

Juridical Acts and the Gap between Is and Ought*

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1 Law on the Borderline of Is and Ought

It is both a strength and a weakness of the law that it seems to hover on the borderline between is and ought.¹ One of law's functions is to guide human behaviour by imposing duties and obligations to act in a particular way. In this behaviour-guiding function, the law seems to belong to the realm of ought.

Another function of the law – which, by the way, is to a large extent fulfilled by guiding behaviour – is to facilitate the coordination of human behaviour. Human society is only possible if people know, at least to some extent, what to expect from each other, and the law helps in this connection by making human behaviour predictable. Law can only fulfil this function if most people can by and large know the contents of the law, and to this purpose the law must be a matter of fact, at least so it seems. In its function to make human behaviour predictable, the law seems to belong to the realm of is.

As the repeated use of the word 'seems' indicates, there are some reasons to doubt the simple picture above that sketches how the law belongs to both the realm of is and the realm of ought. The traditional doubt with regard to this picture is that the realms of is and ought are taken to be separated, both ontologically and logically. An is and an ought would be completely different – this is the ontological separation – and therefore it is impossible to derive an ought-conclusion from solely is-premises by means of a deductively valid argument. Because the realms of is and ought are ontologically separated, it would be impossible that any phenomenon would belong to both realms. That would also hold for the law, which should therefore either belong to the realm of ought or to the realm of is. The former view was famously defended by Kelsen, according to whom the law consists of norms where norms belong to the realm of ought.² The latter view was defended by the Scandinavian legal realists, according to whom the law exists as a

* The author wants to thank Anne Ruth Mackor and the reviewers of the *Netherlands Journal of Legal Philosophy* for their useful comments, which have led to many improvements. All remaining errors remain the author's responsibility, of course.

1 In this paper, the words 'is' and 'ought' are not placed in between quotation marks unless the words, rather than the is and the ought themselves, are the topic of the sentence or in cases where quotation marks are needed to facilitate the reading of the text. The use of quotation marks would suggest that the analysis of is and ought is an analysis of word meaning. There is, however, no good reason to translate ontological questions about the nature of is and ought into semantic questions – not even if one holds the opinion that these words do not denote anything.

2 Hans Kelsen, *Reine Rechtslehre*, 2nd edition (Vienna: Franz Deuticke, 1960), 72 and 4.

matter of fact.³ Both approaches have their problems. Kelsen famously struggled to combine the view that a legal system can only exist if it is effective with the view that the law belongs to the realm of ought. He achieved the desired combination by stating that the *Grundnorm*, on which the building of law was erected, is a normative presupposition (*Voraussetzung*)⁴, a view which did not convince everybody.⁵ The realist approach, according to which the law exists as a matter of fact, has some troubles with explaining how the law can guide behaviour, especially if guiding behaviour is taken to be *providing reasons for*, rather than *influencing* behaviour.⁶

It is also possible to formulate less traditional criticism on the simple picture according to which the law lies on the borderline of is and ought. Why should there be such a borderline? Is it not possible that is and ought overlap, or that ought belongs to the world of is? If that is possible, if there is no gap between is and ought, it is much less problematic to explain how the law can both exist as a matter of fact and be normative at the same time.⁷

In this paper I will use and amend an old argument of John Searle for the conclusion that there is no gap between is and ought, and that it is possible to derive a conclusion about the existence of an ought from premises which do not mention an ought.

My argument in this paper will start in section 2 with some preliminary remarks on the alleged difference between is and ought, and on the differences between obligations, duties and oughts. In section 3, Searle's derivation of ought from is will be presented and criticised because in the end it does not quite do what it promises. In sections 4 to 6 an improved version of Searle's argument will be given in which the central role is played by juridical acts in general and contracts in particular, instead of the promises which played a pivotal role in Searle's original argument. In sections 7 and 8 some objections against the derivation of ought from is will be discussed. Section 9 deals with the most problematic step in Searle's original argument, namely the derivation of an ought-conclusion from a premise about the existence of an obligation. In the concluding section the implications of the results of this paper for the nature of law are briefly indicated.

3 Cf. the title of Karl Olivecrona's main work, *Law as Fact*, 1st edition (Copenhagen: Einar Munksgaard, 1939).

4 Kelsen, *Reine Rechtslehre*, 204.

5 See, for instance, Andrei Marmor, *Philosophy of Law* (Princeton: Princeton University Press, 2011), chapter 1.

6 This line of criticism can already be found in Hart's review of Ross' *On Law and Justice*. Cf. H.L.A. Hart, 'Scandinavian Realism' in idem, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 161-69.

7 A recent collection of papers in which the authors try to account for the normativity of law is Stefano Bertea & George Pavlakos, eds., *New Essays on the Normativity of Law* (Oxford and Portland: Hart Publishing, 2011).

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2 Some Preliminaries

It seems obvious that *is* and *ought* are different. That the Netherlands *are* a democratic country is something else than that the Netherlands *ought to be* a democratic country. However, obvious as the difference between *is* and *ought* may seem, it is far from clear what this difference amounts to.

