

## Legal Ontology and the Problem of Normativity

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Applied ontology is the attempt to put to use the rigorous tools of philosophical ontology in the development of category systems which can be of use in the formalization and systematization of knowledge of a given domain. In what follows we shall sketch some elements of the ontology of legal and socio-political institutions, paying attention especially to the *normativity* involved in such institutions. We shall see that there is more than one type of normativity, but that this fact that has often been ignored in standard attempts by philosophers to build ontologies of legal and other socio-political entities. In order to provide a sound system of categories for legal and socio-political institutions and entities, however, the manifold of normativity needs to be addressed.

The classical examples of normative statements have been moral propositions; they do not merely describe states of affairs; they tell us how states of affairs ought to be. The distinction between how things are and how they ought to be is the basis of the distinction between fact and value. Analytic philosophers for a long time shunned discussions of normativity and ethics. They considered ethical statements as pseudo-propositions, or as expressions of pro- or con-attitudes of no theoretical significance.<sup>1</sup> Nowadays, in contrast, prominent analytic philosophers discuss normative problems and there are important books written by such philosophers on topics such as law and justice. Here we pay attention to three seminal thinkers in this development: H. L. A. Hart, John Rawls, and John R. Searle in concerning ourselves especially with the way in which they deal with the issue of normativity. Hart is, within the context of recent analytic philosophy, the most important philosopher of law, Rawls the most

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<sup>1</sup> See, A. J. Ayer, *Language, Truth and Logic*; Ludwig Wittgenstein, *Discourse on Ethics*; and, in general the work of the non-cognitivists, R. M. Hare and C. I. Stevenson

important political philosopher, and Searle the most important philosopher of social reality. All three of these authors, for all their sophistication, assume that there is but one type of normativity within the realm of social institutions. In so doing, we shall argue, they neglect features of such institutions which are of crucial significance for the success of applied ontology in this domain.

### **I. Hart and Soft Positivism**

We must ask, first of all, how the normativity of the *law* is related to *ethical* or *moral* normativity. This is an issue upon which natural law theorists and legal positivists adopt opposing views. Natural law theorists affirm that immoral law is not law; that is, they affirm that the ontological status of laws is determined by their relation to morality, in accordance with the motto: “*Non videtur esse lex quae iusta non fuerit*”. Legal positivists, on the other hand, insist that law is law independently of whether or not it is moral. According to the classical legal positivism of John Austin (1790-1859), the issue of the legal status of law is an entirely empirical affair, to be established primarily through the determination of pedigree and enforceability. Was the entity or institution created, and is it maintained in existence, in accordance with the appropriate sorts of rules? Is the entity such that the state can coerce people into complying with it? According to Austin, we are to understand the nature of a legal system by starting out from the case of someone forcing someone else at gunpoint to hand over his wallet. The normativity of the law differs from the normativity of the gunman only in this: that the law normally functions on the basis of threats alone; only in extreme circumstances is it necessary to bring guns into play.

While it might be possible to construct a rudimentary formalization of the ontology of the legal domain on the basis of the traditional positivist picture of law, we believe that any adequate ontology of law must go far beyond Austin in this respect, and to this end we must turn first to Hart’s

*The Concept of Law*,<sup>2</sup> which contains a sustained attack on traditional legal positivism. Hart himself still defends a positivistic conception of the ontological status of the law. But he rejects traditional positivism, above all because of its superficial treatment of rules. The rules the gunman imposes upon his victim are all of the same type, being of the form “Hand over your wallet”. The law, however, operates on the basis of two types of rules, which Hart calls primary and secondary. The former are duty-imposing; they demand conduct in just the way in which the gunman’s actions do so. The latter are power-conferring; they make certain sorts of situations possible – they are rules about rules.

