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Real Institutions, and really legitimate institutions

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Summary:

This essay develops a thesis regarding the manner through which social institutions such as property come to be, and a second thesis regarding how such institutions ought to be legitimated. The two theses, outlined below, are in need of explication largely because of the entrenched cultural influence of an erroneous reading of social contract theory concerning the historical origins of the state. In part A, I introduce that error, which yields a pair of myths:

Myth 1: Government precedes and underwrites both the reality and the legitimacy of all other social institutions,

Myth 2: Peoples choices alone generate social institutions.

I will argue that both Hernando DeSoto and John Searle work effectively to counter the basic error and the first myth, though both remain in thrall to the second. With the error and myths examined, I proceed in parts B and C to present two central theses about institutions:

Thesis 1: The construction of social institutions can be understood clearly only if that topic is distinguished from the topic of their normative status, or legitimacy.

Thesis 2: The normative status of such institutions can be understood properly only if their legitimacy is distinguished from the legitimacy of government.

With the distinction of Thesis 1 in place, an informative socio-technical account of the construction of institutions can be formulated with little ado. This allows for clarity concerning how institutions might be legitimated (Thesis 2), and consequently, legitimation can proceed. Some fundamentals of legitimation from a Kantian perspective are outlined in Part C.

This paper, then, is philosophy presented in the tradition of clarification of conceptual fuzziness concerning our mixing of the ideas of the legal and the real and of promoting clear presentation in ethics by disentangling the ideas of the legal and the politically and ethically legitimate. It is intended for a broad audience as a caution against the

tendency to think along the lines of Myth 1, and as a tool for developing clear distinctions between the socially real and the really legitimate. It also offers to philosophers in particular a significant argument in social ontology in its treatment of Myth 2 (see section B.1).

A. Avoiding a Hobbesian error.

Thomas Hobbes conceived of government as composed of and justified by a social contract: an agreement of individuals to live in peace and to form a confederacy of government to improve their "nasty, brutish and short" lives. The familiar fiction he presents is of "a covenant of every man with every man," each to give up his legitimate right to self-government by handing over his right, and practically also his strength, to a legislative, judicial and police force that the men form among themselves.¹

Hobbes mentions a "covenant" of each with all, and the process of generating this covenant is, I think, often envisioned as a first meeting of individuals that ultimately generates the state. It is a meeting that, so far as we know from history, has never taken place, and such a meeting is not

¹ Thomas Hobbes, *Leviathan* [1651], ed. Edwin Curley, Hackett, Indianapolis: 1994). I:17, p. 109.

clearly suggested by Hobbes, or by Locke.² Nevertheless, somehow, both agree that some sort of process to erect or recognize the sovereign must take place; and Rousseau would have us convene just such a meeting regularly: an assembly of all citizens, he says, to re-affirm the foundations of government.³

The culturally familiar story about an original covenant, I believe, has been very significant. It has since led to a myth that pervades much political discussion: that government, as the original exit from the state of nature, is the mother of all other legitimate political institutions. This myth may help to foster another, more general and almost as prevalent: the view that legitimate political institutions are ultimately grounded in the free choices of existing people, the fundamental selves that we have or that we are, prior to politics.

From a historical perspective, these are certainly myths there is no
² Though the precise extent to which Hobbes wished his construction to be treated as representative of history is open to debate, he certainly insisted that the state of nature is a genuine historical possibility which has existed in some places and times, and that commonwealth can arise only through covenant (pp. 65, 89). For Locke similarly, see *Second Treatise of Government*, Sections 86–90.

³ Rousseau, *The Social Contract*, Part III, s.18.

evidence for their reality and from a philosophical perspective, the myths cloud more helpful analyses of sovereignty and legitimacy that have been readily available since Kant, as I will argue below. Myths do have sociological, and so historical impact, however. The two myths play their parts today: I will consider a few current examples.