That the Netherlands *are* a democratic country is something else than that the Netherlands *certainly are* a democratic country. This difference is seldom or never seen as a reason to make a fundamental ontological distinction between 'is' and 'certainly is.' And yet, from a grammatical point of view, the step from 'is' to 'it is certain' and the like is comparable to the step from 'is' to 'ought.' Both are cases of introducing a modal operator; an epistemic operator in the first case, and a deontic operator in the second. Do sentences like 'The Netherlands certainly are a democratic country,' which express an epistemic modality, not express an 'is'? If one comes to think of it, it is far from clear what is meant by an 'is.' Is a 'will be' an 'is'? Is a 'can be' an 'is'? Is an 'ought to be' an 'is'?

Without extensive historical research, it is a matter of speculation why the difference between *is* and *ought* has gained such an important ontological status within philosophy, while other ontological differences did not become so important. Whatever may be the explanation, the precise difference between *is* and *ought* as ontological categories has, to my knowledge, never been explained well. In the absence of such an explanation, we should be careful about claims such as that it is impossible to derive an *ought*-conclusion from solely *is*-premises.⁸ The arguments that will be discussed in this paper, which aim to show that such a derivation is possible, should therefore not be rejected outright starting from the idea that such arguments must be impossible because of the unshakeable ontological difference between *is* and *ought*. If there is such a fundamental difference between *is* and *ought*, it needs to be argued for rather than presupposed.⁹

Other differences which are not beyond dispute are those between duties, obligations and *oughts*. Because the difference between an obligation and an *ought* plays a role in this paper, there is reason to say a little more on the different deontic concepts. The reader is warned in advance, however, that the distinctions

8 On the risk of being accused of casting doubt on everything, I would like to point out that it is often assumed in this connection that the nature of derivation is clear. As recent work on non-monotonic logic and the discussion about its nature (is it logic or not?) makes abundantly clear, the nature of derivation is as unclear as the nature of *is* and *ought*. An impression of the complications can be had from my paper 'Law and Defeasibility' in Jaap C. Hage, *Studies in Legal Logic* (Dordrecht: Springer, 2005), 7-32.

9 A nice example of this presupposition can be found in J.L. Mackie, *Ethics. Inventing right and wrong* (Harmondsworth: Penguin Books, 1977), 66. Mackie argues here that the derivation from 'This is wrong' to 'You ought not to do X' is not a derivation of *ought* from *is*, because there is an *ought* concealed in the predicate 'wrong'. It will be difficult to find a better example of begging the question.

that will be made are to some extent stipulative, because in ordinary usage, the words ‘duty,’ ‘obligation,’ and ‘ought’ are often used interchangeably.¹⁰

Both duties and obligations are reasons why something ought to be done. A duty is connected to a role or status. It is for instance the duty of house owners to pay real estate tax, and the duty of a mayor to maintain the public order in a municipality. All human beings are under a duty not to kill other human beings. A person who is under a duty to do something is obligated to do it.

A person who is under an obligation to do something is also obligated to do it. However, where duties are connected to a particular status or role, an obligation is the outcome of an event. Typical examples of such obligation generating events are causing damage, making a promise, or contracting. Moreover, whereas a duty need not be a duty with regard to somebody in particular (e.g., the duty to stop for a traffic light, even if nobody is approaching), obligations are always ‘directed’ and, thus, obligations towards somebody else.

An ought to do is the result of one or more obligating reasons¹¹, a kind of summary of these reasons. Both duties and obligations are such obligating reasons. An ought itself is not an obligating reason, but merely the reflection of one or more of these reasons. So, where the fact that X is under a duty to pay real estate tax is a reason why X ought to pay real estate tax and also a reason to pay this tax (a reason for acting, without the ought), the fact that X ought to pay the tax is not a reason for paying it, although it *presupposes* the existence of such a reason (the duty, for example).

So far for the preliminaries. Let us turn to the main argument of this paper, the argument that it is possible to derive an ought-conclusion from solely is-premises.

3 Searle’s Derivation

In an early paper, John Searle made an attempt to show that it is possible to derive ought from is.¹² The derivation went as follows:

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.

10 The following was inspired by the analyses in Alan R. White, *Modal Thinking* (Oxford: Basil Blackwell, 1975) and idem, *Rights* (Oxford: Clarendon Press, 1984).

11 ‘More details can be found in Jaap Hage, ‘The deontic furniture of the world,’ in J. Stellmach, B. Brozek and M. Hohol (eds.), *The Many Faces of Normativity* (Kraków: Copernicus Center Press, 2013), 73-114, which can be downloaded from: <www.jaaphage.nl/The%20deontic%20furniture%20of%20the%20world.pdf>’

12 John Searle, ‘How to Derive “Ought” from “Is”,’ *Philosophical Review* 73 (1964): 43-58.

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4. Jones is under an obligation to pay Smith five dollars.
5. Jones ought to pay Smith five dollars.

