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Moral Judgments as Descriptions of Institutional Facts

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Abstract: It deals with the question of what a moral judgment is. On the one hand, a satisfactory theory of moral judgments must take into account the descriptive character of moral judgments and the realistic language of morals. On the other hand, it must also meet the non-descriptive character of moral judgments that consists in the recommending or condemning element and in the fact that normative statements are derived from moral judgments. However, cognitivism and emotivism or "normativism" are contradictory theories: If moral judgments are descriptive, it is not possible to deduce norms from them. But if one can deduce norms from moral judgments, they are not descriptive. As a solution to this problem, the paper suggests that moral judgments represent institutional facts; the corresponding theory is moral institutionalism. A moral institutional fact – "an act X is Y", Y" means "morally right" or "morally false" – is a hybrid of descriptive and prescriptive elements: It is stating a fact in descriptive language ("is") and at the same time, it is short for the prescriptive constitutive rule "X is Y according to the moral rules of the language community C". Institutional facts contain normative presuppositions without letting them appear in their grammatical form. Institutional facts are now (in relation to the language community C) objective and intersubjective and they can be generalized (cognitive aspect), although they cannot be reduced to brute physical or psychological facts, and it is also possible to deduce norms from them because they are built into them. The meta-ethical concept of moral institutionalism, which is evolved further in the paper, preserves the best intentions of emotivism and cognitivism without leading to contradiction. As a by-product, the article shows exactly the error in J. R. Searle's alleged counterexample against the so-called naturalistic fallacy from "is" to "ought". This lies in the normative "are" of the analytic premise or definition in "2a. All promises are [that is ought to be] acts of placing oneself under (undertaking) an obligation to do the thing promised". In "Key concepts in philosophy", institutionalism is explained further (p.184-191) and confined to what Hegel has called "Sittlichkeit" that is customary morality in in distinction to the "morality" of my personal consciousness (p.212-213): http://www.zora.uzh.ch/102314/

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Moral Judgments as Descriptions of Institutional Facts

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1. A Contradiction

Against each of the two classical theories of Cognitivism and Emotivism there are well known objections. Emotivism is hardly able to explain why our moral speech performs not only emotive and directive acts, but also descriptive ones whose content can be genuinely contradictory. Cognitivism on the other hand does indeed take into account the descriptive character of moral judgments, but can barely explain what kind of facts they describe. Since from these descriptive speech acts normative ones also can be derived, these moral facts can be neither "natural" nor "metaphysical" ones. Presupposing "Hume's Law", norms can be derived neither from "natural" nor from "metaphysical" facts. Nevertheless classical Emotivism and Cognitivism, no matter how problematic they may be, express two minimal requirements which can be claimed for every satisfactory theory of moral judgments: (a) Such a theory must take into account the descriptive character of moral judgments and the realistic language of morals. (b) At the same time it must also meet the non-descriptive character of moral judgments which consists in the recommending or condemning element and in the fact that normative statements are derived from moral judgments. The descriptive character appears in the fact that we are expressing ourselves on moral properties (X is morally good; or, in the case of acts, morally right) by means of indicative statements in the same way as on natural ones (X is white) and that we can attribute truth-values to moral judgments just as to factual assertions. But the non-descriptive character is revealed in the fact that moral judgments also serve to

recommend or to condemn something and to guide our actions so that normative statements can be derived from them. The psychologizing term "moral judgment" — contrary to e. g. "logical judgment" — appears not to be replaceable in colloquial language by "moral statement", presumedly because a moral judgment, contrary to a logical one, contains an irreducibly subjective or at least intersubjective — condemning or recommending — element. We shall not expressly argue here about these two requirements, but take them for granted.[1] However, both requirements seem to be mutually contradictory and incompatible. If moral judgments are descriptive, no norms can be derived from them. But if norms can be derived from moral judgments, they are not descriptive. To solve this contradiction, we shall introduce hereafter the new thesis that moral judgments describe institutional facts. So this short paper makes the suggestion that an 'institutional fact' analysis of moral reasoning meets what is persuasive in Emotivism and Cognitivism while losing the above mentioned objections to them.