Regarding the first myth, a pair of cases from the documents of two U.S. public-interest political concerns are illustrative. The Womens International League for Peace and Freedom launched the Challenge Corporate Power, Assert the Peoples Rights campaign in the summer of 2002.⁴ I take their slogan to suggest a fundamental, and vague, priority of people and their choices. Similarly, the National Lawyers' Guild suggests that, "In a democratic society, living human beings are sovereign and are the basis of all government authority."⁵ The latter claim, if concerning legitimacy of authority, is, I believe, true. The claim is a misleading formulation, however, suggesting a matter of fact, and the Women's International League makes a similar maneuver.* The social contract

⁴ See <http://www.wilpf.org/corp/corp-personhood.htm> (19 March 2003).

⁵ <http://www.nlg.org/committees/corporations.htm> (19 March 2003):

Democratic principles require that corporations respect and follow rather than evade the local law...

theorists are not the only constituency that argues that sovereignty is surrendered by individuals to government; many legal dictionaries⁶ assert the same, as do all governments with an executive branch, including democratic ones. The principle of state sovereignty that is reflected in international law similarly suggests otherwise.

Noting such vagueness is not mere pedantry: a brief explanation for the broader audience regarding the purpose in philosophy of conceptual clarification is in order at this point. I find the work of both of these organizations to be worth examination, and particularly, I find the formulation of purpose in the NLG Constitution to be quite clear: [The NLG is] an organization of lawyers ... in the service of the people, to the end that human rights shall be regarded as more sacred than property interests... The errors I have noted are minor, but they are also persistent. They are examples of vagueness in the way people express themselves, even when they are at their best, writing carefully drafted documents, and so they may reflect a persistent patch of vagueness concerning sovereignty. I suggest that misleading background assumptions about the sources of sovereignty may be responsible for the vagueness. Highlighting those assumptions should serve to make them less prevalent, and that is

⁶ See "Organizing Packet," at <http://www.wilpf.org/corp/corp-personhood.htm>.

the general point of this sort of effort in philosophy.

On to Myth 2: William Meyers, David Korten, and many others concerned to change the political landscape frequently write of corporate personhood as a legal fiction.⁷ But the work of the Institute for Liberty and Democracy provides good evidence regarding the extra-legal reality and robustness of business entities. Furthermore, deSoto's *Mystery of Capital* makes a strong case that we should not expect, nor even desire, that institutions related to property and business develop simply and solely through the auspices of legislation and the interpretation of legislation in courts. DeSoto argues that the historical development of property in U.S. law did not fit that pattern, and that the government also did not always do an excellent job, for its part, when it did take charge of the development of the property system during the westward expansion. DeSoto is persuasive in his suggestion that extra-legal dimensions to development have their merits.⁸

⁷ See, e.g., "Sovereignty," *Dictionary of Law*, Oxford: Oxford University Press, 1997.

⁸ William Meyers, "The Santa Clara Blues: Corporate Personhood vs. Democracy," <http://www.iiipublishing.com/afd/santaclara.html> (III Publishing, Nov. 13, 2000). Similarly, see David Korten, *The Post-Corporate World*, West Hartford: Kumarian, 1999. P. 75.

DeSoto also finds a contrary sociological phenomenon: many of us, and politicians in particular, are unaware of the role and extent of non-legal but socially real business activity. He analyzes that neglect partly as the result of our inability to recognize how legality has developed historically, and partly as the product of small-mindedness of government officials, who see extralegal development simply as antisocial illegality, and not as necessary problem-solving in difficult circumstances.⁹ I would like to suggest that the contractarian story has also played a large cultural role in allowing government officials and others to neglect the extra-legal business sector. It is not just that they are unaware of history: I think they have an origins story in their minds, about how legitimate institutions should be set up, that turns the eye away from history. The social contract story, then, may be the root cause of the symptoms that deSoto points to.

