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HUME AND LAW

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Series Preface

The series *Philosophers and Law* selects and makes accessible the most important essays in English that deal with the application to law of the work of major philosophers for whom law was not a main concern. The series encompasses not only what these philosophers had to say about law but also brings together essays which consider those aspects of the work of major philosophers which bear on our interpretation and assessment of current law and legal theory. The essays are based on scholarly study of particular philosophers and deal with both the nature and role of law and the application of philosophy to specific areas of law.

Some philosophers, such as Hans Kelsen, Roscoe Pound and Herbert Hart are known principally as philosophers of law. Others, whose names are not primarily or immediately associated with law, such as Aristotle, Kant and Hegel, have, nevertheless, had a profound influence on legal thought. It is with the significance for law of this second group of philosophers that this series is concerned.

Each volume in the series deals with a major philosopher whose work has been taken up and applied to the study and critique of law and legal systems. The essays, which have all been previously published in law, philosophy and politics journals and books, are selected and introduced by an editor with a special interest in the philosopher in question and an engagement in contemporary legal studies. The essays chosen represent the most important and influential contributions to the interpretation of the philosophers concerned and the continuing relevance of their work to current legal issues.

TOM CAMPBELL
Series Editor
Centre for Applied Philosophy and Public Ethics
Charles Sturt University, Australia

For my parents and Jacquelin and Jamie

Introduction

The year 2011 marked the tercentenary of the birth of Scotland's greatest philosopher, David Hume. No doubt he would experience a quiet satisfaction at the renewed attention his ideas are receiving (and at the fact that the university which turned him down for a chair was the venue for the international Hume Society conference that year). It is probable, however, that he would have reservations about a volume of essays entitled *Hume and Law*. After all, he remarked on *Historical Law Tracts*, written by the judge and fellow Scotsman, Lord Kames:

> I am afraid of Lord Kaims's Law Tracts. A man might as well think of making a fine Sauce by a Mixture of Wormwood and Aloes, as an agreeable Composition by joining Metaphysics & Scotch Law. However, the Book, I believe, has Merit: tho' few People will take the Pains of diving into it.[1]

Indeed, by the time of his death in 1776, it was neither as a philosopher nor as a jurist that Hume was best known, but as an historian and essayist. His philosophical writings were disdained as sceptical and irreligious. And it remains the case that he is not immediately identified as a contributor to legal thought. The 'David Hume' who is most familiar to lawyers in Scotland, and whose work is still quoted in the criminal courts, is the philosopher's nephew. While Hume the philosopher did bring law into both his philosophical and his historical works, his influence on legal thought is largely indirect. What this collection of essays will show, however, is that within Hume's writings there is a sustained approach to law and legal concepts that reveals an important and distinctive philosophy of law from which modern jurisprudence could usefully draw.

Hume was not unfamiliar with the law. He had studied Law for a couple of years at Edinburgh University, though this passage from his *My Own Life* (1777) suggests that his reading in other areas displaced his legal studies:

> My studious disposition, my sobriety, and my industry, gave my family a notion that the Law was a proper profession for me: but I found an insurmountable Aversion to everything but the pursuits of philosophy and general learning; and while they fancied I was poring upon Voet and Vinnius, Cicero and Virgil were the authors which I was secretly devouring. (Norton, 1993, p. 351)

He even went on to report, in an unaddressed letter: 'The Law, which was the Business I design'd to follow, appear'd nauseous to me' (Greig, 1932, p. 13). However, he numbered several lawyers among his closest friends, correspondents and disputants, and, later in life, he was librarian to the Faculty of Advocates (the library that was later to become the core collection of the National Library of Scotland).

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[1] Letter to Adam Smith dated 12 April 1759, in Greig (1932), p. 304; also reproduced in Mossner and Ross (1987).

Although he may not have admitted it, his exposure to the law did have an influence on Hume, for the conception of justice, which he situated at the core of his moral and political writing, could not have been more juristic: for him, to be just is to abide by the (property-focused) rules of law. He also spent much time analysing the prevailing social contract theories of legal obligation, articulated a distinctive justification of private property and a parallel account of contractual obligation, and wove his *History of England* around constitutional issues and legal ideas.