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[1] Paradigmatically we refer here to R. M. Hare, *The Language of Morals*, Clarendon Press, Oxford 1952, 171—172: "For all the words discussed in Parts II and III have it as their distinctive function either to commend or in some other way to guide choices or actions; and it is this essential feature which defies any analysis in purely factual terms. But to guide choices or actions, a moral judgment has to be such that if a person assents to it, he must assent to some imperative sentence derivable from it; in other words, if a person does not assent to some such imperative sentence, that is knock-down evidence that he does not assent to the moral judgement in an evaluative sense — though of course he may assent to it in some other sense (...)". But Hare writes *ibid.*, 179: "But a more important additional factor is that, partly because of their complete universality, moral principles have become so entrenched in our minds — in the ways already described — that they have acquired a quasi-factual character, and are indeed sometimes used nonevaluatively as statements of fact and nothing else, as we have seen". Cf. for a further development *Freedom and Reason*, Clarendon Press, Oxford 1963, 7—29, esp. 26—29, *Moral Thinking. Its Levels, Method and Point*, Clarendon Press, Oxford 1981, 65—86. The term "institutional facts" is not used in any of the three books. It is not mentioned either in the collection of essays of G. Sayre-McCord, *Essays on Moral Realism*, Cornell University Press, Ithaca/London 1988, which documents well the present state of research and contains a useful introduction into the problems. However it is advisable to consult as an antidote against Moral Realism and Cognitivism the comprehensive argumentation against Cognitivism of R. W. Trapp, *Nicht-klassischer Utilitarismus. Eine Theorie der Gerechtigkeit*, Vittorio Klostermann Verlag, Frankfurt a. M., 54—207, as well as R. C. Coburn, *A Defense of Ethical Noncognitivism* in *Philosophical Studies*, 62, 1991, 67—80, both without any reference to "institutional facts". However one can find an anticipation without further elaboration in H. Kliemt, Moralische Institutionen, Freiburg/München 1985, 17: "Although among the British moralists and the discussion following them downright objectivistic positions were represented, the assessment of their theories of social institutions nevertheless suggests the conclusion that moral phenomena can be understood as purely institutional facts".

2. Institutional Facts

The term "institutional fact" was anticipated by G. E. Anscombe in *On Brute Facts* and introduced by J. R. Searle in his article *How to Derive "Ought" from "Is"* and in *Speech Acts*[2]. No matter how old and well-known the term institution may be in the field of law — think of Gaius' *Institutionum commentarii I.IV* — the *terminus technicus* mentioned has existed only since J. R. Searle's essay. The starting-point for his consideration is that we know facts which on the one hand are objective and not matters of opinion or sentiment or emotion at all, but which at the same time cannot be reduced to physical or psychological brute facts. Such facts are "Mr Smith married Miss Jones; the Dodgers beat the Giants three to two in eleven innings; Green was convicted of larceny; and Congress passed the Appropriation Bill"[3]. J. R. Searle calls them "institutional facts". With the "brute facts" they have in common that they are "indeed facts; but their existence, unlike the existence of brute facts, presupposes the existence of certain human institutions".[4] These "institutions" are "systems of constitutive rules": "Every institutional fact is underlain by a (system of) rule(s) of the form 'X counts as Y in context C'".[5] E. g. the fact that X is a stone would be a brute fact. But the fact that X is a boundary-stone constitutes an institutional fact, i. e. it arises only on grounds of constitutive rules of the form "X counts as a boundary-stone in context C", i. e. e. g. in the context of an agreement. Now one could easily object that there are no brute facts at all, but that also so-called "brute facts" arise on grounds of constitutive rule: Also the fact that X counts as a stone is valid only in the context of linguistic conventions which are indeed constituting not the physical properties of the stone here, but the fact that there is a stone here.[6] But even it this were right, such an elementary example nevertheless shows where there is a decisive difference between brute and institutional facts: Whereas from brute facts alone no norms can be derived, these can very well be derived from institutional ones. From the fact that X is a stone no norm can be derived. But from the fact that

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[2] G. E. Anscombe, *On Brute Facts* in *Analysis*, 18, 1958, repr. in *The Collected Philosophical Papers*, III, Oxford 1981, 22—25. J. R. Searle, *How to Derive "Ought" from "Is"* in *The Philosophical Review*, 1964, 43—58, revised and expanded in *Speech Acts. An Essay in the Philosophy of Language*, Cambridge et al., 1969, 50—53, 175—198.