A rule that states that a judge is entitled to decide how to interpret a primary rule is a secondary rule; it gives the judge the power to settle disputes by establishing what is the *correct* interpretation of a law. It is possible, perhaps, to imagine an entire society in which there existed only primary rules. But such a society would be profoundly inept when it comes to resolving controversies about the laws themselves or about their interpretation. Traditional positivism, Hart argues, is unable to distinguish between two crucially distinct phenomena: (1) being *de facto* obliged and (2) having a genuine, *de jure* normative obligation. If a gunman puts a gun to your head, you might indeed be, as a matter of empirical fact, obliged to hand over the money. For you to have a genuine *de jure* obligation, in contrast, it is necessary that you accept not only the empirical fact of your being obliged but also the rightness of the *system of laws* (even if you disagree with some specific laws) which makes this so.<sup>3</sup> You accept that to do this or that is your *duty*; that it is *the right thing to do*. This notion finds no purchase in the realm of actions performed in response to gunmen’s threats. By way of explaining this acceptance, Hart asks us to imagine

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<sup>2</sup> H. L. A. Hart, *The concept of Law*, Oxford: Oxford University Press, 2<sup>nd</sup> edition (1997).

<sup>3</sup> For more on Hart’s endorsement of psychologism, see Hart, *The Concept of Law*, *op. cit.*, 89 ff.

someone describing the functioning of a street light in the following way: when the street light becomes red in the direction of the cars, the likelihood that cars will stop is very high, and the likelihood that pedestrians will cross the street is very high; when the street light becomes green in the direction of the cars, the likelihood that cars will move forward and pedestrians will stay put increases. Such a description, Hart points out, fails to mention a fundamental element of what is really going on. The red light is not merely a *sign* that allows us to *predict* that drivers and pedestrians will behave in this or that way; rather it is a *reason* which *explains* this or that behavior. The red light does not simply indicate *that* I stop, but that I *ought* to stop. This notion of a *reason* is not available to traditional legal positivism.

Since Hart is himself a positivist, it might look as if his introducing normative elements into his determination of the ontological status of the law concedes too much to natural law theory. Whether a given entity is or is not law depends after all, for Hart as for natural law theorists, on normative factors. Hart himself however insists that he has carved out an intermediate theoretical space between natural law and traditional positivism, which he calls “soft positivism”.<sup>4</sup>

Hart’s strategy is in effect to distinguish between two types of normativity. On the one hand is the robust normativity of the natural law theorist, illustrated for example, by the Ten Commandments. On the other hand is Hart’s own brand of normativity – what we might call soft normativity – which is alone, he claims, what is necessary for the existence of laws. Soft normativity is, in Hart’s eyes, fundamentally a matter of logic; it is normativity that flows logically from the very nature and content of secondary rules. Secondary rules, are rules which *create institutions*, and these institutions in turn create the very possibility of certain sorts of acts.

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<sup>4</sup> H. L. A. Hart, *op. cit.*, 250 ff.

As is characteristic of analytic philosophers of his generation, Hart appeals to the example of games in order to illustrate this point. But there is a problem with this approach. For the sense of ‘ought’ is radically different from the sense in which, for example, you ought to treat other human beings with respect, or you ought not to gratuitously harm others. Any ontology of legal institutions that does not do justice to the type of normativity captured by the latter sense of ‘ought’ is incomplete.

A group of people can play football without requiring the presence of a referee of any sort. The absence of a referee may of course give rise to messy disputes, and if someone is appointed as referee, then he will have the last word in resolving the disputes which arise; but his appointment and his exercising this activity is possible only insofar as the players accept the secondary rules that make the refereeing institution possible. That the referee has the last word is part of the content of the corresponding secondary rule, and it is this same rule which gives rise to the normative component in the referee’s decisions. When a referee declares “penalty kick”, for example, he is not merely providing an indication of what is likely to happen next, any more than a traffic light is providing an indication of likely traffic flows. Rather, his declaration is the very reason which *explains* what happens next, because it explains what *ought* to be done.

## II. Rawls and Rule-Utilitarianism

In 1955 John Rawls published “Two Concepts of Rules”,<sup>5</sup> which consists in an attempt to defend utilitarianism against certain traditional objections related to the alleged incapacity of utilitarians to deal with the institutions of the promise and of punishment, and with the fact that, as is commonly supposed, utilitarians must perforce allow, on felicific grounds, the occasional breaking of promises and the punishment of innocents.

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<sup>5</sup> John Rawls, “Two Concepts of Rules” in *John Rawls: Collected Papers*, Samuel Freeman (ed.) Cambridge, MA: Harvard University Press, 1999, 20-46.

