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LAW AND MORALITY: A KANTIAN PERSPECTIVE

*George P. Fletcher**

The relationship between law and morality has emerged as the central question in the jurisprudential reflection of our time. Those who call themselves positivists hold with H.L.A. Hart¹ that calling a statute or a judicial decision "law" need not carry any implications about the morality of that statute or decision.² Valid laws might be immoral or unjust. Those who resist this reduction of law to valid enactments sometimes argue, with Lon Fuller, that moral acceptability is a necessary condition for holding that a statute is law;³ or, with Ronald Dworkin, that moral principles supplement valid enactments as components of the law.⁴

Whether the positivists or their "moralist" opponents are right about the nature of law, all seem to agree about the nature of morality. We have to distinguish, it is commonly said, between conventional and critical morality. The former consists of propositions supported by social consensus; the latter consists of propositions asserted as objective truth. Either way, morality, like law, consists of propositions—of norms that we either violate or obey.

Moral claims incessantly petition for acceptance as enforceable legal rights. The law moves forward by selectively including and rejecting moral claims about the interests of minorities, women, and fetuses. The great issues of life and death in the law—capital punishment, abortion, terminating health care—would not lend themselves to a solution without the infusion of moral criteria. The rights of criminal defendants and of tort victims are addressed at the intersection of positive law and moral principle. Moral claims stand at the temple of the law and demand admission.

This way of thinking about morality can only leave us puzzled about some claims often made about the relationship between the law and morality. Conventionally, we regard many moral duties as suitable for enforcement under the law. But some courts, faithful to a different way of thinking, balk at assuming that moral duties ought to be legally binding. In the failure to rescue cases, for example, the courts some-

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1. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 599–601 (1958).

2. See D. Lyons, *Ethics and the Rule of Law* 67 (1984) (arguing that any "sound legal theory must leave room for moral criticism of law"). For slight variations on the definition of legal positivism see P. Soper, *A Theory of Law* 104–08 (1984); Fletcher, *Two Modes of Legal Thought*, 90 *Yale L.J.* 970, 975–76 (1981).

3. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630, 631–32 (1958).

4. The most influential statement of Dworkin's views remains his early article. See Dworkin, *The Model of Rules*, 35 *U. Chi. L. Rev.* 14 (1967).

times reason that even though there is a moral duty to render aid, it ought not to be relevant to the criminal law.⁵ What is this other way of thinking that treats morality as beyond the ken of the law?

When courts respond to critical claims for moral change, as they have in desegregation decisions, we occasionally hear the riposte: "You cannot legislate morality." Innovative lawyers regard this claim as simply confused. The law has an ongoing impact on "morality," at least on conventional "morality." Prohibiting racial segregation affects public attitudes and eventually reshapes conventional sensibilities about whether it is offensive to sit next to a black at a lunch counter. The law might even inform perceptions of "absolute" moral truth: insofar as understandings of the "moral" are historically contingent, the law is one factor that influences people in their assertions of critical morality. The claim, then, that one cannot legislate morality must reflect a different conception of law, morality, and their relationship.

This other way of thinking about law and morality is to be found in the corpus of Kant's work. An elaboration of Kantian thought helps us understand why it is an argument not for, but against a legal duty to say that the duty is moral. Also, Kant's teachings enable us to fathom the claim that we cannot legislate morality. While the prevailing view today treats law and morality as intersecting sets of rules and rights, the Kantian view treats the two as distinct and nonintersecting. The moral does not petition for inclusion in the legal and the legal cannot determine the moral. To understand how the Kantian view of law and morality can be so different from conventional views we have to clarify, in turn, Kant's conceptions of law and of morality. The final concern of our inquiry will be the conceptual connection between the two. We will probe the possibility that indeed law and morality are overlapping, converging or, at least, intersecting sets.

These are serious questions. Legal theorists looking for alternatives to utilitarianism turn vaguely to Kant's categorical imperative for inspiration.⁶ Yet Kant's precise views on law and on the relationship between law and morality have received much less attention than they deserve. Of course, Kant cannot have the final word on the way his thought should be used in twentieth century legal debate, but he should at least have the first word. My aim in this Article is simply to examine Kant's writing and implicit thinking on these issues.