To dispel the myths and more clearly answer the question, What makes real property real? we must start by distinguishing between the social reality and constitution of an institution and its political or moral legitimacy, as the U. S. critics noted above have not done. History can tell us much about the social reality of the institution; what Hobbes was concerned to explain was the rational basis of political legitimacy. He

⁹ DeSoto, pp. 126-7.

turned to a formulation in terms of a "compact" that was easily misread as a historical claim.¹⁰ It was left to Kant to show that there is no reason for linking the ideal of government with the story of its historical generation, if the ideal of legitimacy alone is what is to be understood.¹¹ Kant steers us away from the error of thinking of people as entities somehow prior, and institutions somehow posterior, to the political situations enveloping them. Instead, we are pointed to a conceptual division between a world of facts (in which history occurs) and a kingdom of ends. Legitimacy concerns ends, motives and purposes; historical events are only accidental, or are symptomatic of legitimacy: by themselves, they will always provide us with a faulty analysis of legitimacy.

Part A of this paper has introduced the division between the real world (the world of facts) and the realm of legitimacy (the kingdom of ends). Part B considers description of the world of facts in further detail; Part C concerns that world's relation to the kingdom of ends.

¹⁰ DeSoto, pp. 73–5, 88.

¹¹ Kant is not entirely innocent of the error of unnecessary mythical historicizing. See the vaguely historicist language at *Perpetual Peace*, 8:365–6. Pagination for this and all other works of Kant refers to the standard Prussian Academy of Science (1907) edition of Kant's work.

B. What makes a social institution real

Kant has provided us a distinction between facts and ends, and that division allows us to return in clarity to the world of facts. Real social institutions produce irreducible social facts, as Peter French has argued,¹² and are the Y term institutional facts in Searles familiar formulation, X counts as Y in [context] C. But how do real social institutions such as property or corporations come to be constituted?

It should become apparent that for each thing there will be a different historical story, but we can probably speak truly of types of stories for some groups of things. There is an open-ended variety of stories for how land is made into property, and many of them quite obvious. Here are several particularly diverse ones:

1. Land is made property by fiat.

In the past, kings and other political leaders have claimed lands outright, and would-be kings have made claims to lands, then pursued those claims against others through war. Landed kings have also made claims to other lands, often allowing vassals that subjugate the people of those lands to govern the lands in the kings names. Minor variants on the same

¹² See the discussion of this turn in Kant found in Otto Gierke, *Natural Law and the Theory of Society*. E. Barker, translator. Cambridge: Cambridge University Press, 1913.

process continue today; see the contribution of David Koepsell to this volume for a particularly unusual one.

2. Land is made property by enclosure.

This is a particularly vivid case, where land is staked, often under the fiat of a regime, and sometimes requiring document filing or an enclosing fence to establish the boundaries of the stake. Other times, the staking itself plays its role in the creation of the political regime: in such cases, good fences literally *make* good neighbors.

3. Land is made property by agreement.

Antarctica's territorial division is an especially clear example of this case; war settlement is another.

The point of the rather bland recitation above is to illustrate that we can consider how property is made without addressing without even touching upon the question of how it is made *legitimate*. The three stories of property creation briefly recounted above are one-sided and limited, of course: they may neglect competing stories concerning the subjugated, the nomadic, and the voiceless, respectively. Those sociological and historical counter-stories are likely to also be a part of any reasonably informative account of the construction of social reality.

How property is made is a sociological, or more precisely, a socio-technical matter, for in the second case, the physical technology of the

fence plays its particularly obvious role. I doubt that we can do better than to follow the lead of Bruno Latour in the sociology of science (see two paragraphs down), or the research work of the Institute for Liberty and Democracy, and study the numerous processes of consolidation of property claims, if we wish to study how property is made from land.

B.1 The social significance of technical structures

The example of staking property leads me to offer a small criticism of both Searle and deSoto. Both seem to be less impressed than they should be by the significance of physical objects in the construction of social reality, and they show it in different but linked ways: they both promote the contribution of the mind to social reality, to the neglect of the material instantiation, such as the surveying stake, that plays a fundamental, functional role in practically all social institutions.