Nevertheless, consistent with his remarks about Kames' *Historical Law Tracts*, Hume produced no grand jurisprudential theory. This lack of a systematic treatise on jurisprudence (or a set of lecture notes along the lines that students of his friend Adam Smith compiled) also means that Hume's ideas on law and legal concepts must be pieced together from various sources. These are *A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects* (1739–40) (hereafter *Treatise*),[2] *Essays Moral, Political, and Literary* (1741–42),[3] *An Enquiry Concerning the Principles of Morals* (1751) (hereafter *EPM*)[4] and *The History of England* (1754–62).[5] While it would be difficult enough to build a coherent body from such sources, the task is magnified by the fact that he is presenting different and probably slightly conflicting arguments in the *Treatise* and the *Enquiry*, the changes being due at least in part from his failure to attract a sympathetic audience for the ideas in the *Treatise*. Although Hume saw greatest success as an essayist and historian in his own lifetime, it is now the *Treatise* that is seen as his most significant work. Its challengingly original ideas saw him labelled as a dangerous sceptic, a caricature that was associated with his philosophy until the twentieth century. In response to the poor reception it received, Hume largely disowned it, and reformulated his ideas in a way that made them more palatable in *An Enquiry into the Human Understanding* (1748), *An Enquiry Concerning the Principles of Morals* (1751) and *A Dissertation on the Passions* (1758).

Although jurists remain more likely to have drawn indirectly on his insights than to have subjected his works to rigorous study, Hume's philosophy has had a significant – though not always acknowledged – influence on modern jurisprudence. There can be no doubting the importance – for natural law theory as much as for legal positivism – of Hume's insistence on the is/ought distinction, his attack on social contract theory, and his account of justice and property as artificial constructs. And Hart's theory of law, in particular, draws heavily on Hume: the anchoring of legal obligation in convention; the minimum content theory of natural law; the starting point of his account (with Honoré) of causation are prominent examples. Rawls, too, acknowledges a debt to Hume's analysis of justice.

James Allan, now of the University of Queensland Law Faculty, has developed a Humean theory of law in his 1998 monograph, *A Sceptical Theory of Morality and Law*. But, there is nothing else that amounts to a full-scale jurisprudential account of Hume's ideas, though it is true that valuable analyses of legal aspects of Hume's writings may be found in Knud Haakonsson's *The Science of a Legislator* (1981), Jonathan Harrison's *Hume's Theory of Justice* (1981) David Miller's *Social Justice* (1976) and *Philosophy and Ideology in Hume's*

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2 References are to the second (1978) edition of L.A. Selby-Bigge and P.H. Nidditch.

3 References are to E.F. Miller's 1987 edition.

4 References are to the third edition (1975) of L.A. Selby-Bigge and P.H. Nidditch.

5 Hume (1983).

Political Thought (1981), Duncan Forbes' *Hume's Philosophical Politics* (1975), Gerald Postema's *Bentham and the Common Law Tradition* (1986) and Annette Baier's *The Cautious Jealous Virtue: Hume on Justice* (2010) – all of which, apart from Postema's, are written by philosophers and political scientists rather than jurists. Of course, chapters that discuss individual concepts (especially justice) or aspects of Hume's theory of law appear in many works on Hume's philosophy.

There is, however, a vast number of articles on aspects of Hume's writings – in particular on justice as an artificial virtue – with jurisprudential content. The articles selected in this volume are ones which indicate the breadth of his influence or which concern topics where his ideas have potential for further development. Inevitably there remain many wonderful pieces that have not been included here.[6].

Philosophical Background

Hume was a leading figure in the Scottish Enlightenment, the period in the eighteenth century that produced the influential figures of David Hume and Thomas Reid in philosophy, Adam Smith in economics, William Cullen, Joseph Black, James Hutton and James Watt in the sciences, Adam Ferguson in the social sciences, Robert Adam and Robert Burns in architecture and literature respectively, and many others.