Searle argued that the relation between a statement in this list and its successor is either an entailment or at least not contingent, and moreover the relation could, where needed, be made into an entailment by the addition of a premise which is neither an evaluative statement, nor a moral principle, nor anything of the sort.

Searle's argument is correct in its underlying idea, but nevertheless not fully convincing. It is not fully convincing because of the premise needed to get from (3) to (4), which is presumably something like:

- 3a. For any x and any A , if x placed himself under an obligation to do A , then x is under an obligation to do A .

Although some caveats may be necessary to account for exceptions and cancelling conditions, something like 3a is necessary to make the argument deductively valid. And the problem is that 3a is a sentence which expresses an ought. The sentence itself does not mention an ought, but merely an obligation, but if we assume that an ought can be derived from this obligation,¹³ then the obligation may be said to express an ought itself too. Searle tries to tackle this objection by the claim that sentences like 3a are analytic (literally: 'tautologies'), but even if Searle is correct in this claim, the point remains that analytic ought-sentences are also ought-sentences. Therefore, Searle did not succeed in deriving ought from is.¹⁴

Nevertheless, Searle's argument that it is possible to derive ought from is has an underlying idea which is correct. This underlying idea is that some facts lead to *new* obligations, and that the presence of these facts itself does not depend on obligations. In this paper I will try to show the correctness of this idea by using juridical acts (legal acts, *Rechtsgeschäfte*, *actes juridiques*, *rechtshandelingen*) as an example, instead of promises. It is possible to create obligations by means of juridical acts, and it is possible to describe this creation in terms of a deductively valid argument with only is-premises and an ought-conclusion. The point of using juridical acts as an example is that juridical acts can also lead to non-normative legal consequences and that this mechanism can be described without the use of ought-premises. The same mechanism can also lead to normative legal consequences and then a conclusion about the existence of an obligation follows from almost the same is-premises.

13 In section 9 we will return to the possibility of deriving an ought from an obligation.

14 This argument against Searle's derivation is not identical to but nevertheless closely related to Hare's argument against this derivation. Cf. R.M. Hare, 'The Promising Game,' *Revue Internationale de Philosophie* 70 (1964): 398-412.

4 Juridical Acts and the World of Law

Juridical acts are the means by which legal subjects can change the legal positions of themselves or other persons. Examples from private law are contracts, last wills, and transfers of rights; examples from public law are legislation, and dispositions. One fruitful way to look at juridical acts is to see them as intentional changes to the world of law.

We are all familiar with the physical world. It consists of a large number of facts. The facts in the physical world exist to a large extent independently of human beings. The social world, or social reality, does not only depend on what is physically the case, but also – and to a large extent – on what people believe the social world is. A fact in the social world can obtain because sufficiently many members of a social group believe that it obtains because people believe so, and also believe that (sufficiently many) other members of the group have the same belief, both about this fact and about what the others believe.¹⁵ Jane may, for example, be the leader of an informal group, because most members of the group take her to be the leader and believe that the others take her to be the leader too and believe that the other members do the same.

In modern societies, however, many facts exist as the result of the operation of rules, including legal rules. These rules deal with how people should behave towards each other, but also with the proper use of language, with the definitions of games, and with the membership of socially defined sets, such as the set of legal rules. If the conditions of these rules are satisfied, their consequences hold in social reality. The part of social reality that is the result of the application of rules is called the *institutionalised part of social reality*. Typical phenomena within the institutionalised part of the social world are the existence of money, promises, the law and everything created through the law, such as officials, legally defined organizations and most legal rules. The world of law is part of the social world and in particular of the institutionalised part of it. The existence of large parts of the law, both rules and legal positions, is based on the operation of rules which attach legal consequences to events, including juridical acts.

The events that lead to changes in the institutionalised part of the world of law can be subdivided into acts and non-acts. If the owner of a building dilapidates it, and the building collapses as a consequence, with casualties as a further consequence, the collapse is an event that makes the owner liable for the damage. This collapse is not an act. If the driver of an automobile causes an accident through his fault, he becomes liable for the damage too, this time as the result of an act. This act is not a juridical act, however, not even if the driver caused the accident on purpose, with the intention of becoming liable for the damages, because the

15 Raimo Tuomela, 'Shared We-Attitudes,' in idem, *The Philosophy of Sociality* (Oxford: Oxford University Press, 2007): 65-82.

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liability does not depend on the intention to create it.¹⁶ A juridical act takes place, if somebody performs an act with the intention to create particular legal consequences (changes in the world of law), and the law attaches the intended legal consequences to this act precisely *because* they were intended.¹⁷ A contract would be an example, because it creates legal consequences for the contractors that were intended and for the reason that they were intended. (The seller wanted to convey ownership to the buyer.)

Juridical acts are acts, performed with the intention to bring about changes in the world of law (legal consequences), to which legal rules attach the intended consequences because they were intended.