Rawls' defense of utilitarianism, which has become a commonplace in philosophical circles, goes roughly as follows: utilitarianism should not be seen as a theory that seeks to maximize general welfare in every instance. Rather, it is a theory that seeks to devise general rules of behavior of a sort that would *tend* to maximize general welfare. The idea is that, once such rules have been established, then they must be followed, even if violating the rules on this or that occasion would yield a net increase in general welfare.

In this way Rawls draws the nowadays familiar distinction between act- and rule-utilitarianism, and this constitutes the first half of his article. It is however the somewhat neglected second half which is important for our purposes. Here Rawls points to a certain ambiguity regarding the notion of a rule, as between what he calls summary rules and practice rules. A summary rule is simply a guide for action, formulated on the basis of experience. For example, if upon incurring debts on different credit cards in the past one has established that the best course of action has been to consolidate the debt, one might decide after running different credit card debts now that it is best to do the same. Summary rules are inductive. The decisions based thereon are logically prior to the rules themselves

Rawls' practice rules, in contrast, are not inductive; they are not the result of such recollection of past events, and they are logically prior to the cases in which they are applied. An example of practice rule would be the rules involved in games like poker; the rules precede the game, what counts as a 'fold' in poker is not the result of looking back at what things have counted as 'folds' in past baseball games and then concluding, well, this must also count as a 'fold'. Practice rules give rise to the very possibility that the cases in which they are applied can indeed occur at all. Thus they are not mere generalizations from past behavior. Practice rules define the very behavior which they at the same time permit. In chess, bishops move diagonally; whether or not to move your bishop diagonally can never

represent a genuine dilemma within the context of playing chess. If someone were to insist on moving his bishop non-diagonally, then he would *eo ipso* no longer be playing chess.

According to Rawls the rules of rule-utilitarianism are precisely practice rules. They are rules which define the very institutions they regulate. The normativity of rule utilitarianism, as Rawls conceives it, is thus the *logical* normativity of the system of propositions which describe institutions that rule-utilitarianism itself creates, institutions such as promising and state-punishment. The state, for example, does not really have the option of whether or not to punish an innocent person; for punishing the innocent is logically forbidden by the very practice rule which sets up the institution of punishment itself.<sup>6</sup> Deciding to punish an innocent person is analogous to deciding to move a bishop non-diagonally in chess. As Rawls would have it: “To engage in a practice, to perform those actions specified by a practice, *means* to follow the appropriate rules”.<sup>7</sup>

The main difference between act- and rule-utilitarianism, on Rawls’ account is that the latter is a *logical theory*. As Rawls himself puts it: “The point I have been making is rather a logical point”, and then he continues: “where a form of action is specified by a practice there is no justification possible of the particular action of a particular person save by reference to the practice”.<sup>8</sup> Utilitarianism in the hands of Bentham and Mill is a moral theory concerned with the same substantial normative issues as are addressed by natural law theorists. Rawls transforms it into a logical doctrine. Whereas in “Two Concepts of Rules” Rawls seeks to defend utilitarianism, in *A Theory of Justice* and other later works he seeks to develop a neo-Kantian theory that is opposed to utilitarianism. Yet there is nonetheless a certain connecting thread between the two works, which is the

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<sup>6</sup> See Leo Zaibert “Punishment, Justifications and Institutions” *Studies in Law Politics and Society*, Fall 2003, forthcoming.

<sup>7</sup> John Rawls, *op. cit.*, 37, emphasis added.

<sup>8</sup> John Rawls, *op. cit.*, 42.

importance Rawls gives to the logical structure of institutions. Rawls (like Hart) makes questions like: “Why should we keep promises?” or “Why should we endorse a social order based on these or those principles?” of a piece with the question “Why should we play the game of chess rather than some other, slightly different game?”<sup>9</sup>

### III. Searle and the Ontology of Obligations

In one of his earliest articles, “How to Derive ‘Ought’ From ‘Is’”,<sup>10</sup> Searle claims that he has found a way of showing that from purely descriptive premises we can derive normative conclusions. In other words, he has shown how to bridge the gap between “is” and “ought”, between matters of fact and judgments of value. In the presentation of this argument in *Speech Acts*, Searle states his thesis as follows:

the view that descriptive statements cannot entail evaluative statements, though relevant to ethics, is not a specifically ethical theory; it is a general theory about the illocutionary force of utterances of which ethical utterances are only a special case.<sup>11</sup>

The traditional problem of deriving normative statements from descriptive statements he thus sees as a particular case of a putatively more general problem in speech act theory. It is then this latter problem, of the normativity associated with speech acts, which Searle sets out to solve – not, as many authors have assumed, the traditional problem of moral normativity.

