arguments, the critique of interest and foundational judgements play an important role. Now the question arises: why do such moral reasons motivate one? This is a question that is debated with much passion in contemporary moral philosophy.

Internalists argue that the moral judgement itself has motivational force.<sup>52</sup> The paradigmatic internalist account is that of Kant, for whom the moral law has motivational force through the ought itself, buttressed (but not constituted) by the central moral feeling, in his view reverence or respect for the categorical imperative.<sup>53</sup>

Externalists deny that as it seems impossible, and think that other, non-moral motives must play a role, e.g. the non-moral interest of agents like concrete desires, the wish to profit from certain social arrangements that are sustained by abiding by moral rules, etc.<sup>54</sup> A classical example of this argument is Hume's critique of the Rationalists: Even granted that there are moral truths, these truths could never motivate people as only desires of some sort have motivational force.<sup>55</sup> The internalist argument seems to fall again into the metaphysical trap, as e.g. Mackie argued against the Platonic idea that the perception of an idea of goodness motivates people to do good.<sup>56</sup>

One should not underestimate the importance of this problem. For Kant it is the very essence of morality itself that duty had to be done for

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<sup>52</sup> See Price, see note 17, 186 for a concise explanation: "When we are conscious that an action is *fit* to be done, or that it *ought* to be done, it is not conceivable that we can remain *uninfluenced*, or want a *motive* to action".

<sup>53</sup> Kant, see note 15, *Kritik der Praktischen Vernunft*, Vol. V, 78: „Achtung fürs moralische Gesetz ist also die einzige und zugleich unbezweifelte moralische Triebfeder“.

<sup>54</sup> For further discussion of internalism see R.M. Hare, *The Language of Morals*, 1952, 20, 30 et seq., 169, 197; R.M. Hare, *Moral Thinking*, 1982, 23 et seq.; D.O. Brink, *Moral Realism and the Foundation of Ethics*, 1989, 39 et seq.; Harman, see note 7, 30 et seq.; an externalist view is taken by P. Foot, *Virtues and Vices*, 1978, 148 et seq.

<sup>55</sup> Hume, see note 19, Book III, Part I, Section I.

<sup>56</sup> Mackie, see note 21, 40: "Plato's Forms give a dramatic picture of what objective values would have to be. The Form of the Good is such that knowledge of it provides the knower with both a direction and an overriding motive; something's being good both tells the person who knows this to pursue it and makes him pursue it. An objective good would be sought by anyone who was acquainted with it, not because of any contingent fact that this person, or every person, is so constituted that he desires this end, but just because the end has to-be-pursuedness somehow built into it. Similarly, if there were objective principles of right and wrong, any wrong (possible) course of action would have not-to-be-doneness somehow built into it."

duty's sake and not for some other reason.<sup>57</sup> It seems to formulate a predicament: Either there are rational reasons for morality, the motivational force of which is inexplicable, or there is moral motivation by feelings and desires for which rational reasons are irrelevant.

How can we escape this predicament? The solution is to follow one of Wittgenstein's best pieces of advice, namely "*Denk nicht, sondern schau*", "Do not think, look."<sup>58</sup> It is one of the constitutive facts of morality that a moral judgement has motivational force. That is why it has normative content and its distinctive dimension of ought. If you witness a massacre you do not only feel a certain emotional aversion unlike the distant or – if you are a committed philologist – more concerned reaction to the incorrect proposition "Aristotle lived before Aeschylus". In addition to these peculiar feelings, moral judgements have motivational consequences if they do not concern past situations, where there is no longer anything that can be done. You experience a moral ought, an obligation to perform a certain act, for example that you should do something to help. Nothing like this happens in the case of judgement about the instrumental good or aesthetics. Aesthetic judgement is volitionally neutral. A judgement about an instrumental good can become a hypothetical imperative. "You ought to use curry for a spicy dish" means nevertheless motivationally something qualitatively different from "You ought to rescue the drowning man, if you can".