5 Constitutive Acts

Searle made a number of distinctions between types of speech acts which are useful for a better understanding of juridical acts.¹⁸ One of them is that between directions of fit. It is illustrated by the following example.¹⁹ Suppose I make a shopping list that I use in the supermarket to put items in my trolley. A detective follows me and makes a list of everything that I put in my trolley. After I am finished, the list of the detective will be identical to my shopping list. However, the lists had different functions. If I use the list correctly, I place exactly those items in my trolley that are indicated on the list. My behaviour is adapted to what is on my list. In the case of the detective it is just the other way round; the detective's list reflects my shopping behaviour. If we consider my behaviour as (part of) the world, we can say that my shopping list has the world-to-word direction of fit, because my behaviour (the world) must fit the words on the list (the words). The detective's list, on the contrary, has the word-to-world direction of fit, because his list must fit my behaviour.

The direction of fit holds between the propositional content of a speech act and the world. The illocutionary force of a speech act determines which direction of fit is involved. Searle distinguished five main kinds of speech acts:

- 16 Neil MacCormick, *H.L.A. Hart* (London: Edward Arnold, 1991), 74 and Torben Spaak, 'Norms that Confer Competence,' *Ratio Juris* 16 (2003): 89-104.
- 17 It may be argued that sometimes contracts are not based on offer and acceptance, but on reliance. In such cases there would, allegedly, be a juridical act even though the relevant intention is lacking. I would say that in such cases, the legal consequences of a valid contract hold, but that these consequences are not the result of a juridical act. See Jaap C. Hage, *De wondere wereld van het recht* (The wondrous world of the law), inaugural address University of Maastricht. For a similar argument, but then to the effect that these legal consequences are not the result of the exercise of a power, see Andrew Halpin, 'The Concept of a Legal Power,' *Oxford Journal of Legal Studies* 16 (1996): 129-52.
- 18 John Searle, 'A Taxonomy of Illocutionary Acts,' in idem, *Expression and Meaning. Studies in the Theory of Speech Acts* (Cambridge: Cambridge University Press, 1979), 1-29.
- 19 The example stems originally from G.E.M. Anscombe, *Intention*, 2nd edition (Oxford: Basil Blackwell, 1976), 56.

- *Assertives* commit the speaker to something's being the case. For instance, the sentence 'It's raining' can be used for an assertive speech act. Assertives have the word-to-world direction of fit; they are successful if they are true.
- *Directives* are attempts of the speaker to get the hearer to do something. For instance, the sentence 'Give me your money' can be used for a directive speech act. Directives have the world-to-word direction of fit, and are successful if they are effective.
- *Commissives* commit the speaker to some future course of action. They have, according to Searle, also the world-to-word direction of fit. For instance, the sentence 'I promise to lend you my car' can be used for a commissive speech act. The difference between commissives and directives is, according to Searle, that directives direct the hearer, while commissives commit the speaker.
- *Declarations* bring about a correspondence between the speech act's propositional content and the world. They have, what Searle calls, a double direction of fit, because the world is made to fit the propositional content of the speech act, while that content comes to fit the world. For instance, the sentence 'I hereby declare you husband and wife' can be used for a declaration.
- *Expressives*, finally, express the speaker's psychological state. For instance, the sentence 'I thank you for lending me your car' expresses the speaker's gratitude. Expressives have no direction of fit, because they express, rather than describe the speaker's psychological state.

Searle's analysis of different kinds of speech acts by means of the difference in directions of fit provides a suitable starting point for the analysis of juridical acts. For that purpose it needs to be amended, however. My first amendment is merely terminological. Declarations in Searle's sense are speech acts by means of which facts are created. Since these acts are constitutive (in the case of the termination in a negative sense), I propose to call these speech acts by means of which the world is changed *constitutive acts*, or *constitutives*. Constitutives are acts that bring about changes in the institutionalised part of the social world. They are made possible by constitutive rules.

The second amendment concerns the direction of fit of constitutives. According to Searle they have a double direction of fit, because the world is altered to fit the propositional content of the speech act by representing the world as being so altered. It seems, though, that the words come to fit the world only because the world has been adapted to the words. Therefore I propose to speak, in the case of constitutives, of a world-to-word direction of fit. However, the world-to-word fit of constitutives is not the same as the world-to-word fit of directives. The success of the latter fit depends on the *effectiveness* of the speech act. The world-to-word direction of fit of constitutives is that the facts in the world come to fit the words as a result of the operation of rules. Searle correctly remarks that declarations (constitutives) normally require an extra-linguistic institution, a system of constitutive rules, in order that the declaration may successfully be performed. For instance, there are rules that lay down how the appointment of a chairwoman, who is competent to open and close meetings, should take place. If these rules are

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followed in a concrete case, the appointment in question is *valid*. The institution not only defines when constitutive acts are valid, but also connects consequences to valid constitutives, for instance that somebody has become the chairman. These consequences are *changes* in the institutionalised world, which account for the world-to-word fit of constitutives.