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<sup>9</sup> Christine Korsgaard, as she delivered the prestigious Locke Lectures at Oxford University in 2002, follows this very sort of strategy; see, e.g. the unpublished manuscript of her lectures available at:

<http://www.people.fas.harvard.edu/~korsgaard/#Locke%20Lectures>.

<sup>10</sup> John R. Searle, “How to Derive ‘Ought’ from ‘Is’”, *Philosophical Review* 73 (1964): 43-58.

<sup>11</sup> John R. Searle, *Speech Acts*, *op. cit.*, 132.



Searle himself is emphatic that whatever relevance his views might have regarding moral normativity would be a mere side effect of his concern with a logical problem about the illocutionary force of certain utterances. “We are concerned” he says “with ‘ought’ not ‘morally ought’”<sup>12</sup> and then we need to “remind ourselves at the outset that ‘ought’ is a humble English auxiliary, ‘is’ an English copula; and the question whether ‘ought’ can be derived from ‘is’ is as humble as the words themselves”.<sup>13</sup> The humble sense of ‘ought’ with which Searle is concerned is the same sense as that in which, when playing chess, you ought to move your bishop diagonally. But this sense of ‘ought’, interesting as it might be, is at best of indirect significance for the question of the normativity of social institutions.

Searle’s derivation of an ‘ought’ from an ‘is’ in fact merely tells us something about the *meaning* of the word ‘promise’. Promising *means* undertaking an obligation, and undertaking an obligation *means* that one ought to do whatever one has obliged oneself to do. But this sense of obligation has little to do with morality. As Searle admits, “whether the entire institution of promising is good or evil, and whether the obligations undertaken in promising are overridden by other outside considerations are questions which are external to the institution itself”.<sup>14</sup> Yet these external considerations are very often precisely *moral* considerations.

The problem with Searle’s treatment of the naturalistic fallacy is brought out nicely by D. D. Raphael writing on the justification of political obligations. Why does the citizen have a duty to obey the laws of the State? Raphael points out that there is an answer to this question which is “simple and obvious”: “It follows logically that *if the State is authoritative*, i.e. has the right to issue orders to its citizens and the right to receive obedience

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<sup>12</sup> John R. Searle, *Speech Acts, op. cit.*, 176.

<sup>13</sup> John R. Searle, *Speech Acts, op. cit.*, 176.

<sup>14</sup> John R. Searle, *Speech Acts, op. cit.*, 189.

from them, the citizens are obliged to obey those orders”.<sup>15</sup> Raphael rubs home the downright platitudinous character of this sort of answer: “the citizen is legally obliged to obey the law because the law *is* that which imposes legal obligations”.<sup>16</sup> And then he compares this sort of answer with the passage in which Hamlet is asked by Polonius “What do you read my lord?” and Hamlet replies, “Words, words, words”. Though both answers are “formally correct”, as Raphael puts it, they tell us “virtually nothing”.<sup>17</sup> Something similar happens with Searle’s derivation of ‘ought’ from ‘is’. The very meaning of promising is that one ought to do what one has promised to do.

Toward the end of his derivation of ‘ought’ from ‘is’, Searle asks “what bearing does all this have on moral philosophy?” His answer deserves to be quoted in full, with emphasis added:

At least this much: It is often claimed that no ethical statement can ever follow from a set of statements of fact. The reason for this, it is alleged, is that ethical statements are a sub-class of evaluative statements, and no evaluative statements can ever follow from a set of statements of fact. The naturalistic fallacy as applied to ethics is just a special case of the general naturalistic fallacy. I have argued that the general claim that one cannot derive evaluative from descriptive statements is false. *I have not argued, or even considered, that specifically ethical or moral statements cannot be derived from statements of fact.*<sup>18</sup>

Clever as Searle’s gambit is, it nonetheless misrepresents the case that has traditionally been made by those who believe that there is an is/ought gap.

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<sup>15</sup> D. D. Raphael, *Problems of Political Philosophy*, 2<sup>nd</sup> edition, (Atlantic Highlands: Humanities Press, 1990), 175, emphasis added.