Although the Enlightenment has also been described as the 'Age of Reason', Hume rejected abstract reasoning as much as he did reliance on religious faith. So, for example, a social contract theory based on the 'self-evident' proposition of 'pacta sunt servanda' was no more acceptable to him than assertions of God-given natural rights. This consistent challenging of received wisdom earned him the labels of sceptic and atheist, and led to his reputation as a philosopher being eclipsed for at least a century by those of philosophers who were spurred to take up pen to counter his scepticism – notably Immanuel Kant on Continental Europe, and by Thomas Reid's Common Sense school in Scotland.

Hume's contribution to our understanding of law lies in his radical reassessments of various key concepts that form the architecture of legal systems. These are bound together not simply by their juristic subject matter, but also by a consistent methodology throughout his whole system of philosophy. The key is to be found in the title – and especially the subtitle – of his first and most radical book, *A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects.* Indeed, everything he wrote was driven by a commitment to empiricism: all knowledge is assembled from discrete particulars in the form of sensory impressions, and the pathway to such knowledge is through a study of how the human mind works.

It is worth highlighting at this point two features of his philosophy that affect what he says of law. Firstly, the empiricism that underpinned his epistemology and theory of the mind led Hume to reject innate ideas; instead, we find in the mind (a) impressions, which are vivid, and (b) ideas, which appear more as copies of impressions. Hume's emphasis on the former of these – impressions, feelings, sentiments and 'calm' passions – is pivotal in his moral psychology. 'The chief spring or actuating principle of the human mind is pleasure and pain'

[6] See additional readng on p. xxvii.

(*Treatise*, III.iii.1, p. 574). We act to bring these about in ourselves or others. When others act, we respond with sentiments of approval toward (the character traits of people whose) actions tend to cause us pleasure, and disapproval when they cause pain. And by the operation of sympathy (a natural mechanism which allows us to experience empathetically others' feelings), we approve or disapprove when they are benefited or injured. A disposition to act in such a way as to cause pleasure in others is a virtue. With a simple act of kindness, pleasure is produced directly as a result of a natural motive. Kindness is a natural virtue. But the detailed demands of justice are complex, and Hume cannot find in us any one natural motive to do all that justice requires: he describes justice as an artificial virtue.

Secondly, using his 'experimental' method, Hume soon came to the realization that 'morality ... is more properly felt than judg'd of' (*Treatise*, III.i.2 p. 470). Here, reason is subservient to the passions. Certainly, this does not mean that there is absolutely no role for reason in morals: once passion has identified a desirable goal, reason can tell us how to achieve it. But it does lead Hume to reject the dominant legal theories of his day.

Law and Jurisprudence

> I cannot agree to your Sense of Natural. Tis founded on final Causes; which is a Consideration, that appears to me pretty uncertain & unphilosophical. For pray, what is the End of Man? Is he created for Happiness or Virtue? For this Life or for the next? For himself or for his Maker? Your definition of Natural depends on solving these Questions, which are endless, & quite wide of my Purpose. ... I have never call'd Justice unnatural, but only artificial. (Letter to Francis Hutcheson, 17 September 1739, Greig, p. 33)

What Hume's methodology entailed for his approach to law was not only a rejection of natural law based on what he saw as the superstition of religion, but also of natural law based on abstract (a priori) reasoning. Instead, he adopted an inchoate social scientific method, which at times drew upon what would later become psychology, history, and economics to create an original account of law and legal institutions.

But to the extent that twentieth-century jurists paid attention to Hume, it was to point out the importance of what was sometimes labelled 'Hume's Law' in defeating natural law theory and paving the way for legal positivism. This observation of Hume's (that ought-propositions cannot be derived from is-propositions) is the focus of Philip Milton's essay (Chapter 1) which, in a wider survey of natural law theories of the period, concludes that Hume had little to do with the decline in natural law thinking.