This moral ought is an intricate phenomenon that is full of riddles if one looks at it more closely.<sup>59</sup> There is a long and continuing debate about the nature of the moral ought and obligation in general.<sup>60</sup> The details are difficult, but at least this much is clear: The ought affects the human will, and inclines it without binding or determining it. If you ought to act in a certain way, you can still act otherwise. Any attempt to understand the intricacies of moral judgement should certainly pay careful attention to this aspect of the object to be explained. Moral rea-

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<sup>57</sup> Cf. e.g. the famous, admired and sometimes ridiculed praise of duty in Kant, see note 15, *Kritik der Praktischen Vernunft*, Vol. V, 86.

<sup>58</sup> L. Wittgenstein, *Philosophische Untersuchungen No. 66*, 1953.

<sup>59</sup> For discussion of the majesty vs. grace debate between Kant and Schiller see F. Schiller, *Über Anmut und Würde*, *Sämtliche Werke*, Vol. V, 465; I. Kant, *Die Religion Innerhalb der Grenzen der Bloßen Vernunft*, Akademie Ausgabe, Vol. VI, 23, footnote.

<sup>60</sup> Hart rightly observes that "obligation" is the concept that "haunts much legal thought", H.L.A. Hart, *The Concept of Law*, 1997, 85.

sons are thus the process of getting to a point where – to use John Rawls' term, though in a slightly different sense – considered judgements are possible, not ill-solicited appraisals based, for example, on an incomplete account of the facts.<sup>61</sup> If one comes in the end, however, to the conclusion that act A is immoral this has motivational consequences. There are no moral judgements without motivational consequences. If the judgement had no motivational consequences it would not be a moral judgement at all.<sup>62</sup> This is a fact about the constitution of the moral judgement of human beings and their moral cognition that could be different but clearly is not.

The pressing question for individuals and cultures is thus not whether moral judgements have motivational force but how can the empirically given intrinsic motivational force of a moral judgement become the guiding motivation, at least in the most important instances for the comportment of human beings? This is, of course, the question that Kant tried to answer with reference to the moral feeling of reverence for the law.<sup>63</sup> Achieving this is one of the reasons – apart from diminishing the uncertainty of the content of rules and creating with courts a neutral institution to adjudicate on them - for instituting the law as far as it has a relation to moral norms and is not just about creating pragmatic and technical rules for organising society. One needs some social buttressing of moral norms because the motivational forces of morality, though they exist, are limited.

To be sure, there are non-moral reasons for moral action. One of the most important is the non-moral good of a social union - a thought with a long tradition. Another is a certain satisfaction to be gained by a moral orientation and acting, perhaps even maintained despite some obstacles – a bit of self-respect and the dignity of preserved uprightness which are not the worst of all possible human experiences.

Thus, the main answer to the problem of the motivational force of moral reasons is that moral judgements are the result of moral reason-

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<sup>61</sup> On Rawls' conception of considered judgements see Rawls, see note 7, 42.

<sup>62</sup> There is an interesting meta-critique of David Hume by Rawls that makes a point which is relevant in this context. He rightly says that Hume's critique of the Rationalists loses its force if one takes the Rationalists to propose not just objective truth in ethics but a motivational principle. For more discussion see J. Rawls, *Lectures in the History of Moral Philosophy*, 2000, 80.

<sup>63</sup> Kant, see note 15, *Kritik der Praktischen Vernunft*, Vol. V, 78.



ing and that the moral judgements which have thus developed have intrinsic motivational force. In addition, there are non-moral reasons for following the intrinsic motivational force of moral judgement – institutionalised in the law, beyond institutions the insight into the value of a community based on benevolence and justice and a sense of the worth of preserved moral integrity.

## VI. Constructivism

Moral dilemmas are an important topic in ethical debates. Moral dilemmas have been used to show the wrongness of ontological moral realism. There can be – the argument runs – no moral contradiction of principles which are at the root of dilemmas if the moral principles derive from objective matters of fact in the world as there are no contradictory matters of fact in the world. There is a subjectivist version of this argument, too. Here it is argued that moral dilemma cannot exist, because morality is a construction of human culture. If there are dilemmas this construction is bad and has to be altered.<sup>64</sup>

The first argument is not of much interest because here no ontological realism is pursued. The second appears not to be true. There are hard cases in ethics, and of course in law, where true dilemmas exist – from the Carneades dilemma to abortion.