The third amendment concerns the analysis of commissives. If I make a promise and nothing extraordinary is the case, I immediately come under the obligation to do what I promised to do. In other words, making a promise has a world-to-word fit of a constitutive. Therefore I prefer to treat promises as a species of constitutives, rather than make them into the separate category of commissives.²⁰ Commissives have a counterpart in constitutives that impose obligations on others than the speaker. For instance, an officer in the army gives a command to a subordinate soldier. In that way he imposes on the soldier the obligation to do what was commanded.²¹

6 Contracts

Juridical acts can very well be taken as a special kind of constitutive acts. They have the world-to-word direction of fit in the sense that if a juridical act is valid, its propositional content becomes true in the law as a consequence of the transaction. Just as with other constitutives, juridical acts can only work within a setting of rules. These rules define amongst other things how juridical acts are to be performed, which persons are competent to bring about which legal consequences, who has the capacity to perform juridical acts and which legal consequences are connected to the successful performance of a juridical act. The very idea of juridical acts is that these legal consequences are by and large the ones intended by the performer of the transaction. Therefore, a legal system can only be said to acknowledge juridical acts if it actually attaches the intended consequences to juridical acts for the reason that they were intended.

Obvious as this view of juridical acts may seem at first sight, its implications are far-reaching. Amongst other things it means that it is possible to derive the presence of an obligation from is-premises only. This will be illustrated by means of an analysis of contracts. In the common law tradition, contracts are often seen as mutual promises.²² With due respect to the common law tradition, this view is too narrow to cover contractual practice. The point of making promises is to

20 See also D.W.P. Ruiters, *Institutional Legal Facts* (Dordrecht: Kluwer Academic Publishers, 1993), 67f.

21 Ruiters, *Institutional Legal Facts*, 70f.

22 Cf. section 1 of the Second American Restatement on Contracts: 'A contract is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.' Quoted from H. Beale et al., *Cases, Materials and Text on Contract Law* (Oxford: Hart Publishing, 2002), 3. See also Charles Fried, *Contract as Promise* (Cambridge: Harvard University Press, 1981) and Dori Kimel, *From Promise to Contract* (Oxford: Hart Publishing, 2003).

undertake obligations. Although it is possible to undertake obligations by means of contracts, contracts can also be used for other purposes that cannot be achieved by promises. It is for instance possible to use a contract to appoint an arbiter who is empowered to decide over conflicts that might arise in connection with the execution of (the rest of) the contract.

It is possible to object against this analysis of contracts by saying that, for instance, the appointment of an arbiter is nothing but the undertaking of an obligation to do whatever the arbiter may decide. If so, the contract would be the undertaking of an obligation. However, interpreting the appointment of an arbiter as undertaking the obligation to do whatever the arbiter decides would misrepresent the appointment.²³

Not everything that is brought about by a valid contract is an obligation. Much more legal consequences are possible. By means of a contract, the parties create or abolish facts in the world of law, to the extent that they so indicate in the contract, and to the extent that they are empowered to do so.

Although contracts do not necessarily lead to obligations – they may for instance be confined to the cancellation of obligations, or to the division of risks in case of default in an already existing contract – they often do. Surprisingly, few people see this as involving some variety of the fallacy of deriving ought from is. It might be objected that contracts only seemingly bridge the gap between is and ought because the obligation to do what was contracted is based on the rule that contracts ought to be complied with. The contract itself would, on this view, be nothing more than a specification for a concrete situation of what this general obligation implies. It is, however, questionable whether the rule that contracts ought to be complied with exists. The point of contracts is more general than merely that contracts facilitate the intentional creation of obligations. Their point is that the facts established by means of the contract hold between the contract parties. Underlying contracts is not the rule that contracts ought to be complied with, but the rule that the facts which a contract aims to bring about actually come to existence if, and to the extent that, the contract is valid.

The rule ‘what parties agreed to holds between the parties’ does not impose any obligations itself. The reason why obligations result from most contracts is because the contract parties *create* obligations between themselves by means of most contracts. Notice the emphasis on ‘create.’ The obligations were not yet there before the contract; they are the result of the contract. The presumed obligation to obey one’s contracts is superfluous. If the contract does not create obligations, but aims for instance to cancel existing obligations, there is nothing to obey, and the rule would not make sense. If the contract does create obligations, the rule imposing the duty to comply would effectively be that one has the duty

23 Cf. Hart’s discussion of the reconstruction of power conferring rules as duty imposing rules, in Herbert L.A. Hart, *The Concept of Law*, 2nd edition (Oxford: Oxford University Press, 1994), 38-42.