<sup>16</sup> D. D. Raphael, *Political Philosophy*, *op. cit.*, 175.

<sup>17</sup> D. D. Raphael, *Political Philosophy*, *op. cit.*, 175.

<sup>18</sup> John R. Searle, *Speech Acts*, *op. cit.*, 187.

Classical moral philosophers have not subsumed the ethical problem under the general speech act problem in order then to show that, since there is a gap concerning that general problem, the gap must extend to the particular ethical version of the problem. It has been enough to point out that there is no way to bridge the gap in the particular case of morality. Searle is rather alone in his interest in the *general* naturalistic fallacy.

#### **IV. Searle and Social Ontology**

In his famous article Searle states that he is going to show that the venerable view to the effect that ‘ought’ cannot be derived from ‘is’ is flawed by presenting a counterexample to this view. He then says:

It is not of course to be supposed that a single counter-example can refute a philosophical thesis, but in the present instance if we can present a plausible counter-example and can in addition give some account or explanation of how and why it is a counter-example, and if we can further offer a theory to back up our counter-example – a theory which will generate an indefinite number of counter-examples – we may at least cast considerable light on the original thesis.<sup>19</sup>

The needed theory has been long in the making. *Speech Acts*, in which “How to Derive ‘Ought’ From ‘Is’” was reprinted with minor modifications, was indeed the first step; but it is only with the publication of his two most recent major works – *The Construction of Social Reality* (1995) and *Rationality in Action* (2001) – that we have Searle’s views on the ways in which speech acts contribute to the construction of social institutions. Indeed, Searle’s philosophy has gained in depth and in comprehensiveness with these recent works – but then for this very reason the neglect of

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<sup>19</sup> John R. Searle, “How to Derive ‘Ought’ From ‘Is’”, *op. cit.*, 43.

morality and, in general, of the issue of normativity within his total system is all the more striking.

The world Searle investigates in these two books includes “the world of Supreme Court decisions and of the collapse of communism”<sup>20</sup> it includes marriages, money, government and property rights, and discussions about altruism and egoism. And Searle expressly claims to be interested in the “basic ontology of social institutions” – of *all* social institutions. Yet still he avoids tackling head on the problem of the normativity of social institutions. In these recent works Searle has emphasized above all the importance of promising. Promises, he tells us are present in “all” or “virtually all” speech acts. Marriages, money, property rights and contracts all contain promises. And promises create obligations. But how?

Searle’s answer is elegant and complex, though, as in Hart and Rawls, it revolves around a distinction between two types of rules, which in terms coined by Searle already in *Speech Acts*, are called ‘regulative’ and ‘constitutive’. Regulative rules, regulate forms of behavior that exist independently and antecedently.<sup>21</sup> Constitutive rules – like Hart’s secondary rules and Rawls’ practice rules – create or define new forms of behavior.<sup>22</sup> Thus when someone violates a constitutive rule, he *eo ipso* places himself outside of the institution to which the form of behavior defined by the rule belongs. Violating a regulative rule, in contrast, may give the violator a reputation for bad manners or reckless driving, but does not *ipso facto* place him outside of any institutions.

#### **IV. The Scope of Rules**

In spite of the fact that Hart cares about legal institutions, that Rawls cares about political institutions, and that Searle cares about social institutions,

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<sup>20</sup> John R. Searle *The Construction of Social Reality*, New York: Free Press, 1995, 120.

<sup>21</sup> Searle, *Speech Acts*, *op. cit.*, 33.

<sup>22</sup> John R. Searle, *Speech Acts*, *op. cit.*, 34 ff.

they have all avoided addressing the challenge encapsulated in Raphael's charge of triviality – the challenge that their respective logical analyses tell us “virtually nothing” about the normativity that is interwoven in the fabric of institutions of these various types. For aside from the sorts of normative demands to which secondary rules, practice rules, and constitutive rules give rise, there exist in law, politics and society other types of demands which are not the result of rules of these sorts of rules. It is one thing to become obliged through an act of promising: it is a logical matter that if you make a promise then you become obliged. It is quite another thing to have an obligation to respect other human beings (in the absence of any promise to that effect).