The exposition proceeds first by examining Kant's conception of law, turns to the theory of morality, then to the points of difference between law and morality and finally to the question whether law and morality in Kant represent aspects of a single theory of freedom.

5. See *People v. Beardsley*, 150 Mich. 206, 212-13, 113 N.W. 1128, 1130-31 (1907) (The case criticizes the court in *Regina v. Instan*, 17 Cox Crim. Cas. 602 (1893), for reasoning that "every legal duty is founded in a moral obligation." *Id.* at 603.).

6. See *infra* notes 38-40 and accompanying text.

I. KANT'S THEORY OF LAW

Freedom is the central word in Kant's thinking about law and morality. For the purposes of law, the relevant form of freedom is external freedom, the freedom to act on one's choices. These choices need not express the dictates of reason. They need not be morally sound choices. They are subjectively contingent choices, reflecting the divergent purposes of concrete individuals. They are expressed in the transactions that define private legal relationships—acquiring and transferring property, making contracts and wills, marrying and establishing a household. The function of law is to reconcile these choices in such a way as to guarantee each individual a maximum sphere of external freedom.

If the function of the legal system is to insure the exercise of external freedom, then the law may be defined as the "set of conditions under which the choices of each person can be united with the choices of others under a universal law of freedom."⁷ These conditions that guarantee maximum choice are the enacted rules of the legal system. The choices that are at stake here represent more than needs, wishes or desires.⁸ They are the expressions of freedom in the external world—acquisition of property or gaining control over another's power of choice in a contractual relationship.⁹ These are assertions of freedom that can conflict with the choices of others. The task of the law is to insure that the choices of each can be reconciled with the choices of others.

The negative implication of this definition of law is that private purposes are irrelevant in legal transactions. The emphasis is on the form rather than the purpose of the transaction. Two individuals can concur on the same contract as an expression of their freedom only if their private purposes in contracting are irrelevant. The aim of private law is to insure that I may pursue my ends and others, theirs—all within the framework of rules securing our external liberty to engage in transactions of the same ostensible form.

This notion of law is obviously an ideal. It is not an account of the law in force in some jurisdiction at some moment of time.¹⁰ Signifi-

7. Translation by the author of 8 I. Kant, *Werke in Zwölf Bänden* 337 (Suhrkamp ed. 1956). For a slightly different version, see I. Kant, *The Metaphysical Elements of Justice* *230 (J. Ladd trans. 1965) (*Rechtslehre*) [hereinafter *Metaphysical Elements of Justice*].

8. *Metaphysical Elements of Justice*, supra note 7, at *213.

9. Significantly, Kant analyzes private law before public law; and within private law, the argument proceeds from property to family relations. The role of property as the primary legal relationship awaits an adequate explanation. For the text, see *Metaphysical Elements of Justice*, supra note 7, at *245–57 (partial translation); I. Kant, *Foundations of the Metaphysics of Morals* *446–63 (L. Beck trans. 1969) [hereinafter *Foundations of the Metaphysics of Morals*].

10. Kant sees little value in the study of the law as a historically contingent phenomenon. See *Metaphysical Elements of Justice*, supra note 7, at *230 ("Although [the

cantly, Kant uses the word *Recht*¹¹ or "Right" to capture this ideal dimension of law. In order to make it clear that Kant's theory does not refer to legal rules and principles actually binding at some moment of time, I shall henceforth use the archaic term "Right" to capture the special sense of law as an ideal framework for maximizing external freedom.