In addition, there is the experience, especially for a lawyer who deals with concrete cases all the time, that in everyday life there is often no quick normative evaluation at hand. And this is not due just to bad, incomplete, contradictory laws. The solutions to these concrete cases will vary, but they seem to illustrate that, in ethics as in law, judgements about concrete cases are often the result of a constructive process which slowly develops a complex code of values and rules in the framework of which new cases are solved. Any legal culture shows how complicated these constructions can get. This complexity is not just the result of the strange minds of lawyers and law-makers. It is to a great degree a necessary consequence of the complexity of the issues involved. That is interesting, because it is possible to imagine a world where every moral and legal question has a clear answer that is found instantaneously,

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<sup>64</sup> On the debate on dilemmas and realism see B. Williams, *Ethical Consistency; Consistency and Moral Realism, in Problems of the Self*, 1973; and P. Foot, *Moral Realism and Moral Dilemma, in Moral Dilemmas*, 2002.

spontaneously, and without (much) reflection. But this seems not to be a human world. The inevitability of moral and legal constructions is therefore a further parameter of practical theory.<sup>65</sup> It clarifies that the realm of ethics and law is one that is deeply situated in conditioning history and social circumstance. It illustrates that fully developed moral codes or legal systems cannot be the object of mentalist approaches, but only the foundational judgements that are one set of the different pre-conditions of the constructive process, that together lead to the complex reality of morality and law.

## VII. The Ontogenesis of Morality

Now the following problem appears: some of the inner resources of human moral cognition cannot be learned in the usual sense of understanding this term, namely by instruction, repetition and internalisation. Just consider the most basic of all moral categories, namely “ought”. Note that the issue is not the content of a certain prescriptive rule, say: you ought not to lie. The issue is the meaning of ought, its normative semantic. There is no way in which you can instruct a child on what ought as a category means if the child does not know it in advance. Sanctions can help to induce certain behaviour but leave the inner side of this behaviour untouched. Explanations like: “Ought is an inner compulsion which affects the will without determining it, followed sometimes, in case of contradicting behaviour, by remorse.” will certainly not help to create the phenomenon *ex nihilo* in the cognition of the child. It will look at the instructor and not understand a word. One can run through the same kind of argument - of course no other than the familiar poverty of stimulus argument known from the theory of mind - for other elements of moral cognition, for example moral emotions like shame, guilt etc, with the same results.

The same problem arises for the material principles of altruism and justice. Interesting work has been done on the development of human moral cognition and one has to see where all this leads to.<sup>66</sup> But, given the intricate constituents of moral judgement and the actual stimulus

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<sup>65</sup> Note that this is a familiar picture in the history of thought; see Aquinas, see note 11, I-II, q. 91, 3.

<sup>66</sup> Cf. for a short overview of the literature J. Mikhail, “The Poverty of the Moral Stimulus”, in: W. Sinnott-Armstrong (ed.), *Moral Psychology*, 2008.

children encounter, there is good reason to believe that the traditional learning theories are not to the point.

If so, that would not be surprising. Various areas of enquiry have made it plausible to assume that the human mind is not an all-purpose, infinitely malleable learning machine but an ensemble of different specialised faculties with properties which are to a certain degree innate.<sup>67</sup> Well studied examples are vision or language.<sup>68</sup> Human moral cognition appears from this point of view thus to be generated by a human moral faculty with certain innate features, among them categories like ought and material principles like those of altruism and justice.

This nativist stance formulates a claim which is not new. It is no less than the theoretically transformed restatement of the idea that human beings have a faculty of moral orientation, a practical reason as part of their nature in the terms of a modern anthropology not blind to the findings of the theory of the mind. And this thesis of the existence of practical reason is as old as human reflection itself, as the abovementioned concepts of Socratic *δαίμόνιον* (*daimonion*), Platonic and Aristotelian *φρόνησις* (*fronesis*), Aquinas' *Synderesis*, Hutcheson's and Hume's Moral Sense or Kant's Practical Reason illustrate.

From a mentalist point of view, many very complex problems arise. Empirical knowledge is limited.<sup>69</sup> Many questions are far from being solved or even formulated properly,<sup>70</sup> and a strong sense of the limits of

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<sup>67</sup> For an overview see e.g. Pinker, see note 2.

<sup>68</sup> For an overview see Jackendoff (1994), see note 6.