As a warm-up, consider the institutional significance of the speed bump, a particularly vivid example of what Bruno Latour dubs socio-technical objects.* There are at least two obvious ways to turn dangerous speeders into good citizens in the neighbourhood of a school zone. One is to spend \$100,000 or so per year on a police officer and the infrastructure necessary to support the officer, in order to solve the problem for an 8 hour day; another is to lay a lump of asphalt for cost and

maintenance of, say, \$200/year. The effects of the two solutions are not exactly the same, of course, yet they both reconfigure social reality in substantial and similar ways, and it is no wonder that some English refer to the latter group as "sleeping policemen." The physical properties of speed bumps, coupled with the speech acts necessary for their judicious placement, can yield social order: the invented technology re-makes social institutions, alters the economy, *etc.*

Both of these authors, however, greatly downplay the contribution of the material to social institutions. DeSoto provides an importance to written law that generally discounts the significance of technological regimes:

It is law that detaches and fixes the economic potential of assets as a value separate from the material assets themselves and allows humans to discover and realize that potential. It is law that connects assets into financial and investment circuits. And it is the representation of assets fixed in legal property documents that gives them the power to create surplus value.

Lifting the bell jar, then, is principally a legal challenge...¹³

Yet it is law and physical fact *together* that make the speed bump effective. Law allows speed ordinances and the mobilization of city workers crews, and design and brute substance carry the rest of the burden. Similarly, the things of first importance when we speak of real

¹³ Peter French, *Collective and Corporate Responsibility*, New York: Columbia University Press, 1984.

property should doubtless include stakes and surveyors as well as law, for thousands of years past right to the present. More recent technologies will include the barking dogs made famous by deSoto, and global positioning systems. These are themselves bound up in law also: a wooden stake is rarely acceptable, humane laws cover many barking dogs and so allow them to mark boundaries effectively, and a GPS system requires a maintenance contract. It may be the case that deSoto, for his part, has found that the problem has been, practically, a legal challenge. It would be misleading, however, to suggest that such matters are *fundamentally* legal: they are at least as much socio-technical.

Furthermore, the choice among and development of technological regimes is crucial to what law can speak of, particularly with regard to real property. One who treats deSotos lesson too narrowly may neglect the importance of the appropriate infrastructure of banking, including the willingness of bankers to offer mortgages (see Andrew Franks paper, this volume). Technological innovations, such as global information systems, may also play their roles in solving the problem of social order (see Eric Stubkjaers contribution, this volume). Innovation in both these respects will alter the language that lawyers, courts, and legislature can use in their work, by antecedently altering the real structure of social institutions.

I have similar concerns with a discounting of the important role of

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physical objects and technology in Searle. He misleads us towards mentalism when he writes:

In a sense there are things that exist only because we believe them to exist. I am thinking of things like money, property, governments, and marriages.¹⁴

In a sense, of course, Searle is correct, but only in a very loose sense, as he ignores the socio-technical component in these and other status functions that are generated in social reality. Money, which is one of Searle's most developed examples, requires a technology, such as counters. We simply could not get by on our beliefs alone here it could not practically work. The same goes for the other institutions in his list, at least in the form that those institutions take today. One might be able to decide and keep in ones head who is the leader of a group, but governments of the sort with which we are acquainted require much more socio-technical apparatus, encompassing voting machines as well as supreme courts to override them. Similarly, technologies such as paint and paper, in wedding portraits and parish registers, have served their roles in the development of the institution of marriage.¹⁵

My suggestion is that, as DeSoto was too focused upon law, Searle is

¹⁴ See Bruno Latour, "On Technical Mediation – Philosophy, Sociology, Genealogy." *Common Knowledge* 3, 29–64.

¹⁵ DeSoto, 157–8.

similarly too mentalist in his quick adoption of these examples: he gives too little credit to the social significance of *things* within the construction of social reality. A more suitable example to make Searles point about the conventional nature of social reality would be a simple verbal promise between friends, and this may qualify as a social fact, and perhaps an institution, along the lines that Searle suggests. But it is also an exceptional case that we should not take as the basis for other social institutions, such as government: for such a model of agreement might underwrite the common and troubling historical interpretation of Hobbes covenant of every man with every man.