Nevertheless, Hume himself can be seen as making a significant break with the natural law tradition that dominated both continental Europe and the Scotland of his day.[7] He denied that the content of legal norms depends either on reason or on the Will of God. Equally he rejected a social contract approach that based human law on an eternal principle that promises must

[7] Toward the end of the seventeenth century, the leading Scottish jurist, James Dalrymple, Viscount Stair, prefaced his account of Scots Law with an accepted rationalist definition of law: 'the dictate of reason determining every rational being to what is congruous with and convenient to its nature and condition' (Stair, 1681).

be kept. But that did not drive him to a hard positivist position which might hold that laws are the arbitrary dictats of legislators or judges. Indeed, in his discussion of Hume's empirical approach to law (Chapter 2), Sheldon Wein, perhaps rather unfairly, condemns Hume for not developing a full-blown positivist theory of law; for confining himself to 'doing metaethics' and not venturing into the field of normative jurisprudence.

It is to Hume's credit that he is not trapped in a natural law/positivist dichotomy. In his assertion that, while man-made, the rules of justice reflect the nature of the human condition, Hume may be laying the foundations for what Hart was later to develop as a minimum content theory of natural law. Similarly, he does on occasion treat the rules of social institutions such as ownership, at least as they develop in their pre-legal form, as rules of natural justice (or natural law) (*EPM*, III.ii, p. 196). But it is fruitless to debate whether this makes Hume 'count as' a natural lawyer or not. The answer to this question depends more on the scope of the label than on the writings of the jurist. Although he talks of the stability of property, its transfer by consent and the performance of contracts as laws of nature (*Treatise*, III.ii.VI, p. 526), they have no specific content, and his labelling of them as natural laws seems almost metaphorical. However, as Neil McArthur demonstrates in Chapter 3, the fact that laws must be developed in their own context does not mean that, for Hume, any law is as good as another. Not only are the best laws those that are suited to their people and customs, but good laws are general in the sense that they are consistent with what later became known as the rule of law. This is seen by Hume not simply as the constitutional requirement that Dicey explored, but as an integral part of the nature of law. Following this latter analysis, Hume's account of law can be viewed as a forerunner of Fuller's 'inner morality of law' as well as a prototype for Hart's minimum content theory of natural law.

The influence of Hume is clear too in Hart's 'descriptive sociology'. But, equally, the modern jurist rereading Hume may be reminded variously of Bentham's and Austin's utilitarian positivism when he states that laws are to be praised because they promote public utility, the scepticism of the legal realists (both American and Scandanavian), the historical school, and flashes of an economic analysis of law. And his 'demystification of property rights, promissory rights, and rights to command obedience' (Baier, p. 125) will appeal to more recent critical writers. Although far from the final evaluation of Hume's place in the history of jurisprudence that it purports to be, Alfons Beitzinger's essay (Chapter 4) is a useful overview hinting at these various fruits in later jurisprudence (though, necessarily, not taking account of any new directions in jurisprudence since 1975) that come from the seeds Hume sowed. What does emerge is an appreciation of the perceptiveness of Hume's understanding of the role of social institutions and of human psychology in law and justice.

Justice

> Thus, the rules of equity or justice depend entirely on the particular state and condition in which men are placed, and owe their origin and existence to that utility, which results to the public from their strict and regular observance. Reverse, in any considerable circumstance, the condition of men: Produce extreme abundance or extreme necessity: Implant in the human breast perfect moderation and humanity, or perfect rapaciousness and malice: By rendering justice totally

> useless, you thereby totally destroy its essence, and suspend its obligation upon mankind (*EPM*, III.i, p. 188).

The aspect of Hume's legal philosophy which has attracted most attention has been his account(s) of justice as 'an artificial virtue' and his proposition that 'being just' equates with respecting the rules of property.

At its simplest, justice is a virtue because we morally approve of 'just' actions and the motives behind them; but it is artificial in that there is no natural motive (such as benevolence) to comply rigidly with the general rules of justice. A particular just outcome may be counterintuitive in that is goes against our natural sentiments: an example that Hume gives is that justice requires that a needy pauper return goods to a rich miser if the latter has better title. Hume sets out to find an explanation of why certain acts are approved as 'just'.

While his solution – that justice must be a virtue that is created to meet a need – seems to be driven by his overall moral theory, Hume's restriction of justice to observation of the rules of property does not. It appears to be a case of the paradigm example being taken as comprehensive, when in fact it is not necessarily exhaustive, and it may well be that he is open to extending its boundaries.