Kant's definition of Right is readily understood if one thinks of it as the precursor of Rawls' famous first principle of justice: "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."¹² The two definitions are remarkably similar. However, although Rawls relies explicitly on Kant,¹³ there are some important differences between his definition of justice and Kant's conception of Right. Rawls distinguishes sharply between the requirements of justice in establishing the framework of social cooperation and the problems that occur as a result of deviations from this ideal scheme.¹⁴ His principles of justice tell us nothing about why we should punish criminals, award damages in tort or compel the performance of contracts.¹⁵ In contrast, Kant's theory of Right not only establishes the framework of private legal transactions and public law, but it also justifies the use of coercion to secure that framework—in particular against those who offend against the Right by committing crimes, causing harm to others, or refusing to perform their contractual commitments.

It is also significant that Rawls' first principle addresses only the distribution of liberties: he treats the allocation of offices and material benefits under a distinct principle of universally beneficial inequality.¹⁶ On the issue of material benefits, there is no suitable point of comparison in Kant's thinking. The Right is not a principle for justly allocating freedom or anything else. It is a principle of harmony among in-

empirical knowledge of these actual laws] can provide us with helpful clues, a purely empirical theory of justice and Law (like the wooden head in Phaedrus' fable) is very beautiful, but, alas, it has no brain!" (footnote omitted)).

11. On the distinction between *Recht* (Right) and *Gesetz* (enacted law), see Fletcher, *supra* note 2, at 980-84.

12. J. Rawls, *A Theory of Justice* 60 (1971).

13. *Id.* at 31, 43, 251-57.

14. *Id.* at 351-52.

15. One regularly encounters the effort to invoke Rawls as the basis for particular legal practices. The approach of the original position, however, only leads us astray if we try to invoke it as the basis for principles of corrective justice or of the vindication of personal autonomy, as in the principle of self-defense. All legal systems concur, for example, that a woman may use deadly force to prevent being raped. In the original position, however, no one would know whether he would turn out to be a male rapist or a victim. It would not be rational, therefore, to agree in advance to a rule that permitted one to be killed, should one turn out to be a rapist. On the requirements of the "maximin" solution, requiring that every possible outcome be acceptable, see *id.* at 152-57.

16. *Id.* at 60 ("[S]ocial and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.").

dependent actors realizing the freedom they already have. In brief, Rawls designs principles of allocation; Kant, principles of ongoing social cooperation.

II. KANT'S MORAL THEORY

Freedom is also the central concept in Kant's moral theory. The freedom in moral action, however, is internal rather than external. While external freedom arises from the absence of physical restraint, internal freedom, at least defined negatively, derives from the absence of sensual interference with the dictates of reason.¹⁷ Though we directly experience external freedom, we do not experience in the same way the freedom defined as the absence of sensual interference with the dictates of reason.¹⁸

Kant assumes that we have internal freedom to act exclusively according to reason. It stands as an ideal of human behavior, as friendship and loyalty stand as an ideal in relations between people.¹⁹ Freedom can be imagined as the consequence of progressively abstracting our actions from the influence of the inclinations and the senses.

Internal freedom is but one of a number of equivalent expressions for the emanations of practical reason, or pure reason as expressed in human action. The notions of autonomy, of will, of the noumenal—all of these expressions represent the same side of the basic dichotomy in Kant's thinking. The other side of the dichotomy is captured by the notions of heteronomy, subservience to inclination and the phenomenal. This second set of terms invokes the world as we perceive it with our senses; the first, a world beyond the senses.

In the first part of the *Foundations of the Metaphysics of Morals*, Kant seeks to develop the claim that moral action must be an expression of the noumenal realm. Later I shall attempt to explain why Kant stresses the connection between morality and the noumenal, but first I shall trace, in brief, the transition from these assumptions to his famous principle of moral action, the categorical imperative—the principle that one should not act on a maxim unless one can will that maxim to be a universal law.

The centerpiece of Kant's thinking about morality is the notion of acting out of duty alone.²⁰ By focusing on his duty, the actor can abstract his conduct from sensual input. This sensual input could come in the form of internal desires or inclinations that bring one to action or in

17. *Foundations of the Metaphysics of Morals*, supra note 9, at *446-47 (distinguishing between negative and positive freedom).

18. *Id.* at *448 (“[W]e could not prove freedom to be real in ourselves and in human nature.”).

19. *Id.* at *408.