[3] Searle, 1969, 51.

[4] Searle, 1969, 51.

[5] Searle, 1969, 51—52.

[6] Cf. on this question G. Patzig, *Satz und Tatsache* in *Argumentationen. Festschrift für J. König*, ed. by H. Delius/G. Patzig, Göttingen 1964, 170—191.

X is a boundary-stone can be derived the norm that e. g. X should not be displaced. J. R. Searle demonstrates this possibility to derive an "ought" from an "is" by means of the example of a promise:

"1. Jones uttered the words 'I hereby promise to pay you, Smith, five dollars'.
2. Jones promised to pay Smith five dollars.
3. Jones placed himself under (undertook) an obligation to pay Smith five dollars.
4. Jones is under an obligation to pay Smith five dollars.
5. Jones ought to pay Smith five dollars."[7]

But the passage from the fact of the promise in (1) and (2) to the obligation of this particular person in (3) is possible only as a result of the analytic premise or definition in "2a. All promises are acts of placing oneself under (undertaking) an obligation to do the thing promised".[8] Obviously the identificatory "are" cannot have here a constative character and be the expression of an assertion about facts concerning our world, for if this were the case there would e. g. be no cheats in it who make promises without thereby undertaking an obligation for themselves to do the thing promised. (Also cheats do incur obligations from the outside. But they do it with the necessarily concealed intention of dishonouring them. So they make promises without thereby undertaking an obligation from the inside.) But how can we know that Jones is not such a cheat? The identificatory "are" must thus have a normative meaning: (2a') "All promises ought to be acts of placing oneself under (undertaking) an obligation (for oneself) to do the thing promised".[9] Thus if (2) still

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[7] Searle, 1969, 177.
[8] Searle, 1969, 179.
[9] Concerning the normative "are" and the source of error in Searle's famous example cf. R. Ferber, *Das normative "ist" und das konstative "soll"* in *Archiv für Rechts- und Sozialphilosophie*, 74, 1988, 185–199, esp. 191–193. Of course Searle's argument has often been refuted, cf. e. g. the last chapter of J. Hintikka's book *Models for Modalities. Deontic Logic and Its Philosophical Morals*, 1969, 1984–214, esp. 206–214, or in a more general way H. v. Wright, *Is and Ought*, in *Man, Law and Modern Forms of Life*, Dordrecht, 263–281, esp. 265–268. But the exact linguistic source of the error in the wordings of Searle's argument — the ambiguity of 'are' — in "2a. All promises are [normative 'are'] acts of placing oneself under (undertaking) an obligation to do the thing promised" seems yet unnoticed, also J. Hintikka is right "He [Searle] has in effect pointed out that from an 'is' and from an analytical principle one may legitimately derive a perfectly genuine obligation, viz. a *prima facie 'ought'*", *if* this analytical principle (2a) is understood in a normative way. H. v. Wright's refutation, that the "ought" in (5) is a technical "ought" occurring in technical and hypothetical imperatives and therefore constative, not normative, is an interesting interpretation, but does not render the intention of Searle. Searle

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constitutes an institutional *fact*, (2a) no longer does, for (2a) rather constitutes a *norm*, although it has the form of an assertion about a fact. But if the normative premise (2a') has been smuggled in with the constative garment of (2a), then in (3) a "Jones placed himself under (undertook) an obligation to do the thing promised", in (4) a "Jones placed himself under an obligation to pay Smith five dollars" and in (5) a "Jones ought to pay Smith five dollars" can be derived. Abridged to the essential J. R. Searle's error can be shown clearly as follows:

Constative major premise	"1. Jones uttered the words 'I hereby promise to pay you Smith, five dollars."
Normative minor premise	"2a. All promises are [normative 'are'] acts of placing oneself under (undertaking) an obligation [for oneself] to do the thing promised."
Normative conclusion	"5. Jones ought to pay Smith five dollars".