<sup>69</sup> See note 66. On at least partly empirically-minded theories of moral cognition of authors like Jean Piaget, Lawrence Kohlberg or Jürgen Habermas see Mahlmann, see note 3, 46.

<sup>70</sup> There is an increasing amount of work in this area. Mikhail pursues the thesis that the principle of double effect describes part of the universal moral grammar or, in technical language the I-morality. See further Mikhail (2000), see note 3; Mikhail, see note 32, 143. This is one of the first substantive theses about the content of a universal moral grammar, and as such of great importance. For more discussion of this approach see Hauser, see note 3.

Here a different course is taken: basic judgements about altruism and justice which are highly abstract are analysed. Concrete moral principles are taken to be the product of constructions from this abstract base. Research into the notion of double effect and justice/altruism (and any other imaginable topic) is thus not contradictory but complementary. Mikhail is very clear about the status of the principle of double effect: "The Principle of Double Effect is not itself a test of whether an action is right or wrong; rather its status is that of a

human understanding in ethical issues is as appropriate today as it was self-evident for the major thinkers of the past.<sup>71</sup> But some problems that seem to speak against such a theory on first view are not conclusive arguments against it under closer scrutiny.

First, note that, given in particular the importance of the non-moral preconditions of moral judgement and a constructive process, this does not imply that from this point of view any specific full morality, for example an egalitarian morality, is innate. There is no room for any biologism in ethics. There is a long way from *Grundurteile* or foundational judgements with a possibly innate basis for a full normative system of ethics in the sense in which this term is usually understood. All the work of normative ethics over centuries is situated in this sphere of construction of rules and systems of values beyond foundational judgements. Theories of the moral mind are thus not a substitute for this reflection and never will be.

Secondly, given the fact that moral motivation is in addition just one of many competing human motivations, like pursuit of power, wealth and recognition, a whole further dimension of non-moral influences on human action has to be taken into account. There is no direct connection between moral judgement and human action. The variety of human action is therefore no argument against the existence of *Grundurteile* or foundational judgements, as full moral judgements depend on (contentious) non-moral preconditions, a constructive process, and are in addi-

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second-order ‘priority rule’ or ‘ordering principle’ whose proper application is to state the *only* conditions under which otherwise prohibited actions are (or may be) permissible. Put differently, the principle’s natural application is to serve as a principle of justification that states the necessary conditions that must hold for a presumptively wrong action to be justified”; Mikhail (2000), see note 3, 162 (2000) (emphasis in the original). This leaves open the question of what makes an action wrong (or right) in the first place. Here it is maintained that justice and altruism are a good starting point for investigating this.

<sup>71</sup> E.g. Kant, see note 15, *Grundlegung der Metaphysik der Sitten*, Vol. IV, 463; or see further Hutcheson’s earlier comments, see note 14, 271 on the mysterious nature of the “occult Quality” of the moral sense: “This *natural Determination* to approve and admire, or hate and dislike Actions, is no doubt an *occult Quality*. But is it any way more mysterious that the Idea of an Action should raise *Esteem*, or *Contempt*, than that motion, or tearing of Flesh should give *Pleasure*, or *Pain*; or the Act of Volition should move *Flesh* and *Bones*?” On the limits of understanding in general in cognitive matters cf. the classic distinction of “riddles” that are solvable and “mysteries” that are not, e.g. Chomsky, see note 41, 58 et seq.

tion just one of many motivational influences that in the end determine human action.

Thirdly, for such a highly developed and historically determined cultural artefact as the law the point of the only indirect and mediated connection between *Grundurteile* and legal codes is obvious.

Two further apparent consequences that certainly quickly come to mind should not discourage the pursuit of these kinds of ideas. Assuming a human moral faculty does not mean committing a naturalistic fallacy, and there is no conclusion from is to ought. There is no naturalistic fallacy because the irreducibility of moral goodness is not denied but emphasised by the account that has been developed about the falsity of analytical reductionism. There is no conclusion from is to ought because the statement that human beings have a certain kind of moral cognition entails not the conclusion that they should have this particular one and not another foundational moral faculty instead. Of course one can ask what the foundation of the foundational judgements is. It would be wonderful to know. But the foundational question whether the moral mental constitution of human kind should be different, cannot be answered. The answer would necessarily imply the use of the moral mental constitution the reach of which is in dispute. Questions of the foundations of foundational judgements reformulate them thus as a case of what Kant calls comprehensible incomprehensibility and takes as what we can plausibly demand from a critique of reason<sup>72</sup> – we can demarcate the limit of our knowledge but not transgress it.