For convenience, discussion of justice can be grouped under three headings: the origin of justice, the obligatory nature of the rules of justice, and the content and scope of justice.

Justice – Origins

> But if by convention be meant a sense of common interest; which sense each man feels in his own breast, which he remarks in his fellows, and which carries him, in concurrence with others, into a general plan or system of actions, which tends to public utility; it must be owned, that, in this sense, justice arises from human conventions. (*EPM*, App. III, p. 306)

The establishing of both the idea of justice and its content is, for Hume, a matter of empirical social science and not a narrowly philosophical one. The substantive rules that are its content are not universal but are arrived at in each society through convention. Historically, the (just) behaviour came first and then was labelled as just. As Ian Baxter explains in Chapter 5, the initial impulse for the rules is self-interest, but this is gradually replaced – through the mechanism of sympathetic appreciation of the beneficial outcomes for self and others of following the rules – with the desire to carry out mutually approved rule-bound conduct.

In Hume's powerful metaphor of two oarsmen in a boat adrift on a river, each is intent on promoting his own interest (*Treatise*, III.ii.II, p. 490). They do not necessarily have a shared final goal: one may be fleeing an enemy; the other may be travelling to a family reunion. However – and without necessarily discussing it, far less agreeing – each discovers that it is in his own interest to row in unison with the other. Hence a convention of pulling together emerges. Following that convention turns out to be of mutual benefit, and promotes the interest of each. There is probably also an indirect 'public good' in that an efficient means has been found for crossing the river. Additionally, spectators, through sympathy, approve the rowers' disposition to observe the rules of coordination and condemn failures to do so. The rowers, too, come to appreciate and internalize that approval and disapproval. In the

same way as the beneficial rowing convention is, so justice is the unintended consequence of individual actions.[8]

Both the need for and the content of the rules of justice are, for Hume, circumstances-dependent. The most important circumstances that are determinative are moderate scarcity and limited altruism. Where things are superabundant (such as air), there is no need for exclusive property rights, nor for rules of justice protecting them. Equally, in times of extreme scarcity – as in a siege – the rules of justice are suspended. The rules are therefore peculiar to each society. The essay by Andrew Lister (Chapter 6) explores Hume's conception of the need for and purpose of justice, in the light of the claim that John Rawls too took this as his starting point, but produced a subsequent theory of justice quite different from Hume's.

Justice – Obligation

> Nay when the injustice is so distant from us, as no way to affect our interest, it still displeases us; because we consider it as prejudicial to human society, and pernicious to every one that approaches the person guilty of it. We partake of their uneasiness by sympathy; and as every thing, which gives uneasiness in human actions, upon the general survey, is call'd Vice, and whatever produces satisfaction, in the same manner, is denominated Virtue; this is the reason why the sense of moral good and evil follows upon justice and injustice. And tho' this sense, in the present case, be deriv'd only from contemplating the actions of others, yet we fail not to extend it even to our own actions. The general rule reaches beyond those instances, from which it arose; while at the same time we naturally sympathize with others in the sentiments they entertain of us. Thus self-interest is the original motive to the establishment of justice: but a sympathy with public interest is the source of the moral approbation, which attends that virtue. (*Treatise*, III.ii.II, p. 499)

Because Hume's concept of justice is a juridical (or legalistic) one, the obligation to be just is equivalent to the obligation to obey the law. In Chapter 7, from the perspective of the jurist, Luigi Bagolini returns to the middle ground that Hume takes between the natural lawyers who explain legal obligation in terms of moral obligation and a positivist 'sanction theory' of law. Certainly, Hume is closer to the positivists on the point that moral and legal obligation are separate. The reason for respecting and following the rules of justice is not a desire to do good, but equally, it is not a fear of sanction or force; nor because of any agreement to obey the lawmaker; nor because the specific act produces the greatest utility. And, in the example given, it is not in the immediate interest of the pauper to return goods to the rich man. The overall benefit of having conventional rules and following them emerges as the likely driver. A problem for Hume – one where he seems to change his mind between the *Treatise* and the *Enquiry* – is to explain the basis of that obligation.