Further detail concerning the case of money will show a point that is already implicit in the examples discussed above: that physical technology actually plays a determinative role in setting social function. Searle does allow a place for physical technology: he allows that money uses one, and he states that football touchdowns, for example, are not executed simply by declaration.¹⁶ He also writes of the "agentive functions" in social reality of objects with particular physical properties: he gives credit to the structures of screwdrivers and the "sheer physics" of tall fences, for

¹⁶ Searle, 1.

example.¹⁷ Searle passes over any such acknowledgement for the institutions of marriage and government, however, and as social institutions become more enfolded in human cooperation, he is less inclined to note technology's contribution to the social product. Searle writes, In the extreme case, the status function may be attached to an entity whose physical structure is only arbitrarily related to the performance of the function, and he uses money as his example.¹⁸

In the case of money, Searle's acknowledgement of debt to technical reality is miserly indeed, for he writes:

just about any sort of substance can be money, but money has to exist in some physical form or other. Money can be bits of metal, slips of paper, wampum, or entries in books. ... Most money is now in the form of magnetic traces on computer disks. It does not matter what the form is as long as it can *function* as money, but money must come in some physical form or other.*

Here Searle presents a partial analysis of the importance of physical facts to social institutions. But he downgrades the physical matter by suggesting

¹⁷ See the discussion of the social and legal significance of wedding portraits in Erwin Panofsky, *Early Netherlandish Painting*, Cambridge, MA: Harvard, 1953, vol. 1, 202–3. Thanks go to Carolyn Butler Palmer for this example.

¹⁸ Searle, 55.

that the form of money hardly matters, and actually becomes arbitrary over the course of institutional development, so long as the stuff "can function as money." Searle does not allow that what the physical constitution of the counters *is* plays a great role in determining what constitutes the function itself, and in shaping social reality.

Money isn't what it used to be. As everyone is aware, it has become electro-magnetic for good, non-arbitrary reasons concerning efficient transfer; but that change has also altered its social role and its function significantly. Particularly, the volumes of currency made available for transfer by the electronic form have allowed for a specific importance of currency traders to international economics. Governments of developing countries, in efforts to attract stable foreign investment, have used available funds to artificially stabilize the values of their currencies. Large sales of currencies gained a functional use in traders eyes particularly in Asian currencies in the late 1990s once the traders recognized that they could exhaust the national reserves dedicated to propping prices. Traders sold borrowed currency, exhausted the governments prop, subsequently pushed down the value of the currency, and then bought it back at profit.¹⁹ Collusion among money traders, and large-scale borrowing and selling done for such functional purposes, are now carefully restricted in

¹⁹ Searle, 20, 39.

international markets by those with opposed purposes. So, the new medium for money had unintended social effects, and it also altered money's function: once the traders understood those effects, money was functionally different, since it could be used in a new way to draw profits.

The physical structure of money has also been exploited for quite opposed purposes. According to Plutarch, the ruler and social engineer Lycurgus introduced iron, at very high weights per unit, as the exclusive legal currency in Sparta. By this means Lycurgus reduced theft, crippled external trade deliberately, and consequently, attacked luxury among wealthy citizens. Money lost many of its specific functions as a medium of exchange, then, as a consequence of Lycurgus' choice of physical technology:

The iron money, after all, could not be exported elsewhere in Greece, and was considered a joke there, not an object of value. Consequently it was impossible to buy any shoddy foreign goods, and no cargo of merchandise would enter the harbours, no teacher of rhetoric trod Laconian soil, no begging seer, no pomp, no maker of gold or silver ornaments because there was no coined money. Thus gradually cut off from the things that animate and feed it, luxury atrophied of its own accord.²⁰

In Searle's analysis of function, it is necessary that the practical effects of the physical technology be recognized by someone for them to

²⁰ Searle, 41.

actually be functional: functional, as opposed to brute fact (such as, "greenbacks make my wallet this thick...") and as opposed to unintended consequence (the unintended devastation that currency traders can wreak). I conclude, however: First, these brute facts and unintended consequences have great roles in the construction of social reality, even if they are not functional because they were not intended to arise. Second, regarding function: The mental work of belief and agreement that Searle highlights is one of a pair of components that makes for almost every social institution, but the specific physical technology involved is as important for shaping the functional product. Because it so shapes function, it is misleading to view these institutions as existing only because we believe them to exist. This is as true of money, governments and marriages as it is of speed bumps.