### VIII. Universalism and Relativism

Opinions are very different, say, as regards the rights of women in Saudi-Arabia, in Europe or Canada. There are many other examples where one finds in certain groups more often than in others a particular set of full ethical convictions. Under closer scrutiny, the apparently obvious case for relativism, however, becomes more complicated. Human groups are never homogeneous. In any group there are many dissenters and dissidents. The question arises where, if there is really a determining relationship between the group you belong to and ethical convictions, dissent comes from. And, more interestingly, where does successful dissent come from? Why is there something like moral progress in

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<sup>72</sup> Kant, see note 15, *Grundlegung der Metaphysik der Sitten*, Vol. IV, 463.

human thought? There are good reasons for thinking that there is not much ethical progress in practice if one remembers that the 20th century was one of the most horrible in human history, given the major wars and genocides that took place. It seems, however, hard to deny that, particularly over the last 50 years, a very remarkable moral consciousness has developed which is embodied in the modern culture of human rights.

The answer seems clear, given the preceding restatement of the meaning of practical reasonableness or - shorter and more traditional - of practical reason in mentalist terms. The dice seem to be epistemologically cast in favour of universalism. None of the factors of a reasonable moral judgement in the sense outlined is dependent on belonging to a certain group or culture.<sup>73</sup> The only precondition is that one belongs to the

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<sup>73</sup> The account proposed here is thus remote from a rortian kind of contingency-based irony. See R. Rorty, *Contingency, Irony, and Solidarity*, 1989. It is furthermore “vindicatory” in the sense in which Bernard Williams uses the term, arguing that ethics is one of the intellectual and cultural endeavours that cannot be “vindicatory.” See B. Williams, “Philosophy as a Humanistic Discipline”, *Philosophy* 75 (2000), 477, 487: “For liberal ideas to have won an argument, the representatives of the *ancien régime* would have had to have shared with the nascent liberals a conception of something that the argument was about, and not just in the obvious sense that it was about the way to live or the way to order society. They would have had to agree that there was some aim, of reason or freedom or whatever, which liberal ideas served better or of which they were a better expression, and there is not much reason, with a change as radical as this, to think that they did agree about this, at least until late in the process. The relevant ideas of freedom, reason, and so on were themselves involved in the change. If in this sense the liberals did not win an argument, then the explanations of how liberalism came to prevail – that is to say, among other things, how these came to be our ideas – are not vindicatory.” Saying that something is morally wrong means therefore in Williams view not very much: “it conveys only the message that the earlier outlook fails by arguments the point of which is that such outlooks should fail by them. It is a good question whether a tune as thin as this is worth whistling at all”, id., 488. The alternative to a vindicatory approach is, for Williams, some kind of ethical existential fatalism: “We believe, for instance, that in some sense every citizen, indeed every human being – some people, more extravagantly, would say every sentient being – deserves equal consideration. Perhaps this is less a propositional belief than the schema of various arguments. But in either case it can seem, at least in its most central and unspecific form *unhintergebar*: there is nothing more basic in terms of which to justify it. We know that most people in the past have not shared it; we know that there are others in the world who do not share it now. But for us, it is simply there. This does not mean that we have the

human species and shares the common cognitive human moral resources.<sup>74</sup>

A peculiarity of the current debate should be noted in this context. Nearly always, relativism in current debates locates human rights, democracy and the rule of law practically in Western traditions, as opposed to other traditions, say those of the East or recently especially of the Muslim world. There is a distinct grain of historical amnesia in these arguments if one remembers the many aspects of Western history that have nothing to do with the pursuit of human rights, democracy and the rule of law and that cast serious doubt on any assumption of an intrinsic connection between these values and the ethical traditions of the West.

The plurality of ethical convictions is therefore not the last word in practical debates. This is another encouraging result.