One of the most significant insights in Hume's moral psychology is that, while the original motive upon which justice was founded was self-interest, that is not sufficient for its maintenance. In the *Treatise*, that task was undertaken chiefly by sympathy, whereby we experience vicariously the benefits that others have at being the objects of just actions, as well as the positive sentiments we feel when we benefit. Thus we approve just actions and motives

[8] Haakonssen comments: 'To see justice in this way, as the unintended consequence of individual human actions, must be one of the boldest moves in the history of the philosophy of law' (1981, p. 20).

even when we do not directly benefit. In the *Enquiry*, however, the task falls to utility: we approve justice because of its overall usefulness. Both sympathy and utility can be reinforced by desire for approval and by a sense of duty.

But is that enough? Hume himself had doubts that he had found adequate and coherent grounds for the obligation to do justice, sufficient to persuade everyone. In Chapters 8 and 9 respectively, Gerald Postema and Jason Baldwin take up the problem of what Hume identified as the 'sensible knave' who decides to go along with the conventional obligation of law only when it suits him (known nowadays as the 'free rider'). The difficulty for Hume is, having asserted that it is in one's long-term or the collective interest to obey the law (even when doing so goes against one's immediate interest), he seems to have no argument to persuade the sensible knave to forgo his short-term interest. Both articles go through a list of possible arguments that Hume might use to persuade the sensible knave to conform. While Postema ends up conceding that there is nothing that will work with the determined knave, Baldwin suggests that a desire for approval and conformity combined with the long-term inconvenience that the knave would experience would suffice in all but the most extreme case (when nothing would be likely to be effective anyway).

Justice – Content and Scope

> We shall suppose, that a creature possessed of reason, but unacquainted with human nature, deliberates with himself what rules of justice or property would best promote public interest ... His most obvious thought would be, to assign the largest possession to the most extensive virtue, and give every one the power of doing good, proportioned to his inclination. In a perfect theocracy, where a being infinitely intelligent governs by particular volitions, this rule would certainly have place ... But were mankind to execute such a law, so great is the uncertainty of merit, both from its natural obscurity, and from the self conceit of each individual, that no determinate rule of conduct would ever result from it; and the total dissolution of society must be the immediate consequence. (*EPM*, III.ii, p. 192)

Hume insists that the content of the rules, although man-made, is not arbitrary: the rules have arisen through the particular circumstances of a particular society and there will have been good reasons for whatever current rules have emerged. But there is no necessary distributive principle underlying them. Nor should they be changed to comply with a distributive principle: an attempt to redistribute would be a breach of justice. Such a refusal to endorse a particular distributive principle may be unusual in a moral philosopher, but it is worth noting that the stance that the rules should be upheld regardless of their moral content is familiar – and frequently praised when adopted by formal-style judges.

Hume does consider, but rejects as impracticable, possible distributive principles: deserts, needs, and equality. All would need constant adjustment and the beneficial certainty of inflexible rule-following would be lost if they were adopted. In Chapter 10, Russell Hardin explores, and finds merit in, Hume's argument for non-redistribution when considered alongside the theories of justice of Hobbes and Rawls. On the other hand, Alistair Macleod argues in Chapter 11 that Hume was wrong to hold that progressive changes could not be made to existing property rules without undermining the utility of property as a social institution.

While Hume's rejection of a distributive element in his account of justice is explicable, a second limitation in his account is more puzzling. Having taken as a starting point for his analysis of justice the respecting of property rules, Hume failed to extend it (except in the cases of promises and chastity) to other situations requiring just action. On balance, it seems that there is no inherent reason for not extending the concept, once established, beyond property rules. Indeed, later, in the *History*, Hume does consider the need to develop rules of justice to regulate and protect liberty.

Arthur Kuflik's essay (Chapter 12) looks at Hume's reasons for limiting those who can be the subjects or objects of just acts and finds that it is not so much that they have to all be approximately equal to be included, as has been suggested by some commentators. Rather, only those who are capable of a 'sense of justice' – as opposed to appreciating the simpler virtue of benevolence or kindness – can come within its scope.