Hence J. R. Searle's alleged counter-example against the so-called naturalistic fallacy from "is" to "ought" does not legitimate the deduction from a *pure* "is" to a *pure* "ought", but only the one from a set of premises with an "is" *and* an "ought" to an "ought". This deduction however is as common as allowed. Thus e. g. it is true that we can draw from the institutional fact that X is a boundary-stone the normative conclusion that X should not be displaced. But we can draw it only because the minor normative assertion "Boundary-stones should not be displaced" is added to the descriptive major assertion. Against J. R. Searle's derivation of an "ought" from an "is" we thus can keep to "Hume's Law" of the underivability of an "ought" from an "is". Yet J. R. Searle's error does not only teach us that institutional facts are formulated in such a way that the

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wants to deduce a normative "ought" and not a constative "ought". But v. Wright rightly says: "I have seen it stated that some legal codes have been deliberately written in the indicative mood. For example, using sentences of the type: 'Whoever does so and so will be sentenced to such and such'. This may be a pretty accurate description of what actually happens in a society and a basis for reliable predictions. But as a fragment of a legal text, *i. e.*, as a norm-formulation, the form of words is neither descriptive, nor predictive, but prescriptive. It says what ought to happen consequent upon such and such facts", 268. An analogous remark applies to the analytical premise "2a". In the context of Searle's argument it must be understood in a prescriptive way: "All promises ought to be acts of placing oneself under [undertaking] an obligation to do the thing promised".

constitutive, and this means here the normative presupposition of institutional facts cannot be recognised in the grammatical form of institutional facts: "2. Jones promised to pay Smith five dollars" has the shape of a constative or descriptive statement. It does not only show us that institutional facts are including an "ought" which is objectivized in the garment of an "is". It furthermore teaches us that even the *constitut*ive rules of an "ought to be" can be formulated in a con*stat*ive way like in "2 a. All promise are (normative 'are') acts of placing oneself under (untertaking) an obligation to do the thing promised". In other words constitutive rules too can be formulated in the shape of assertions about facts. These are also containing an 'ought' which is objectivized in the garment of an "is". That is why we also can count such mostly definitory rules of a stipulative nature like "2 a" among institutional facts. Institutional facts are thus ones that contain normative presuppositions without letting them appear in their grammatical form.

3. Ordinary Moral Judgments as Descriptions of Institutional Facts

Now this aspect makes them interesting not only for the *Institutional Theory of Law* of N. MacCormick and O. Weinberger,[10] but also for a new theory of moral judgments. For obviously the ordinary moral judgment that e. g. it is blamable to snatch away her handbag from an old lady does not describe a "brute fate". It is true that the fact that someone takes hold of an old lady's handbag or puts it under his arm may be a brute fact. But the fact that someone snatches away the handbag already constitutes an institutional fact, i. e. it arises only in the framework of constitutive rules which are interpreting the taking hold of the handbag or the taking it under one's arm as a snatching away. Now if already the statement that someone snatches away a handbag is describing not a natural, but an institutional fact, *a fortiori* this is the case for the ordinary moral judgment: "It is morally wrong to snatch away her handbag from an old lady". For if from the mere physical act that someone takes under his arm an old lady's handbag one cannot gather the legal quality like any physical or secondary quality, it is the more impossible to gather the moral one. The fact that the act mentioned is morally wrong arises only as a result of constitutive rules or of a system of constitutive rules which are added in

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[10] Cf. N. MacCormick and O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, Dordrecht et al. 1986.