20. For the beginning of the discussion of duty, see *id.* at *391. The use of the phrase “duty alone” admittedly reads an interpretation into the Kantian text; it stresses duty as the determining ground of the action.

the form of an end or purpose that, in turn, generates internal desires and inclinations toward action. Acting out of duty,²¹ then, invites concentration of the mainsprings (*die Bestimmungsgründe*) of one's action. Kant concedes that neither the actor nor an observer can ever be sure if the action proceeds out of duty alone.²² Yet this remains the ideal attainable in moral action.

It is precisely because human beings do not always act out of reason, out of "pure duty,"²³ that an imperative is necessary as a constraint on the will. An imperative is categorical, rather than hypothetical, if it does not posit any ends in the phenomenal world. Only a categorical imperative—also called the moral law—can lead one to moral action, for any constraint based on ends would invariably inject sensual impulses into our conduct. However sound the content of the moral law, merely conforming to its demands could not guarantee that the resulting action would be moral. The criterion of morality is not conforming to a prescription, but rather thinking oneself into a form of action that springs from the noumenal world of reason.

How, then, does Kant make the transition from the notion of acting out of duty to the categorical imperative? The way in which the terms "law" and "moral law" emerge in the *Foundations* merits our attention, for the ideas seem to come forth, fully formed, without preliminary explanation and grounding. The critical transitional remark in the first section is Kant's definition of duty as "the necessity of an action executed from respect for law."²⁴ This remark provides the bridge from the discussion of will, reason and duty to the discussion of law. What does the remark mean? Why should one think of duty as a kind of necessity?

We ordinarily think of duty as implying a rule to which we may or may not conform. We violate or fulfill duties as we violate and conform to rules. This common notion of duty appears in Kant's exposition of legal duties. For the purposes of moral theory, the central notion is not duty as such, but acting out of duty. Therefore, the way to read this curious definition of duty is in the context of the more general claim that an action has moral worth only if the actor acts exclusively out of duty. If we substitute the definition of duty in the latter assertion and make a few grammatical emendations, we get the following:

21. Acting out of duty is distinguished from acting in accordance with duty; the latter embodies no moral distinction. See *id.* at *397; (example of store keeper who conforms to his duty to treat customers honestly, but does so in order to maintain a positive image).

22. *Id.* at *406.

23. *Id.*

24. *Id.* at *400 ("Pflicht ist die Notwendigkeit einer Handlung aus Achtung fürs Gesetz"). For an excellent commentary on this section of the *Foundations*, see R. Wolff, *The Autonomy of Reason* 65–84 (1973).

An action has moral worth only if the actor acts out of the necessity . . . [generated] by reverence for the law.

This proposition gains full significance only against the backdrop of Kant's commitment to determinism. "Everything in nature works according to laws," Kant tells us in the second section of the *Foundations*.²⁵ The laws of nature render causal connections necessary rather than contingent. This basic orientation generates the antinomy of freedom and determinism that taxes Kant's thinking in the first *Critique*.²⁶ The antinomy is resolved only by positing that freedom obtains in the distinct noumenal realm exempted from the laws of nature. Yet, given Kant's thinking in the matrix of laws and necessity, it is not surprising that he would hold that events in the noumenal realm must also occur out of necessity.

The notion of noumenal necessity is not particularly puzzling. We should recall that to act out of duty is to respond to the dictates of reason. These dictates are univocal. If one responds to reason, there is only one thing one can do. This is the necessity generated by acting out of "pure duty." Later in the *Foundations*, Kant refers to the will as a kind of causality.²⁷ This rounds out the argument and brings the notion of will into line with the other concepts tied to the noumenal realm. As causality in the phenomenal realm expresses the necessity of one event's following another, causality in the noumenal realm expresses the necessity of a particular action's following—through the mechanism of the will—the dictates of reason.²⁸