There is of course nothing wrong with the division of labor, and there is no reason why philosophers working on, say, the philosophy of mind or logic, should be obliged to work on ethics (or on ontology) also. But we find it noteworthy that our authors, concerned as they are with social institutions, would systematically avoid all discussion of those forms of normativity that go beyond the merely logical forms of normativity found in games encapsulated in what we have called here soft normativity. For it is clear that at least some social institutions manifest moral dimensions as part of their nature, dimensions having to do with obligations of this second sort:

(1) You ought not to appeal to legal loopholes and technicalities in order to achieve personal advantages.

(2) The principle of sovereignty can be overridden by considerations having to do with basic human rights.

(3) Legal procedures can be discretionally changed by judges when these procedures impose severe burdens on people.

(4) Equity trumps formal justice.

You have an obligation not to kill or rape innocent people independently of any agreements you might have entered into, and independently of any of the constitutive rules of any institution or game. We can morally criticize

Nazi institutions whether or not their status as law is ultimately granted; promises do not obligate if what is promised is itself immoral. We can condemn someone for insisting that obligations be fulfilled under certain circumstances, for example when someone insists on killing his neighbor because he has promised to do so, even while accepting that these obligations truly do exist.

To sort these matters it will never be enough to trace merely the logical paths between speech acts, institutions and consequent obligations. What we need is an ontology in which speech acts, institutions and obligations are acknowledged as existing in some sense in their own right and as situated in specific ways in relation to each other and to their surroundings. 'In their own right' means that though these obligations are indeed associated with institutions, they do not depend for their existence on those institutions and they cannot be analyzed away as the mere logical consequences of certain associated constitutive rules. Focusing on the logical analysis of a given domain can certainly bring illumination, but those normative factors which pertain to the wider context of legal and social and political institutions should also be taken into account.

The suspicion with which our authors approach robust ethical and ontological discussions paves the way for their concern with the logical structure of conventional institutions and with their underlying generators: speech acts. Ever since the heyday of Oxford ordinary language philosophy, and in particular since Austin's *How to Do Things with Words*, philosophizing about speech acts has enjoyed a certain prestige amongst analytic philosophers. The philosophical discussion of intentionality, in contrast, was for a long time met with skepticism, though Searle has done much to correct this state of affairs, with his book *Intentionality*.

The wider importance of the discussion of intentionality for Searle is sometimes difficult to see, however, in part because Searle wrote *Speech Acts* in 1969, and *Intentionality* in 1983, and because many crucial aspects

of intentionality are explained in terms of speech act theory in a way which and this might suggest that speech acts are more fundamental than intentional states. But it is in fact exactly the other way around: the discussion of intentionality is more fundamental than the discussion of speech acts. In appealing to speech acts to explain intentionality, Searle is merely availing himself of the fact that speech act terminology was, by the time he wrote *Intentionality*, already part of familiar philosophical vocabulary. At the outset of *Intentionality*, however, he makes clear that, as matters stand ontologically, the priority is reversed.

The capacity of speech acts to represent objects and states of affairs in the world is an extension of the more biologically fundamental capacities of the mind (or brain) to relate the organism to the world by way of such mental states as belief and desire, and especially through action and perception.<sup>23</sup>

The realm of intentional phenomena is marked, however, not only by the fact that it is biologically more fundamental than the realm of language, but also by the fact that it manifests normative features independent of and prior to the logical normativity of constitutive rules. We fully agree with Searle's assumption regarding the priority, biological and otherwise, of intentional states over speech acts, though we wish he had done more to exploit his own insight as to the priority of the intentional in his recent work on social ontology. We wish, too, that he had found a way to do justice to the fact that that there are normative and evaluative capacities of the mind (or brain) which are not reducible logically to examples of normativity which he discusses but which are no less fundamentals than these examples. Searle stresses in this work the singular importance of the speech act of promising: "virtually all speech acts" he tells us, "have an element of promising".<sup>24</sup> The focus on promising allows Searle to buck a venerable tradition in the history

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<sup>23</sup> John R. Searle, *Intentionality*, *op. cit.*, vii.

