Prof. Dr. iur. Matthias Mahlmann   Fall semester 2017

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Legal Theory

11 January 2018

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Duration: 120 minutes

- Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains 2 pages (this page included) and 4 questions.

Notes on marking
- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1	20 points	20 %
Question 2	20 points	20 %
Question 3	40 points	40 %
Question 4	20 points	20 %
Total	100 points	100 %

We wish you a lot of success!

Outline Solution Legal Theory – fall semester 2017

The following outline solution is not meant to include the only possible answers to the exam questions, but to illustrate one approach among others. Furthermore, the students were not expected to write such a detailed text; instead, they should recognise the core aspects of the questions and write down their thoughts in an accurate and coherent manner and supported by convincing arguments.

Question 1 (20 %)

What is the difference between competence and performance? Please define these terms and provide an example. Why is this distinction important for the study of the human mind?

Question 2 (20 %)

What is the content of the "poverty of stimulus" argument? Why is it important for the study of human cognition? Please provide an example of such a "poverty of stimulus" argument in a concrete case.

Question 3 (40 %)

What is the "trolley problem"? Why is it important for the study of law and human cognition? Are there other possible principles of human moral understanding beyond those derived from the analysis of the trolley problem? If so – please explain their content.

Question 4 (20 %)

What is – in your view – the use of neuroscience, the theory of mind, psychology and evolutionary theory for the theory of law? Please include in your assessment some remarks about the question: What kind of picture of humanity is painted by these theories?

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Question 1 (20 %)
What is the difference between competence and performance? Please define these terms and provide an example. Why is this distinction important for the study of the human mind?

While *competence* refers to our system of knowledge, providing us with the mental capacity to undertake certain tasks, *performance* denotes the usage of this knowledge. The distinction between the two concepts is central insofar as performances (instances of use of knowledge) alone cannot be taken as providing sufficient data for identifying the scope and content of the respective competence (system of knowledge) on which they are based. This is especially so because of the possibility of performance errors, rooted, e.g., in limited memory, emotions, prejudices or distractions. These factors can influence our performance and therefor need to be taken into account, too.

Example of linguistics: The phenomenon of garden path sentences in linguistics shows that while we misunderstand the sentence due to its word order and thereby fall prey to a *performance* error, this does not yet imply that our linguistic competence is equally constrained. In this case, the performance does not adequately mirror the underlying linguistic competence.

Example of moral judgments: In the moral sphere, the performance, thus the use of our system of knowledge, can be observed via moral judgments. However, non-moral factors (such as emotions, biases, or limited attention) can cloud such judgments (think of "I hate her so much that I think it is justified that she got a lower grade in the exam"). Thus, again, performances alone are not sufficient for discerning the moral competence behind them, i.e. the moral faculty.

Question 2 (20 %)
What is the content of the "poverty of stimulus" argument? Why is it important for the study of human cognition? Please provide an example of such a "poverty of stimulus" argument in a concrete case.

The poverty of stimulus argument concludes that, if a capacity cannot be acquired through learning or experience inputs, it must be inborn. This does not mean that such an inborn capacity is already fully established at the time of birth: It may still need triggers in order to evolve into its mature forms – but the disposition is innate. The term 'poverty of stimulus' goes back to Noam Chomsky.

Example of morality: For the case of moral cognition, the argument may be relevant as well: The question is whether our moral faculty is too rich to assume that it is only based on learning and experience. There are some indications that this may be the case. Small children, for instance, already perceive the difference between moral and conventional norms and exhibit the respective volitional and emotional reactions with regard to the former. They cannot be taught moral principles (such as justice and altruism) at that age, but still develop the capacity to distinguish morally right from morally wrong actions at a very early age.
There are various elements that hint at the thesis of a Universal Moral Grammar: The intuitive grasp of the distinctiveness of the moral space; the self-evident and non-learned nature of non-instrumentalization (expressed in residual permissibility principles) as well as of altruism and justice (which are not assumed to be in need of justification but are foundational principles of normative systems); the intuitive understanding of formal preconditions of moral evaluation (agency, distinction between direct and oblique intentions, identification of objects of moral evaluation); the role and nature of moral emotions; and the phenomenon of volitional consequences of moral judgments (the moral "ought", which cannot be explained only by the experience of sanctions or role-taking). The Universal Moral Grammar thesis states that the formal structure of morality, its substantive foundational principles and its volitional and emotional consequences are innate parts of the universal moral faculty, which is uniform across the species. This faculty provides the basis from which an infinite number of moral judgments can be derived.