For the person who seeks to act morally, therefore, the proper concentration of mind is to seek to abstract oneself from the phenomenal necessity of physical laws and to subject oneself to the noumenal necessity of reason. The argument has advanced to the point that we now have some guidance on how we abstract our actions from the physical impulses that subject us to phenomenal necessity. Necessity—both in the physical world and in human action—means that the events occur according to laws. Physical causation occurs as a matter of necessity if it expresses a physical law. An analogous form of necessity in human action would have to bring to bear the notion of law-like behavior. But how can this be done? A compulsion in following moral rules would hardly generate the kind of necessity we need, for, it will be recalled, the relevant kind of necessity in moral action is one that insulates the actor from the input of his sense and inclinations. An attachment to an

25. *Foundations of the Metaphysics of Morals*, supra note 9, at *412.

26. I. Kant, *Critique of Pure Reason* *A444/B472–A452/B480 (N. Smith trans. 1929); see also N. Smith, *A Commentary to Kant's Critique of Pure Reason* 492–95 (2d ed. 1929).

27. This is the opening line of the third and final section of the work. See *Foundations of the Metaphysics of Morals*, supra note 9, at *445–46.

28. For commentary on Kant's two concepts of causality, see R. Wolff, supra note 24, at 103–17.

external rule would surely invoke the phenomenal impulses that would deprive the action of its moral worth.

Kant proposes an ingenious solution to this conundrum. A law can generate the kind of necessity that, paradoxically, renders an act free and autonomous only if it is the pure law-like nature (*die allgemeine Gesetzmäßigkeit*) of one's act that provides the mainspring (the "determining ground") of one's action.²⁹ Any substantive aspect of a law guiding conduct—other than its pure form as law—would invariably commit the actor to ends in the phenomenal world. This is the key to Kant's well-known principle of universalization. Only by universalizing the maxim of one's action (what one proposes to do) and taking that universalized principle of action as the ground for acting can one abstract oneself from one's desire and inclinations. This explains what Kant means by that particular kind of "reverence for the law" that renders one's actions free from extraneous impulses. It is not reverence for the content of any particular law, but rather concentration of one's mind on the law-like nature of one's action that creates the possibility of acting out of "pure duty."

The first statement of the categorical imperative, then, is this: "I should never act in such a way that I could not also will that my maxim should be a universal law."³⁰ I stress the derivation of this principle since it is important to grasp it in the context of Kant's concern about noumenal necessity and acting out of duty alone. It may be that universalizing one's action states a principle of fairness and therefore commends itself to us. Thinking of the categorical imperative by analogy to the Golden Rule, however, distorts its place and function in Kant's thinking. Thinking of the rule as one that moral people follow misses the argument. The point of universalizing one's maxim is not to determine whether an action, however executed, is moral or not. Rather the imperative prescribes a discipline that enables one to concentrate one's faculties of mind in order to submit oneself to the noumenal necessity of reason and thereby confer moral worth on one's actions.

Though there is much more to be said about the structure of Kant's moral thought, I shall limit myself to a variation on the categorical imperative that converts the discipline of universalization into the substantive instruction: always treat humanity in yourself and in others as an end in itself and never merely as a means. Thus the formal principle (act only if you can will your maxim to be a universal law) proves to be a standard for condemning certain practices, most notably utilitarian

29. See *Foundations of the Metaphysics of Morals*, supra note 9, at *402.

30. *Id.* At this stage of the exposition Kant does not refer to this principle of action as the categorical imperative. The exposition of imperatives as constraints on the will comes later, see *id.* at *421, where the principle of universalization is formulated in the same language as in the first reference but now described as a categorical imperative. On the five different formulations of the categorical imperative, see H. Paton, *The Categorical Imperative* 129–32 (1965).

judgments requiring that some suffer (that they "be used") for the good of others. The problem in reading Kant is fathoming how he makes this transition from a formal principle of universalization to a substantive injunction about how we should treat each other.