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thought: 'for us, it is simply there'. It means that we have the thought: 'it is simply there.' (That is what it is for it to be, for us, simply there)", id. 492 (emphasis in the original). For an attempt to transcend this account from the view of pragmatism see H. Putnam, *Ethics without Ontology*, 2005, 129: with reference to "situated resolution of political and ethical problems and conflicts" (emphasis in the original). If the mentalist argument is right, the *Grundurteile*, or foundational judgements are *unhintergehbbar*, they are, however, as such not historically and cultural contingent (though many things in a full ethics are) and they are the bases of any "situated resolution" which will be ethically convincing.

<sup>74</sup> In recent contributions there are attempts to account for moral difference by the use of a technical device of universal grammar – parameters. See Dwyer, see note 7, 169; Hauser, see note 3, 158, 420. Of course, such parameters could exist. But, as has been stated before, there is no reason to assume that morality is like language in this respect. There is no point in arguing somebody out of linguistic parameters. There is a point, however, in arguing about, for example, human rights. There are reasons for different moral judgements, not all clear, like knowledge of the relevant facts, ideological distortions etc, but parameters are not part of these reasons. The possibility of understanding exists and is illustrated in the current global human rights culture by any small progress in moral questions from slavery to the relations between man and woman. In consequence, there is ample empirical evidence that morality is rather like visual perception, and not operating with parameters like language at all. See further Mahlmann/Mikhail, see note 3, 95.

## IX. Some More Consequences for the Law

As we have seen, a mentalist theory of ethics provides a clear concept of the origin of the foundation of morals, which in turn is the decisive critical yardstick for the legitimacy of law. There are, however, many other perspectives worthy of being explored leading beyond the scope of these remarks, including a critique of some applications of cognitive science to the law.<sup>75</sup> Examples encompass as much the clarification of certain perennial analytical problems, e.g. of the semantics of ought, as such grand material challenges as a scientific framework for tackling some of the core normative questions raised in legal systems, e.g. of the legitimacy of human rights. In addition, a mentalist viewpoint gives a sense of the deficiencies of accounts of the law that view morality as something soft and unscientific which should have no importance in legal work and which wrongly enjoy the aura of hard science, like certain forms of the economic analysis of law – a point that J. Mikhail has made with considerable force.<sup>76</sup>

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<sup>75</sup> At the moment, far-reaching questions are discussed in respect to the relationship between neuroscience and law: For example free will and responsibility in criminal and civil law, the enhancement of cognitive functions (have witnesses to undergo such procedures?), tests of truth and lying, or bias, even predictions of behaviour: see further B. Garland (ed.), *Neuroscience and the Law: Brain, Mind, and the Scales of Justice*, 2004. It is an important question whether there is any hard theory of cognitive functions that really raises the normative questions discussed in this context. Is there, for example, really a theory even remotely in sight that would in any significant sense predict behaviour? One should not forget that many equivalent claims were formulated in the past with equal self-confidence, like some of the current claims which failed to live up to their promise. An important concern for the law should therefore be to prevent illusions about the reach of cognitive science from distorting the administration of justice. For some comments on the importance of the theory of mind and language for general legal theory see J. Mikhail, “Plucking the Mask of Mystery from Its Face”: Jurisprudence and H.L.A. Hart, *The Georgetown Law Journal* 95 (2007), 733 et seq.

<sup>76</sup> Mikhail, see note 7, 1057. One might argue that the economic analysis of law is very much inspired by scepticism about the rationality or even reality of moral concepts. Because morality seems to offer no clear guidance, the sober and seemingly clearer alternative of utility and effectiveness calculations is pursued.



## X. Moral Judgement and the Self-Perception of Humankind

To sum up: given the preceding findings, the following picture seems to emerge. Morality is a real *sui generis* phenomenon with cognitive, emotional and volitional dimensions which is a creation of the human mind from its internal resources triggered and occasioned by certain properties of objects of moral evaluation. The totality of these cognitive resources can be called the human moral faculty or practical reason in traditional terms. The moral faculty is universal and uniform in all human beings and forms part of human cognitive nature the evolutionary basis of which is – by the way - beyond our current understanding.<sup>77</sup>