Searles view, that it is often a matter of convention²¹ when we tie technologies to status functions a view that DeSotos writing about law suggests he might share is misleading because we cannot choose whatever specific physical technology we like: we choose among those we find to be available, or are sure we can make available through technological development. A more helpful claim, albeit a slightly metaphorical one, would be that we do not choose technologies; instead,

²¹ Searle, 34–5.

we enlist nature in our causes, and nature also has its say in the construction of social reality. Daniel Dennett's claim that We learn... how to spread our minds out in the world,²² gets us part way to the realization that many of our institutions fundamentally depend on material instantiation. Dennett does not, however, make it obvious that the world will play a further significant role by aiding or frustrating, and altering, our efforts. The technology we use will usually have unintended effects that contribute to social reality, as we have found with voting machines recently, and it will also shape the functions that we can impose with its use, as the money example suggests. Consequently, Searles recent retreat to the view that credit and electronic cash are each only representations of money,,representations of laying direct weight, presumably, on bills and coin,²³ makes matters worse, and the problem clearer: if the technology

²² See Ricardo Saludo and Antonio Lopez, As speculators reign supreme, how safe is your country's money? and other articles in *Asiaweek*, 25 July, 1997. Available at <http://www.asiaweek.com/asiaweek/97/0725/cs1.html>.

²³ Plutarch, *Lives of the Greeks*, Lycurgus, Ch. 9. See Plutarch, *Plutarch on Sparta*, Richard Talbert, translator. London: Penguin, 1988. p. 17. Talbert mentions that Plutarch's reporting in this instance, as elsewhere, is largely, but not perfectly accurate; see note 1, p. 17.

plays a role in determining functions, the technology must play its part in constituting what the social institution money is.

Section B.1 has provided a detour into social ontology. It presents the cautionary lesson that physical infrastructure plays a fundamental role in the construction of social reality. Its lesson may be added to the general point of Part B, in which I have attempted to defend the claim that the construction of institutions can be studied without reference to legitimacy. I have argued that the legitimacy of institutions is a matter entirely separate from their construction: we must consider each separately to consider them clearly. I have also gestured at a philosophical distinction that supports this separation: the division between the world of facts and the kingdom of ends, as presented by Kant.²⁴ Now, what more can I say about legitimacy?

C. Real institutions, and really legitimate institutions

Kants division between the world of facts and the kingdom of ends remains an extremely useful idea for understanding legitimacy, and I think it is a particularly appropriate one to promote for the concerns of the²⁴ See Searle 49, 56 for reiterations of the strong conventionalist position laid out at 41-2.

interdisciplinary conference that spawned this volume. I will elaborate upon its implications to close this paper, sticking close to reflections upon Kants development of the division.

I should briefly note that variant conceptions of justice are also currently on offer, as are discussions that analyze both the concept and the application of the idea of a kingdom of ends. There are well-subscribed contemporary ethical approaches, such as virtue ethics, that do not explicitly countenance the concept, or at least, do not use it as the main tool for determining legitimacy.²⁵ There are others that allow for such treatment, but will disagree with Kant as to what in the world qualifies as an end; for example, arguing that we should include some non-human animals, and exclude some human animals (e.g., seriously brain-damaged ones).²⁶ Recent work in the Kantian tradition also digs into analysis of the conditions under which treatment of individuals as ends is appropriate; for example, considering the participatory conditions

²⁵ Daniel Dennett, *Kinds of Minds*, New York: Basic Books, 1996. p. 139.