The restatement of the categorical imperative in the language of ends and means responds to a general problem that vexes Kant: how can there be human behavior without the setting of ends? Ends seem to be necessary for action yet they invariably deprive actions of their moral worth by injecting desire and inclination into action. The categorical imperative is so named precisely because, in contrast to the hypothetical imperative, it seeks to guide action without the setting of an end.³¹ An end of an action could be compatible with reasoned, moral action, however, if it presented itself as a requirement of reason to all rational beings and if, further, it did not trigger sensual inclinations in anyone acting toward that end.³²

For an end of action to meet these requirements, it must obtain as an end in itself. If it did not exist as an end in itself, it would presumably operate in the phenomenal world as the kind of end that would generate desires or inclinations in the actor. The final step in this phase of the argument is the inference that for something to exist as an end in itself, it must have absolute worth. If it did not have absolute worth, it could serve as a means to something even more valuable.

To the implicit question, "What has absolute worth?" Kant responds unequivocally:

Now, I say, man and indeed every rational being exists as an end in himself³³

If A treats B as an end in himself, it is possible for A to act with an end, namely B's end, without thereby submitting to the desires or inclinations that would arise from setting an end in the phenomenal world. Understood in this way, the restatement of the categorical imperative as an injunction that we treat ourselves and others as ends and not as means captures in different language the point of acting out of "the necessity of reverence for the law." The point is always that for actions to have moral worth, they must derive not from impulses and desires but from the noumenal necessity of reason.

The assertion of absolute human worth is developed further in the thesis that only humans have a dignity beyond price in other commodities.³⁴ This premise enables Kant to negotiate some difficult philosophical turns. More significantly, the assertion that human worth is beyond price helps us to understand the particularly stringent sense

31. Foundations of the Metaphysics of Morals, supra note 9, at *414 ("The categorical imperative would be one which presented an action as of itself objectively necessary, without regard to any other end.").

32. See H. Paton, supra note 30, at 165-70.

33. Foundations of the Metaphysics of Morals, supra note 9, at *428.

34. Id. at *434-35.

that Kant confers on the notion of moral action. As human beings are an end in themselves because they have absolute worth, they have this worth beyond price because they are capable of acting out of the necessity dictated by reason. We must be treated as ends in ourselves because, as beings endowed with reason, we are capable of moral action.

Moral action is an ideal. We can never prove that the ideal is realized in any particular act.³⁵ Yet so long as we think of ourselves as free and rational beings, the ideal engages us. It is obvious, however, that this ideal provides little instruction for resolving conflicts that occur among human beings as they actually are—invariably affected by sensual inclinations. For resolving these conflicts and assuring social cooperation, we need a different set of normative prescriptions. The task of resolving these worldly conflicts falls to Kant's theory of Right—his legal theory.

This review of the moral theory brings us to the point where we can state more systematically the differences and interactions of the moral and legal theory.

III. DISTINCTIONS BETWEEN THE MORAL AND LEGAL THEORY

For Kant the difference between the moral and the legal lies in distinct postures of the actor toward his duties. In the moral system, mere compliance with the external demands of duty—i.e., fulfilling one's promise—is insufficient to render the action moral. The duty must, in addition, be the determining ground of the action in compliance. Fulfilling a duty out of fellow feeling or fear brings to bear precisely those sensual stimuli that deprive an action of its distinctive moral worth. In the legal sphere, however, all that matters is external compliance.³⁶ In assessing the legality of an action, the motive for compliance is irrelevant.³⁷

True, any given legal duty lends itself to execution as a moral act. If the obligor fulfills his contractual promise because he takes his duty—and not the fear of sanctions—to be the determining ground of his action, then he acts morally. There is no impediment to treating legal duties as the basis of moral action, but Kant does not hold that all legal duties need be executed in this way. Part of the idea of a legal duty, it seems, is that one may comply with the external form of the duty without subjecting oneself to the discipline of moral action.

The critical point is that the external coercion of the law induces non-moral compliance. Insofar as one acts in order to avoid a legal

35. *Id.* at *406–07.

36. *Metaphysical Elements of Justice*, *supra* note 7, at *219.

37. At a second stage of analysis, however, the actor's motive and other criteria of personal responsibility do become relevant. See *id.* at *227–28 (analysis of criteria for imputation and personal responsibility).

sanction, the action cannot be moral. This is the sense we can give to the old saw: you cannot legislate morality.