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to do what one is under an obligation to do. That would be an almost analytical rule which does not make much sense either. So there is no role for the rule that contracts ought to be obeyed.²⁴ The obligation to do what one contracted to do therefore does not derive from such a rule. The obligation is created by means of the contract and it is a new obligation that did not yet exist before the contract, not even in the more abstract form of a duty to comply with one's contracts.²⁵

The same point can also be made in a slightly different way. The operation of contracts by means of which obligations are created can be analysed in two ways. According to the first way, there exists a prior duty to do what one has contracted to do. This duty already existed, and the sole function of the contract is to give this general duty a specific content by indicating exactly what parties have undertaken to do. This style of analysis can also be used for the analysis of promises, if one assumes that the practice of promising includes the existence of a prior duty to keep one's promises. The function of actual promises is then to provide content to this general pre-existing duty. Logically this analysis boils down to something like the following:

- I. For all x it holds that if x has contracted/promised to do A , then x is under a duty (ought) to do A .
- II. Jones has contracted/promised to pay Smith five dollars.
- III. Therefore: Jones is under a duty (ought) to pay Smith five dollars.

Notice that the first premise, which expresses the pre-existing general duty, is an ought-premise.²⁶ The ought-conclusion is on this analysis *not* derived from is-premises only. Moreover, the ought of the conclusion stems from the ought of premise I.

The second way to analyse the operation of contracts emphasises that contracts, like other juridical acts, bring about the facts in the world of law which the parties intended to bring about and which they expressed in the propositional content of the contract. On this analysis there is no pre-existing duty and the contract can therefore not be interpreted as a specification of a duty that already existed. There is not a duty, but a pre-existing rule which makes juridical acts possible. This rule approximately holds – the details may differ for different kinds of juridical acts – that the facts which the parties intended to bring about will actually

24 The principle 'pacta sunt servanda' was originally meant to express that a *particular kind* of agreement, the so-called 'pacta nuda' were binding too. Later it came to express that contracts ought to be honoured *under all circumstances*. Cf. Reinhard Zimmermann, *The Law of Obligations* (Oxford: Oxford University Press, 1996), 576-77.

25 An additional argument in this connection is based on the difference between duties and obligations. The duty to comply with one's contractual obligations is, as the name says, a duty. It holds in general and is attached to the status of contractor. The contract does not lead to a duty, however, but to an obligation.

26 If the distinctions between duties, obligations and oughts is kept in mind, the present analysis of Searle's argument looks strange. Only if, as sometimes happens, these distinctions are ignored, this argument has a ring of plausibility.

hold in the world of law. Notice that there is nothing ought-like in this rule; the rule also holds for the cancellations of duties, as well as for the empowerment of arbiters, for the foundation of organisations, and for the creation of obligations. Logically this analysis boils down to something like the following:

- IV. For all states of affairs *s holds that if a valid juridical act was performed with the content [state of affairs *s will be the case], then state of affairs *s will be the case in the world of law.²⁷
- V. Jones has concluded a valid contract with Smith with, amongst other things, the content [Jones will be under an obligation towards Smith to pay her five dollars].
- VI. Therefore: Jones will be under an obligation toward Smith to pay her five dollars.
- VII. Therefore, after the conclusion of the contract, Jones ought to pay Smith five dollars.

Notice that the counterpart in this analysis of ought-premise I of the earlier argument is premise IV, which does not contain an ought. Premise V may seem to contain an ought ('obligation'), but this ought does not express an existing obligation, but is merely part of the propositional content of the speech act by means of which the obligation was created. It is, in a sense²⁸, an ought between quotes. So the derivation on the second analysis appears to be an example of a derivation of an ought-conclusion from a set of is-premises.

7 The Normativity of Legal Obligations

The above argument about the way in which juridical acts make it possible to derive ought-conclusions from is-premises may be the object of a number of objections. A first objection might be that the ought of conclusion VII is not a 'real' ought but only a legal ought, or to use the famous phrase coined by Hare, an 'inverted comma's ought.'²⁹ The obligation for Jones to pay Smith five dollars is only an 'obligation' to the extent that Jones wants or intends to obey the law. This objection has been formulated in different variants. One variant is the one

27 The use of brackets to denote propositional contents into which quantification is possible was inspired by different but related analyses in W.V. Quine, 'Quantifiers and Propositional Attitudes,' in *The Ways of Paradox and other essays*, revised and enlarged edition (Cambridge: Harvard University Press, 1976), 185-196 and David Kaplan, 'Quantifying in,' in D. Davidson and J. Hintikka, *Words and Objections: Essays on the work of W.V. Quine* (Dordrecht: Reidel, 1969), 178-214. This use of brackets requires elaboration, but here is not the place to do so. The same holds for the quantification over states of affairs. The interested reader can find background information on that in Hage, *Studies in Legal Logic*, 72-76. Those who have objections against the less than traditional use of logical techniques may find consolation in the fact that the logical analysis is not essential to the main argument of the paper.

28 I use the phrase 'in a sense', because propositional content is not a linguistic expression, although it has some things in common with declarative sentences.

