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Noel B. Reynolds

Brigham Young University - Provo, nbr@byu.edu

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HUME AND HIS CRITICS: Reid and Kames

Response to Kenneth Mackinnon
"Property Rights--Hume and his Opponents"
IPSE 86 (Conf. on Law and Enlightenment)
Noel B. Reynolds, author and copyright holder
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ABSTRACT:

This presentation was in response to Kenneth MacKinnon's defense of Thomas Reid's preference for natural virtue against David Hume's conventionalism in his theory of law. It is argued that because Hume's legal theory follows easily from his theory of human nature, Reid and Kames—and MacKinnon—need to refute Hume at that level to be successful in their rejection of his conventionalism.

KEY WORDS:

Kenneth MacKinnon, David Hume, Thomas Reid, Lord Kames, justice, natural virtue, artificial justice, natural rights, property rights, convention

There are basically two directions a discussion of this kind of paper can take. We can assess the relative merits of positions advanced by Hume, Reid and Kames, for the value that can be derived from them today. And we can quibble about the particular interpretations that our speaker has put on the eighteenth century texts. I will attempt to open up both these potential lines of discussion.

It is our good fortune that Ken MacKinnon has taken earlier and more ample opportunities to develop some of these issues. Although he does not side strongly

with Kames' criticism of Hume, given the number of ambiguities it entails, he has claimed that Reid succeeded in showing against Hume "that justice is a natural virtue."¹ Reid's argument is that "as all works of men are imperfect, human laws may be unjust; which could never be, if justice had its origin from law...."²

Mackinnon agrees with Reid on this point because "far from being the product of law, justice stands against law, as a yardstick for assessing law's moral worth for the use both of lawmakers and their critics."³

Mackinnon is aware of the limitations of this natural lawyer's position which reduces the certainty of law. But he appears to side with Reid in favoring the approach for its advantages in allowing one "to ensure the justice of each action."⁴ But why should we expect Hume to be overturned by the observation that human laws are imperfect? More of this later.

On the side of interpretation, we should remember that it was Hume who characterized the debate over natural and artificial justice as to a great extent

¹Kenneth MacKinnon, "Thomas Reid on Justice: A Rights-Based Theory," a paper delivered at the Thomas Reid Conference, University of Aberdeen, 4 September 1985, p. 9.

²Mackinnon, p. 8, quoting from Thomas Reid, Essays on the Active Powers of the Human Mind, B. Brophy, ed., Cambridge, Mass., 1965, p. 385.

³Mackinnon, p. 9.

⁴Ibid.

"merely verbal."⁵ For "the word "natural" is commonly taken in so many senses and is of so loose a signification, that it seems vain to dispute whether justice be natural or not."⁶ He finds justice and property undoubtedly natural if one means by that not usual or not miraculous. And further, "if self-love, if benevolence be natural to man; if reason and forethought be also natural; then may the same epithet be applied to justice, order, fidelity, property, society."⁷ But the young Hume believed that the idea of artifice, which he had developed in such detail in his account of human cognition, should also perform a fundamental role in his account of morals and politics. And so he called justice "artificial".

It is not easy to make a sustained comparison and evaluation of Reid and Kames against Hume for the reasons that Ken MacKinnon has outlined. For his two critics were speaking from partial theories which also remained in flux (and radically so for Reid up until his death). Hume on the other hand had announced a full blown theory of man with a thoroughly worked out system of cognitive, affective, and moral propositions while yet in his mid-twenties, and never changed his fundamental views, but rewrote in later years primarily to improve the style

⁵Enquiry, p. 308n.

⁶Enquiry, p. 307.

⁷Ibid.

and appeal of the arguments.

The intentions of his critics are not nearly so clear as those of Hume. Kames objects instinctively to Hume's brazen rejection of natural rights. But in his own analyses of the law tends to lapse into utilitarian justifications that are not easily distinguished from Hume's. Reid advances a more aggressive account in terms of natural rights, but like Hume, appreciates the limiting force of reason and the common good. Yet Kames and Reid share our normal fear of going the whole hog with Hume and bluntly recognizing a fundamentally artificial element in human justice.

But what are their alternatives? If you deny Hume's view, as they clearly wanted to do, you must hold some ground for justice more basic than human convention. But what can be the point? If human conventions, as described by Hume, are formed by men in the free pursuit of their mutual advantage as rules which will multiply the opportunities of all for self-improvement, natural rights could only play a significant role as limitations on the range of acceptable conventions.

But do they impose limits derived from moral wrongs in some cosmic sense unrelated to human welfare? Clearly not. For Kames and Reid the naturalness of justice is focused negatively on injuries that are resented by all men. But such

universal sentiments for human welfare are explicitly accounted for in Hume's theory of convention. Men will not ordinarily combine to do themselves injury.

Do theories of natural rights assert that men are primarily motivated to just action and to avoid injustice, and that therefore authoritative conventions are unnecessary? Indeed, this would seem to be the implicit assumption of even contemporary rights theorists who believe that judges should reach beyond the rules of a legal system to invoke rights directly in seeking just resolutions of cases. Such an approach indeed gives natural rights a meaningful role. But it fails to account for the implications of Hume's rather common-sense notion of human nature. For if men are moved both by self-love and benevolence, and if their understanding is always limited and contingent, assertions of the existence of natural rights would be virtually irrelevant in a system of laws administered by men over men. Unless one is willing to claim that such natural rights will be self-enforcing or will arise accurately, forcefully and spontaneously in every human breast, society can only protect itself from the evil effects of human weakness through conventional rules, which will inevitably produce results in many individual cases which violate someone's sense of justice. If Hume is correct in his description of human nature and the effectiveness of law as a remedy, can anyone who believes in justice, even of an absolute variety, fail to appreciate the

net balance of benefits to humanity that will come from submitting to a regime of artificial justice? Like Hume, I do not see how they can do so without ignoring part of the overall problem.

On the other hand, the explosion of interest in rights theories in the last two decades testifies to a strong dissatisfaction with the bare bones Humean view. Most of us want some things to be right or wrong, independently of utility. We do hold moral views. But what role should these play in the law? If Reid (and MacKinnon) would be satisfied to see them as grounds for criticizing the law and seeking its improvement, Hume would hardly have an objection. But if they want to assert that natural rights are law and will ensure justice in individual cases, they need to expand their theory to explain why Hume's account of human nature and its implications is mistaken. And this does not appear to have been attempted.

Time permitting, it might be worthwhile to sketch one further perspective from which these writers might be contrasted. Each of them in the final analysis is interested in the justification of law. But whereas Hume's skeptical empiricism leads him to look to experience for evaluative guidance, Kames and Reid want to rely on intuition or sentiment. They perhaps share the view that there is something more universal and less arbitrary in such appeals. But Hume's epistemological investigations have deprived him of every plausible excuse for sharing such views.

He would expect such reliance to produce uncertainty, injustice by any definition, and bitter and destructive divisions between men, rather than the public good. So Hume's justification of law as convention rests on his explanations of human nature. The natural rights theorists would perhaps have less confidence should they undertake to provide an alternative theory to explain human nature.