Example of linguistics: In his Universal Grammar theory, Chomsky holds that the linguistic elements that children acquire cannot all be traced back to inputs of experience or learning processes. Still, the ability to

understand and speak a language is already exhibited at very early ages. Despite the impoverished linguistic input, young children prove able of identifying correct language patterns, dealing with complex grammatical structures. This suggests that the linguistic faculty is an inborn cognitive capacity, containing a set of principles from which an infinite number of grammatical expressions can be derived.

Example of vision: In the Kanisza Triangle, as our seeing the triangles cannot be traced back to learning processes or prior experience, it appears that this perception is based on an inborn visual capacity.

Question 3 (40 %)
What is the "trolley problem"? Why is it important for the study of law and human cognition? Are there other possible principles of human moral understanding beyond those derived from the analysis of the trolley problem? If so – please explain their content.

The trolley problem refers to a thought experiment intended to identify people's moral intuition about the preconditions of permissible killings by confronting them with a choice between the death of one person and the deaths of five persons.
The problem is framed in many variants, two of the most basic of which will be described in what follows. In variant (i), a trolley is running on a track on which, behind a switch, five people are working. On the other track, one person (A) is working. You are in a position to turn the switch which detours the trolley to the second track, killing one person and saving five. In (ii), the trolley is running on a track on which five people are working, but the only way to stop it is by throwing bystander B (located on a footbridge above the tracks) onto the track in front of the trolley. Again, one person is killed in order to save five.

Empirical findings from numerous studies across the globe reveal that people judge it permissible to kill A in variant (i), based apparently on a utilitarian evaluation, while impermissible to kill B in variant (ii), based on a non-utilitarian evaluation. These findings suggests the following:
- The distinctions between *oblique and direct intention* as well as between *intended and foreseen consequences* matter and amount to *formal preconditions of moral evaluation*. In variant (i), A's death is merely a side-effect of saving five others – a bad consequence that is foreseen but not intended. The death of B in variant (ii), on the other hand, is a direct means to save the five.
- One interpretation of these findings is that the *principle of double effect*, an approximation to the findings, appears to be anchored in human moral cognition. It holds that otherwise impermissible acts are permitted if the act and its negative consequences can be foreseen but are not directly intended; the good effects are directly intended and outweigh the bad ones; and no morally preferable alternative exists.
- As people tend to judge the instrumentalization of B (using him as a direct means to save the five) as impermissible, the findings suggest that the *principle of non-instrumentalization*, which prohibits using human beings as mere means to achieve one's ends and requires respecting every person as an end in herself, is also part of human moral cognition.
- The acceptance of a utilitarian evaluation in one situation does not commit one to accept it in all other situations. There appears to be a kind of 'threshold deontology' operative in human moral cognition.

The trolley problem is important as it allows testing intuitions about the preconditions of permissible killings and thereby reveals *basic formal moral distinctions* as well as *substantive principles rooted in human moral cognition*. This is also relevant for the content of positive law, which can both incorporate or correct moral intuitions (cf. the prohibition to weigh lives in the framework of justification/defence in criminal law).

Next to the above-mentioned principles, there are further potentially universal and general *substantive foundational principles* that structure human moral cognition:
- According to the *principle of altruism*, acts are morally good insofar as they are performed with the *direct intention to promote the well-being of a sentient being* and lead to *beneficial outcomes*. Both elements are necessary: It is neither sufficient if (i) the consequences are good but the intention to benefit the other is merely oblique and indirect, nor if (ii) there is a direct intention to benefit the other, but the acts have bad effects (yet, in this latter case, the *intention* itself is still a morally good one).
- The *principle of justice* is concerned with distribution and restitution in cases of unjust distribution. It requires that equal distributive standards be applied to essentially equal addressees and that proportional

equality be applied between the reason for an action and the distributive act itself according to a reasonable sphere-specific criterion (equal distribution is just in case no such criterion exists).