29 R.M. Hare, *The Language of Morals* (Oxford: Oxford University Press, 1952), 164-72.

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formulated by Mackie.³⁰ Mackie distinguishes between taking an institution such as contracting from the inside and from the outside. From within the institution, a promise leads to an obligation which really binds, while from the outside a promise leads only to an obligation from the perspective of the institution. The statement that legally spoken Jones ought to pay Smith five dollars would, according to Mackie, be purely descriptive, would describe brute facts. Another variant is to consider the obligations that result from a contract as hypothetical obligations, analogous to hypothetical imperatives in the Kantian sense. We find this approach in the work of Philippa Foot who argued that moral requirements are hypothetical imperatives.³¹

There are two variants of this objection, neither one of them decisive. The first variant is that although the legal obligation is a real obligation, it still needs to be balanced against possible conflicting other duties or obligations. It is merely a 'pro tanto obligation' and therefore the presence of the obligation does not imply that Jones 'really' has to pay five dollars. This objection wrongly assumes that a pro tanto obligation is not a real obligation. Pro tanto obligations are real obligations, because if there are no other duties or obligations a pro tanto obligation determines what ought to be done. This means that the normative force of an ought is already present in a pro tanto obligation.

The second variant of the inverted comma's objection is that obligations that are labelled with a particular point of view, for instance the legal point of view, are not real obligations, not really 'normative' because it is always possible to ask whether the obligations of that point of view ought really to be complied with. The attractiveness of this objection may be strengthened for lawyers by the observation that the 'obligations' based on a foreign, or merely historical legal system are not real legal obligations here and now. Just as a Dutchman is not bound by Italian law, one may argue that a person is not bound by the law in general. The descriptive sentence 'According to English law, cars ought to be driven on the left hand side of the road' is a true description, and therefore, one might argue, not normative.³²

The problem with this approach is that it applies to all duties and obligations, including moral ones (as Foot argued). If one can question whether legal obligations are normative, one can also question whether moral obligations are normative, and whether obligations based on particular rules and values are normative. It may be true that morally we ought not to kill other human beings arbitrarily, but is this true judgment really normative? Does it prescribe or merely describe what is the case according to morality? Somebody who takes this type of questioning seriously might be tempted to assume an underlying duty that obligates

30 Mackie, *Ethics*, 67-72.

31 Philippa Foot, 'Morality as a System of Hypothetical Imperatives,' in *Virtues and Vices* (Oxford: Basil Blackwell, 1978), 157-73.

32 This argument was pointed out to me by one of the anonymous reviewers of this paper for the *Netherlands Journal of Legal Philosophy*.

to follow law, morality or particular rules and values. Subsequently, this duty may be questioned in the same way, leading to the assumption of even more fundamental underlying duties, and so ad infinitum.

This reminds one of Lewis Carroll's tale about the tortoise and Achilles.³³ The upshot of this tale is that any derivation based on a rule of inference can be questioned by turning the underlying inference rule into a premise of the argument and questioning whether the conclusion would follow from the premises of the original argument, augmented by the transformed inference rule. Obviously this does not make sense; some rule of inference has to be presupposed, rather than explicitly stated as a premise. In a similar way it does not make sense to ask of any rule etc. that underlies an obligation whether one ought to comply with it.

Basically, the very idea of normativity as opposed to duties from a particular point of view, or duties based on a particular set of norms, is unclear. One can understand how duties can exist under a set of mandatory rules, such as rules prohibiting torture or murder, or under a set of rights or values, such as the right not to be hurt, or the value of liberty. It is also understandable how obligations can be created, if a particular setting of constitutive rules, such as the rules for juridical acts, is in force. And finally, it is also clear how it may be the case (notice the formulation: 'be the case'; can it be more factual?) that one ought to do something, given that there exists a duty to do so. If one asks, however, whether such a duty, obligation, or ought is really normative, one assumes that there exists a kind of normativity that does not coincide with the obligations, duties and oughts based on rules, values, or rights. The precise nature of this normativity cannot be specified, however, and the burden of proof that such a vague thing exists lies on those who claim its existence.

8 Other Objections

Another possible objection against the derivation of a legal obligation from premises that do not contain an ought is that the derivation is based on a rule, namely the rule that the facts which the parties intended to bring about will actually hold in the world of law. This objection can be met in two ways, one opportunistic, the other fundamental. The opportunistic rebuttal would be that 'The facts which the parties intended to bring about by means of a valid juridical act will actually hold in the world of law' may be interpreted as a true declarative sentence, rather than as a rule. Under this interpretation, the argument would still be valid. In fact it would even be a better specimen of a deductively valid argument, because the sentence has a truth value, while the corresponding rule would not be true, but rather valid. That the truth of this sentence depends on the validity of the rule does not detract from the fact that the argument under this interpretation exem-

33 Lewis Carroll, 'What the Tortoise Said to Achilles,' in *id.*, *The Penguin Complete Lewis Carroll* (Harmondsworth: Penguin Books, 1982), 1104-8.

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plifies the deductively valid derivation of an obligation from premises that do not contain an ought.³⁴

Some may find this rebuttal less than satisfactory for the reason that ought-premises and rules are in the same boat. They are both not 'objective' in the sense that their truth or validity does not rest in a man- or mind-independent reality, but is a matter of choice, or adoption. The point of the non-derivability of ought-conclusions from is-premises is, it may be argued, not the merely logical issue of derivability, but the more fundamental issue of the objective nature of ought-judgments. If ought-conclusions can be derived from is-premises, these ought-judgments would be just as objective as the is-judgments from which they are derived.