<sup>24</sup> John R. Searle, *Rationality in Action*, *op. cit.*, 181.

of philosophy according to which the realm of normativity is seen as being significantly different from and as being divorced from the realm of what happens and is the case. Rather, it allows him to uphold the claim that “normativity is pretty much everywhere”.<sup>25</sup> While it is hard to see where in the speech act of asking, say, *What time is it?* the element of promising is to be found, still many, perhaps most, speech acts do include the element of promising. The reason why asserting, requesting, ordering, etc., are all forms of committing ourselves is because all these speech acts contain elements of promising.

If you say ‘It is raining’, if you really mean it, you are thereby committed not to say that ‘It is not raining’, and you are committed to not say, you *ought* not say, things which are inconsistent with the assertion. Searle is explicit about this: “For a long time philosophers tried to treat promises as a kind of assertion. It would be more accurate to think of assertions as a kind of promise that something is the case”.<sup>26</sup> The same would be true with requests: if you request that, say I give you something, you are committed, you *ought*, to allow me to give you that something. And for commands, if you command me to do something, you are committed, you *ought*, to allow me to obey your command

### **Conclusion: Tasks for an Ontology of Normativity**

Speech act theory has provided us with an important clue as to the correct treatment of one specific kind of normativity – the logically-derived normativity that is closely associated with, if not identical to, the normativity involved in games like chess or poker. This type of normativity pervades the world of social and legal and political institutions. But it is not the only type of normativity with which the ontology of legal, political and

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<sup>25</sup> John R. Searle, *Rationality, op. cit.*, 182.

<sup>26</sup> John R. Searle, *Rationality, op. cit.*, 181.



other social institutions needs to deal. Other types of normativity are illustrated for example by:

- (1) Thou shall not kill
- (2) We ought to respect our parents.
- (3) Murder is wrong (whether or not a legal system admits it).
- (4) Some laws are grounded in moral obligations.
- (5) You ought not promise what is morally wrong.
- (6) Lawmakers ought not to pass laws which conflict with moral obligations.
- (7) To do harm intentionally is more blameworthy than to do harm unintentionally.
- (8) To do the right thing intentionally is more praiseworthy than to do thing by accident.
- (9) To believe that someone did something blameworthy, is to believe that he ought not to have done it.
- (10) When you believe that you have done something that harms another, you believe that you ought to apologize for it.

The constitutive rules characteristic of logically derived normativity do indeed give rise to claims which exhibit some sort of normative force, but they are not the end of the story. And ontologies of social reality must find ways to account for this fact. We believe that an ontology of social reality must deal then with at least three sorts of normativity. First is the normativity which flows from constitutive rules, the normativity upon which Hart, Rawls, and Searle have focused. Second is the normativity exemplified by (1) – (6), that is, the normativity which is in no obvious way connected with logic, and which has been the focus of traditional natural law theories. Finally there is the normativity exemplified by (7) – (10) which although in some respects analogous to logically-grounded normativity, it is related to the immanent logical structures of mental phenomena and not to conventional games and institutions.

To develop a sound ontology of legal and socio-political institutions would demand a thorough discussion of moral realism, i.e., the view (1) that there are moral facts (something with which our authors might agree), and (2) that these are independent of human conventions (something about which our authors have pointedly avoided pronouncement, though something which they have tacitly denied). A sound ontology of legal and socio-political institutions needs to take into account examples like the ones just presented, and the different sorts of normativity to which they give rise. It might, in the final analysis, turn out that moral realism is actually false, that is, that examples like (1) – (3) listed above are either not true, or true in virtue of our agreements, but this should be shown, not simply assumed *ab initio*. Still, examples like (4) – (6) seem to be necessarily true; they share with examples of normativity which derives from constitutive rules a certain invulnerability to scepticism, but insofar as they refer to unchangeable mental states, they are not as trivial as games.

The development of this sound ontology might also demand a discussion of the sorts of normativity that flow from the logical structures of phenomena which are not themselves conventional, such as that which flows from our intentional states. The normativity that would follow from logic in such cases would surely not be as trivial as the normativity associated with games and other purely conventional phenomena. These are, of course, difficult tasks in their own right, even before we try to apply them to the development of ontologies. But tasks like these should not be ignored simply because they are difficult. While we have not presented here any systematic framework for the treatment of the variegated forms of normativity that undoubtedly exist in the realm of legal and socio-political institutions, we believe that diagnosing the problem is itself of value, and that such diagnosis might help promote much needed work in this field.