Property

> 'Tis evident property does not consist in any of the sensible qualities of the object. For these may continue invariably the same, while the property changes. Property, therefore, must consist in some relation of the object. But 'tis not in its relation with regard to other external and inanimate objects. For these may also continue invariably the same, while the property changes. This quality, therefore, consists in the relations of objects to intelligent and rational beings. But 'tis not the external and corporeal relation, which forms the essence of property. For that relation may be the same betwixt inanimate objects, or with regard to brute creatures; tho' in those cases it forms no property. 'Tis, therefore, in some internal relation, that the property consists; that is, in some influence, which the external relations of the object have on the mind and actions. (*Treatise*, III. ii.VI, p. 527)

As has been explained, closely bound up with justice, in Hume's mind, is property. Entitlement to property is neither governed by natural laws or natural rights, nor is it in the gift of a human legislator. Equally significant is that, because it pre-dates the creation of government, property is not merely the product of positive law. The circumstances in which mankind finds itself – especially the combination of human greed and relative material scarcity – lead necessarily to a particular form of ownership, namely private property. George Panichas examines this argument in Chapter 13, but is unconvinced that it is only private property that could adequately regulate avidity in respect of scarce resources, suggesting that a trusteeship system might satisfy the conditions.

Recognizing that there is nothing inherent in an object that makes it the property of one person rather than another, Hume sees the importance of the association in the mind between the object and its owner. Such acts of the imagination (and not rules dictated by Nature) serve as the basis of the traditional principles of property: occupation, prescription, accession, and succession. Thus, for example, when a farmer has cultivated a strip of land for a long time without challenge (and has acted as if it were his), we associate that land with him. A legal rule that gives him a prescriptive title to that land over time is consistent with that association in the mind. In looking at what is involved in having property in something, Christopher Berry

explores in Chapter 14 Hume's appreciation that it lies in an (often symbolic) association in the mind between a person and an object rather than in a physical attribute or act. The necessity for shared social conventions on property that is inherent in Hume's analysis distinguishes him clearly from the individualism of Locke's account of property.

A signal feature of Hume's theory of property is the lack of either an assumed initial distribution or a prescribed set of substantive rules. This moral minimalism appeals to Jeremy Waldron as being well suited to the needs of the market economy. In Chapter 17, he discusses the implications of Hume's theory in light of current analyses of the market.

Promises and Contracts

> That the rule of morality, which enjoins the performance of promises, is not natural, will sufficiently appear from these two propositions, which I proceed to prove, viz. that a promise wou'd not be intelligible, before human conventions had establish'd it; and that even if it were intelligible, it wou'd not be attended with any moral obligation. (*Treatise*, III.ii.V, p. 516)

Hume's treatment of promises and contracts develops out of his account of justice and property. As was the case with the following of property rules, Hume can find no natural motive to bind oneself to doing something which may turn out to be inconvenient or painful. The reason that promises should be kept is not because of a command of God, nor that there is a self-evident a priori duty to do so, nor because legislation commanded it. But that is not to deny that promises and contracts are binding. As Elizabeth Anscombe points out in her characteristically enigmatic essay (Chapter 16), Hume is confronted with the circular proposition that promises are binding because they are. Hume's explanation is that a social institution of promise-keeping has evolved, and complying with that institution receives moral approval.

But Annette Baier argues in Chapter 17 that promise-keeping is more problematic than the conventions about property. Promises and contracts inevitably involve others (who are often strangers) and require positive action by the other. Furthermore, because a promise relates to the future, the advantages of compliance – or future cooperation – are less immediately obvious. To use one of Hume's examples, only after both I and my neighbour lose our harvests – having refused to assist each other to bring them in, lest the other not reciprocate – do we see the inconvenience of not being able to rely on future exchanges (of services as much as of goods).

Without the appreciation of the disadvantages of non-compliance, individuals will have no motivation to enter into contracts or to fulfil them. Hume's remedy is the creation of a social institution of promise-keeping, reinforced by sanctions, which, Baier points out, is very quickly formalized in law.[9]

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[9] Following Atiyah's account of English contract law, Baier assumes that bare promises are not legally enforceable. But Hume is more aligned with the law than Baier believes, since, in Scots Law, bare promises are enforceable.