addition to the constitutive ones for "brute" institutional facts. Only these are fixing that thefts by snatching away a handbag unlike thefts of food for immediate consumption are morally wrong. The constitutive rule of the form "X counts as Y in context C" is now expressed as follows: An act X counts as morally wrong in the context of a certain speech community C. Yet the constative form of the ordinary moral judgments appears to be detached from the constitutive and normative presuppositions of this speech community and purports to describe objective facts in the sense of facts independent of language and consciousness. The constitutive rule of the form "X counts as Y in the context of C" is thus shortened to "X is Y" resp. "Thefts by snatching away are blamable". These morally constitutive rules are added to the constitutive rules for "brute" institutional facts. For most often it is the case that ordinary moral judgments do not refer to "brute facts", but already to institutional ones such as e. g. that Green has stolen something and that this is morally wrong or that it is morally right that Jones keeps his promise towards Smith. Ordinary moral facts thus would be institutional facts, but indeed mostly institutional facts of a higher order; a higher order since they also count as criteria to judge about "brute" institutional facts such as e. g. that Green was convicted of theft or that Smith was cruel to Jones. If these considerations are right, the fact that thefts by snatching away are morally wrong is at all events not a natural but institutional fact. Unlike "brute" institutional facts such as the one mentioned by J. R. Searle it would be a "moral" institutional fact (so that in the case of institutional facts as in the case of judgments of value we can distinguish between moral and extramoral ones).

This conception solves for ordinary moral judgments the contradiction of the two minimal requirements which can be claimed for a theory of moral judgments, namely that they meet on the one hand the descriptive character of moral judgments and on the other hand their non-descriptive, emotive and prescriptive character. For obviously the mentioned ordinary moral judgment that it is wrong to snatch away her handbag from an old lady is descriptive and expressed in a realistic language. It describes a fact and says what *is* wrong. Yet it also takes into account the non-descriptive character of moral judgments. For the judgment also contains a condemnation of such acts and guides people not to act in such a mean way. This condemnation and thereby the normative function of guiding acts comes about through the fact that in the descriptive moral judgments constitutive rules, i. e. here normative rules of a speech community are already built in, namely that a certain act X in the context of a speech community C is

morally blamable. In other words this condemnation comes about through the fact that the descriptive moral judgment is describing an institutional fact. Herewith also J. L. Mackie's question "What is the connection between the natural fact that an action is a piece of deliberate cruelty ... and the moral fact that is wrong?"[11] receives an unpretentious and clear answer. Apart from the consideration that an act of deliberate cruelty presumedly represents no natural fact, but an institutional one, the connection consists in the following: The moral fact came about on grounds of constitutive rules of the form "A cruel act X counts as morally wrong in the context of the speech community C" and is therefore itself an institutional fact. Ordinary moral facts are institutional facts, but indeed of a higher order.

4. Revolutionary Moral Judgments and Institutional Facts

Until now we have considered a moral judgment which refers to accepted moral standards. It is something different when new moral standards are being fixed. Here metaethical institutionalism seems to fail. For the revolutionary does not refer to existing institutional facts of this world, but *sets* new institutional facts. Yet I presume no revolutionary will take the floor with formulations such as "In my personal opinion racial segregation or eating meat seems to be unworthy of human beings". He will say: "Racial segregation or eating meat *is* immoral or *is* unworthy of human beings". He will not say that according to his feelings this or that is the truth, but: The truth *is* this or that. Also the revolutionary who sets new standards will use a descriptive language and maintain that his moral judgments are objective and universalizable truths. But if he does not refer to the existing institutional facts, how can he raise a claim to truth? His declaration indeed cannot correspond with "institutional facts", since these are not yet available. The answer provides the following consideration: As the statements of deontic logic count as true, but do not refer to the norms of a real system of norms — e. g. an existing legal order with its contradictions — but to a deontically perfect world,[12] thus the claim to truth of the moral revolutionary does not refer to institutional facts of

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[11] J. L. Mackie, *Ethics: Inventing Right and Wrong*, London 1977, 41. Quoted in Hare, 1981, 83.

[12] This was worked out by G. H. v. Wright in his important essay *Is and Ought* in *Man, Law and Modern Forms of Life*, ed. by E. Bulygin, J. L. Gardies and I. Niiniluoto, Dordrecht et al. 1985, 263—281, esp. 272.

our world, but to the institutional facts of a morally more perfect or perfect world: "*Le moraliste est par essence un utopiste et (...) le propre de l'action morale est précisément de créer son objet en l'affirmant*" (J. Benda). One should add that this creation of moral facts can already occur through affirmative moral speech acts. The efficacy which moral norms should factually have is thus already presumed to be realized in the language and thereby the "normative" is strengthened further through the indicative. The revolutionary may link to this the hope that the institutional facts of a morally more perfect world will also become part of the institutional facts of the real world. If the moral facts of the morally more perfect world are accepted by a majority, they thus will increasingly become institutional facts of the real world — up to their legal codification. E. g. the first article of the Chilean Constitution codifies in a very nice way the once revolutionaty directive: "*Los hombres nacen libres e iguales en dignidad y derechos*". In the meantime it already belongs *de facto* to the legally fixed institutional facts of our real world that e. g. racial segregation and discrimination are blamable. Our everyday moral language is unthinkable without the constitutive rules of moral revolutionaries which prevailed.