²⁶ John Searle, in John Searle and Barry Smith, The construction of social reality: an exchange, *American Journal of Economics and Sociology* 62 #1, Jan. 2003.

required for legitimate adjudication among those who are ends.²⁷

What in general can we say about the relation of the real to the legitimate, where these are conceived as the historical world of facts and the normative kingdom of ends? First, a caveat about what legitimacy is not. It is not a feature that may be gathered from the study of history, but it is reasonable to hold nonetheless that a historical story concerning facts can be told of how one comes to maintain a view concerning what the kingdom of ends is. The historical story might, for example, include intellectual discussion, such as is briefly reviewed in the paragraph that precedes this one. A socio-technical story of the development of any account of legitimacy may also be told; much like the ones briefly mentioned above regarding the constitution of real property.²⁸ But no

²⁷ I will stick with Kant's term "kingdom" here, rather than other possible descriptors (community, democracy, discourse community, etc.) because I maintain that each capable individual remains sovereign over his, her, or its ethical choice. Kant's view agrees with this, but adds an extra layer that is not intended here, since he assumed a continuing role for monarchy in the development of ethical progress in a cosmopolitan context (see *On Perpetual Peace*).

²⁸ See various writing of Martha Nussbaum for a richly developed alternative.

such stories will in any way serve as a normative basis for a legitimacy claim. I may write all I like about Kant and Rawls, and a sociologist might write all he or she likes about the facts and causes of my education. Both of these discussions may bring up ideas for consideration, but neither will move us a step toward explaining what makes a real institution really legitimate in addition.

Legitimacy is distinct from the historical, then, but it is also clear they have some relation. This suggests a point that is rather basic, but very important for establishing a clear characterization of the relation between the factual and the normative: that we can learn about what works from experience, without also committing ourselves to the idea that we can learn what is good from experience. Here is how Kant expresses the relation:

Nor could anything be more fatal to morality than that we should wish to derive it from examples. For every example of it that is set before me must be first itself tested by principles of morality, whether it is worthy to serve as an original example, i.e., as a pattern; but by no means can it authoritatively furnish the conception of morality. Even the Holy One of the Gospels must first be compared with our ideal of moral perfection before we can recognise Him as such...

Few would doubt that history, presented as facts and causes, does provide us with useful evidence that is in some way relevant to consideration regarding legitimacy. Once again, I think it is helpful to simply introduce Kants succinct treatment of this point:

Imitation finds no place at all in morality, and examples serve only for encouragement, i.e., they put beyond doubt the feasibility of what the law commands, they make visible that which the practical rule expresses more generally, but they can never authorize us to set aside the true original which lies in reason and to guide ourselves by examples.²⁹

What, then, is the relation between fact and end? In the first section, I loosely referred to the relation as "symptomatic": what has happened, and what will happen in the world of facts, shows the symptoms of what is unseen but relevant in the kingdom of ends. I have brought in Kants discussions of ideals and examples as a first step toward further precision. A second step is offered by G. E. Moore, in his discussion of the naturalistic fallacy. Because this is a paper addressed to an audience not exclusively of philosophers, a swift introduction to this fallacy may be helpful.

The vexed relation of event to ethical norm was discussed in a particularly clear way by G. E. Moore a century ago. Moore joined with Kant in the view that facts about the world and the basis for ethical norms, including legitimacy, must be distinguished. Moore did not envision a category that might be referred to as a kingdom of ends; rather, here is how he put their relation:

[N] ...Ethics aims at discovering what are those other properties

²⁹ See writing of Peter Singer.

belonging to all things which are good. But far too many philosophers have thought that when they named those other properties they were actually defining good... (*Principia Ethica*, 10)

Moore coined the phrase naturalistic fallacy to clearly label the mistake of maintaining that norms can simply be other facts about natural objects that they are a feature of objects in experience. Moores treatment of the relation is a particularly careful and convincing one: it does not suggest that there is a distinct Platonic Realm of Goodness from which natural objects draw their goodness; rather, some natural objects happen also to have the (non-natural, ethical) feature of goodness.

The root division between the historical world of facts and the normative kingdom of ends remains clear, then. This essay has been concerned with characterizing that division clearly, particularly with respect to institutions. It is an essay in conceptual clarification, and has not been concerned with explaining which institutions are in fact legitimate, and why. It is an effort preliminary to that one: we must be clear on the concepts before we can proceed clearly with the substance.