Some of these mental resources lead to *Grundurteile*, foundational judgements, expressing among other things the principles of altruism and of justice. Together with the rationality of other factors entering into a full moral judgement, most importantly the non-moral preconditions of moral judgements, these principles form standards of ethical or practical reason. The moral judgements have – that is part of their nature – motivational force by affecting the human will by a moral ought. This moral ought demands moral action for no other reason than for duty's sake. Non-moral reasons for following and not resisting the moral ought are the non-moral worth of a community based on solidarity and justice for the individual and the value of preserved moral integrity. The outlined content of practical reason opens the path to a universalistic ethics. Ethics consists of a constructive process trying to construct answers to new problems by weighing and balancing competing *prima facie* rules and values themselves derived from *Grundurteile* or foundational judgements in concrete cases. The law is an institutionalized form of this complex process.

What is the consequence of this picture for our human self-perception? This question arises necessarily in practical reflection because every remark about morality arouses emotions because something important about human existence is at stake. What are our rights? What are our obligations to others? What does justice demand?

Any theory of morality embodies a concept of humankind in one way or another. Humans can appear to be selfish animals, curbed in their harmful actions against others only by shrewd utility calculations of their own greatest advantage that may lead them to some grudging con-

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<sup>77</sup> See further Mahlmann, see note 3, 285.

cessions to the interests of others if this unfortunately turns out to be the most prudent path to the maximal satisfaction of their own selfish desires. Humanity can appear to be a minor dependent on transcendental revelation and guidance by benign supernatural forces if it is not to drown in crime, pain and war. It can be described as the malleable mass, the passive obedient plaything in the hands of history, social circumstance or economic forces.

Assuming the existence of a human moral faculty means asserting a different picture. It views human beings as invested – along with other remarkable faculties like language, artistic creativity, and the faculty to form sciences and to self-determination – with a moral orientation, a practical reason, a conscience.<sup>78</sup> This conscience demands some concern for others and respect for everyone's due share of the material and immaterial goods of this world, a share which – one should never forget – is not given to individuals as crumbs from the table of grace but as a matter of right. The good of others and the demands of justice preserved are normatively relevant and a natural part of our life from this point of view, independently of utility calculations, traditions of authoritative metaphysical laws or social conditioning.

Without doubt a curtain is rising. The presence of conscience is no longer obscured as in the competing pictures of humanity where selfish utility calculations, obedience to superhuman forces or passive submission to social formation reign supreme. The inner life suddenly regains its wider horizons – of genuine generosity, a bit of magnanimity, mutually respected rights and a comforting touch of human care.

Developing this picture does not mean indulging in sentimental anthropocentric narcissism of an unpleasant kind. It does not mean entertaining the idea that human beings naturally are good, honest, peaceful and full of universal love. This is so because to acknowledge the potential relevance of morality (and a bit of its appeal) means not, as explained above, to assert that human beings are motivated only by moral consid-

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<sup>78</sup> It should be remembered in this context that moral orientation is traditionally taken as (one of) the bases of the ascription of human dignity. See Hutcheson, see note 14, 142. Also, see Kant, see note 15, *Kritik der Praktischen Vernunft*, Vol. V., 87: "Der Mensch ist zwar unheilig genug, aber die *Menschheit* in seiner Person muß ihm heilig sein. In der ganzen Schöpfung kann alles, was man will, und worüber man etwas vermag, auch *bloss als Mittel* gebraucht werden; nur der Mensch und mit ihm jedes vernünftige Geschöpf ist *Zweck an sich selbst*. Er ist nämlich das Subjekt des moralischen Gesetzes, welches heilig ist, vermöge der Autonomie seiner Freiheit" (emphasis in the original).

erations. There is much else. In Europe you just have to travel to the remnants of a concentration camp (never very far away) to understand what this simple sentence entails. But the theory of the moral faculty does mean that there are hard scientific reasons for believing that morality is a reality of human life. Human beings have the means to ease some of their sufferings and perhaps even open the door a bit wider to the experience of some shared happiness. Among these means are the inner moral resources of their autonomous minds. Given the old problems of the world, new wars and grand power schemes, cruelly fuelled religious fanaticism, the often blind responses to it and the growing disdain for the idea of an international order of right, the years to come do not look too pleasant. But given the inner moral resources of the human mind there are reasons for entertaining some hopes for a human life in a bearable light.