5. Institutionalism as Metaethical Theory

But what metaethical institutionalism does not achieve and presumedly cannot achieve is a philosophical justification of moral judgments. For from the fact that at least a great range of the ordinary and revolutionary "language of morals" does describe institutional facts it does not follow that these judgments are indeed right or justified. We do not deem moral judgments right because they are institutionalized (in the sense which has been characterized), but we institutionalize them because they *are* right. Thus it does not answer Bradley's famous question "Why should I be moral?"[13] if this question is understood as a question of justification. Yet just as little as this already was an objection against emotivism, just as little it is an objection against institutionalism, since neither expressive emotivism nor metaethical institutionalism are a theory of justification. Metaethical institutionalism only makes clear *what* has to be justified, i. e. primarily neither cognitions nor emotions, but constitutive rules of a speech community, or, — to put it ontologically — institutional facts.

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[13] F. H. Bradley, *Why should I be Moral?* in *Ethical Studies*, Oxford 1876. Quoted in Hare, 1981, 190.

Where could one flee who flees from all — even the linguistic — institutions? He would flee from the human community and language. But institutionalism distinguishes itself from emotivism insofar as like cognitivism, it deems moral judgments able to be true or false and accordingly to be in principle able to be (internally) justified, even if institutionalism as (external) non-cognitivism does not believe that we ultimately or externally can know what is good and bad. Thus if we already presuppose some institutional facts of a moral nature e. g. *that* thefts by snatching away are blamable, then we can also try to substantiate through Hobbesian, utilitarian, Kantian or even Platonic considerations *why* thefts by snatching away are blamable. Thus e. g. already Plato in the *Republic* and Kant in the *Groundwork to the Metaphysic of Morals* proceed from such institutional facts of a moral nature such as the one that justice consists in giving back what is due and in telling the truth (cf. R.331 c) or that one should keep one's promises (cf. GMM.402), even if they do not yet know the term. Kant speaks *prescriptively* of imperatives which command categorically, whereas Plato talks *descriptively* of those "*dogmata* of the Just and the Beautiful, under which we were brought up from childhood on as by parents, obeying them and honouring them" (R.538 c). Metaethical institutionalism is thus neutral towards the different types of justification of moral judgments — with the exception of the intuitionistic one, which however is no type of justification.[14] In the justification of moral judgments the disagreement in moral philosophy will presumedly continue. This should worry moral philosophers, but it will shock neither the moral institutions nor the people acting in them. Just as one can speak correctly a language without knowing its rules, one can act rightly without being able to say why it is right. Yet it is to hope that in our age in spite of all the moral disagreement between and within the various cultures the moral speech community — at least with regard to the fundamental institutional facts of morals — will increasingly comprise the whole mankind. The charter of institutional facts which are codified in the Convention of Human Rights is an attempt to this end.[15]

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[14] Cf. H. A. Prichard, *Does Moral Philosophy rest on a Mistake?* in *Mind*, 21, 1912. In *Die Unwissenheit des Philosophen oder Warum hat Plato die 'ungeschriebene Lehre' nicht geschrieben?*, St. Augustin 1991, I have tried to show why Plato was no "intuitionist" insofar as he would have considered intuition as an already sufficient justification for the perception of Ideas.

[15] A fuller version of this paper will appear under the title "Moralische Urteile als Beschreibungen institutioneller Tatsachen. Unterwegs zu einer neuen Theorie moralischer Urteile". *Archiv für Rechts- und Sozialphilosophie* 79, 1993. I thank an anonymous referee for some stylistic improvements.

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