The first thing to notice about this rebuttal is that it grants that it is possible to derive ought-conclusions from is-premises. The alleged impossibility is not the logical impossibility to make some kind of derivation, but rather the ontological impossibility to find a foundation for ought-judgements in man- and mind-independent reality. The issue at stake is not a logical one anymore but rather an ontological one.³⁵ This leads to the fundamental rebuttal.

The ontological issue which really is at stake is not confined to ought-judgements. One may just as well, with the Scandinavian legal realists Olivecrona and Ross, question whether legal rights exist in a man- and mind-independent reality.³⁶ A similar question may also be asked about organisations, public offices and all other things which exist in social reality.³⁷ Moreover, even necessity and certainty judgements arguably depend on rule-like entities for their truth.³⁸ Maybe all conclusions about the man- and mind-dependent parts of reality require premises about man- and mind-dependent parts. But even if this is the case, this does not amount to the impossibility of deriving ought from is.

9 The Derivation of Ought from 'Obligation'

Until now, the argument against the derivation of ought from is which I consider to be the strongest has not yet been discussed. This argument is that it may be impossible to derive the existence of an ought from the existence of an obligation without the use of an ought-premise. Searle already pointed out that the step from 'Jones is under an obligation to pay Smith five dollars' to 'Jones ought to

34 Hage, *Studies in Legal Logic*, 197-200.

35 It may be doubted whether this distinction between the (deductive) logical and the ontological is sharp. The reason is that the issue whether a conclusion must be true given the truth of the premises is hardly distinguishable from the issue whether the state of affairs expressed by the conclusion must obtain, given the facts expressed by the premises.

36 Olivecrona, *Law as Fact*, ch. 3 and Alf Ross, 'Tü-Tü,' *Harvard Law Review* 70 (1957): 812-25.

37 It is no coincidence that Searle, many years after publishing the paper on the derivation of ought-conclusions from is-premises, published a book on the *construction* of social reality. John Searle, *The Construction of Social Reality* (New York: The Free Press, 1995).

38 Jaap C. Hage, *Feiten en betekenissen*. PhD thesis (Leiden, 1987), ch. 5.

pay Smith five dollars' might not be deductively valid, but he argued that it could be made so by the addition of a non-evaluative and non-moral etc. premise. It seems, though, that it is necessary to add a premise like 'If P is under an obligation to do A, then, *pro tanto*, P ought to do A.' The same may be said in terms of contributory reasons: The fact that P is under an obligation to do A is a contributory reason for the fact (conclusion) that P ought to do A.

It is difficult to deny that such a premise would be an ought-premise, but would it really be necessary for the deduction of the ought-conclusion? The answer is that it depends on how one characterizes deduction. If deduction is characterized in terms of the formal systems which are presently called systems of deductive logic, the answer will be negative. In these systems the step from obligation to ought requires a separate premise and that premise will be an ought-premise. If deduction is characterized independently from existing logical systems as a step in an argument which guarantees the truth of the conclusion on the basis of the truth of the premises, then arguably the argument 'P is under an obligation to do A. Therefore, *pro tanto*, P ought to do A' is deductively valid. If one wants to go into this direction with deductive logic, there is reason to adapt one's favourite system of deontic logic to allow the derivation from 'obligation' to 'pro tanto ought' somewhat analogously to the derivation from 'ought' to 'permitted'.³⁹

10 Conclusion

This paper argues that Searle's argument about how to derive ought from is, is basically correct, but that it would become stronger if the argument would rely on contracts, rather than on promises. The reason is that contracts do not necessarily lead to obligations and that shows that the way in which contracts lead to new facts has nothing to do with obligations or oughts. That is even the case when a contract is used to create an obligation. The mode of operation of contracts and other juridical acts is that of constitutive acts: acts which bring about changes in the world through the operation of rules. One kind of change is the generation of an ought where previously there was none. If one simulates the generation of an ought in the form of an argument, this may very well be an argument with only is-premises and an ought-conclusion.

In the introduction it was claimed that the possibility of deriving ought from is would help us in understanding how the law could be on the borderline between is and ought. It is now time to evaluate this claim. A legal ought can be generated by applying a rule, for instance a rule about the creation of obligations, to facts. The existence (validity) of a legal rule is a matter of fact, and the facts to which the rule is applied are – obviously – also facts. The application of such a 'factual'

39 Details of how that should be accomplished go beyond the scope of the present paper. Suffice it to point out, for those who are interested in the formal side of the derivation, that the addition of the following axiom to a deontic extension of reason-based logic (Hage, *Studies in Legal Logic*, ch. 3) would do the job: $Ar(*obligation(p, do(A)), *ought(p, do(A)))$.

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rule to 'factual' facts may lead to a legal ought. It is in this not very spectacular way that the law can be on the borderline of is and ought.