There are further *formal preconditions of moral evaluation*: The presence of agency; the distinctiveness of moral evaluation (in contrast to other evaluative spheres, e.g. aesthetics); the limited class of objects of moral evaluation including voluntary acts of agents with effects on other sentient beings; and (as discussed above) the distinctions between oblique vs. direct intention and foreseen vs. intended effects.

Moral evaluations also have *emotional and volitional consequences*: Emotions such as pride or shame are produced by moral evaluation and can be used as heuristic tools. However, they do not amount to the moral judgment itself, which is based on cognitive principles and thus of cognitive character. Moral judgments have volitional effects insofar as they generate obligations, moral 'oughts', thereby having an impact on the will of agents. They are categorizing actions deontically, i.e. into morally prohibited, morally permitted, morally obligatory and morally supererogatory acts.

> *In the answer to the second part of this question, one might also have presented a different approach of moral judgments, such as neuroethical emotivism. Whichever the approach presented, the principles argued for should have been explained by examples (a part which is not included in the solution outlined above).*

Question 4 (20 %)
What is – in your view – the use of neuroscience, the theory of mind, psychology and evolutionary theory for the theory of law? Please include in your assessment some remarks about the question: What kind of picture of humanity is painted by these theories?

Possible answer:
The human mind is what normative systems such as ethics and law are created by. The essence of such normative systems lies in constructing norms, applying them to actions and evaluating actions accordingly; legal interpretation, legitimation and application are based on ethical principles. These are essentially cognitive operations, undertaken by our mental faculties. The insights of a theory of mind into the structure and functioning of our mental faculties in constructing these normative systems will thus contribute to the understanding of law and its cognitive foundation. As indicated by a study of the history of thought, the moral sense or conscience has often been regarded as part of the human mind (think of Sokrates' daimonion, Hume's moral sense, Kant's practical reason).

If there are such universal, substantive principles as justice and care, structuring an inborn cognitive moral faculty, this not only implies essential equality of human beings with regard to the moral core of our human nature, but they also provide the cognitive foundation for human rights: They allow for universal epistemic access to the idea of human rights, providing strong grounds for assuming their universal rather than relative nature. Through them, the theory of mind is directly relevant for the justification of human rights.

Moreover, such a picture presupposes the possibility of free will, the ability of human beings to freely decide about their conceptions of a good life. This has various implications for the legal sphere: The purpose of human rights is based upon the assumptions of such a free will; criminal law and the application of sanctions rely on the concepts of responsibility and guilt; the idea of private autonomy and pacta sunt servanda depend on the assumption that human beings are in a position to make free choices.

However, there is no naturalistic fallacy involved in judging these insights about the human mind to be relevant for a theory of ethics and law. *Being part* of the structure of human mind does not yet *normatively justify* such substantive principles. Nevertheless, from a position of constructive scepticism, it still seems reasonable to assume their legitimacy as long as no valid, principled objections against them can be identified. While such principles can figure as foundational starting points, additional constructive work by normative theory is required in order to arrive at concrete formulations and interpretations of moral and legal norms.

> *This is a relatively open question, intending to make students think about the relation between cognitive science and legal theory and the underlying picture of humanity. Thus, possible answers could include approaches like:*
> *- Evolutionary theories and their problems*
> *- Forensic use of neuro-imaging studies and its methodological problems*
> *- Neuro-ethical emotivism and its consequences*

- The theory of universal moral grammar and its problems and consequences
- Neuroscience and human rights
- Neuroscience and the self-understanding of human beings, including the prospects of humanism

There is nothing in the modern evolutionary theory – a heterogeneous and contentious field – that would contradict this picture. A plausible evolutionary pluralism without adaptionist misconceptions leaves ample space for such a picture of humanity – and thus for scientifically informed humanism.