For all the obvious differences between Kant's legal and moral thought, philosophers seeking inspiration in Kant conflate these two distinct branches of Kantian theory. Thus John Rawls blends Kant's notion of rational judgment in moral thought with Kant's notion of a hypothetical social contract.³⁸ Charles Fried treats the moral institution of promising as a basis for the legal institution of contract.³⁹ Ernest Weinrib relies upon Kant's moral theory in arguing for a legal duty to rescue.⁴⁰ All these instances of interweaving the moral and legal ignore distinctive features of these two realms of normative thought.

A. *The One and the Many*

Kant's moral theory leads ineluctably to the identity of all persons acting morally. So far as our actions are necessitated by reason, we all do the same thing. In our noumenal selves we are all alike.⁴¹ Kant's legal theory derives from the assumption that concrete individuals, each acting out subjective choices, enter into civil society in order to secure their rightful claims, as Kant puts it, to "mine and thine."⁴² Morality elicits our identity as beings endowed with univocal reason; the law acknowledges our concrete particularity and seeks to harmonize our divergent purposes.

Kant's moral theory is communitarian;⁴³ and the legal theory, individualistic or liberal. The emphasis on duty in moral action elicits our solidarity as agents committed to a reason that speaks with a single voice. The emphasis on rights in the legal theory distinguishes us, each with his own subjective claims, his own property and his own purposes. We can all have the same duties, but we cannot all have rights in the same objects. Duties unite us in a moral community of ends; rights divide in the concrete community of laws.

As is well known, Rawls derives his principles of justice by asking what individuals would choose as principles to govern their lives if they had to decide in the original position, a perspective abstracted from the benefits they would derive at the expense of others by adopting particu-

38. See the discussion of Rawls, *supra* notes 12–14 and accompanying text.

39. C. Fried, *Contract as Promise* 14–17 (1981).

40. Weinrib, *The Case for a Duty to Rescue*, 90 *Yale L.J.* 247, 266–67 (1980).

41. Robert Paul Wolff argues that because the noumenal self is abstracted from the phenomenal world, we "have no consistent account of the way in which several rational agents encounter one another in the natural world and establish moral relationships to one another." R. Wolff, *supra* note 24, at 15.

42. *Metaphysical Elements of Justice*, *supra* note 7, at *255–56.

43. The possibility of a moral community disappears if we assume either, as Wolff argues, *supra* note 41, that noumenal selves cannot confront each other at all, or that, as Rawls argues at the opposite extreme, there are no distinctions among our reasoning selves. See *infra* notes 46–48 and accompanying text.

lar principles.⁴⁴ Individuals negotiating in the original position come to adopt Rawls' two principles of justice, the first of which resembles Kant's definition of Right.⁴⁵

Now if we ask the question, "How many people are there in the original position? One or many?" we are hard put to answer. Rawls seeks to invoke the contractarian tradition, including Kant's theory of a hypothetical contract to secure claims of Right.⁴⁶ Therefore he writes of the original position as though it consisted of distinct individuals negotiating toward a contract.⁴⁷ Yet the description of those individuals, what they know behind their veil of ignorance and how they decide to adopt particular principles, makes it clear that the contracting partners are all mirror images of each other. Thus Rawls casts a vision of a social contract emerging from numerous identical individuals. The point of contract, however, is to harmonize the purposes of distinct individuals with divergent values, and therefore the notion loses its bite so far as the contract links identical, rational and disinterested selves.

The possibility of disinterested, rational choice comes to us from Kant's moral theory. Yet Rawls relies upon this notion of disinterested action as the basis for his theory of justice as fairness. If the bargaining procedure is fair, the resulting social contract will be just. By acting morally behind the veil of ignorance, individuals end up choosing the principle of Right as a basis for cooperation in a world of divergent purposes and self-interested action.

B. *Are there Moral Rights?*

In the contemporary philosophical lexicon, rights are ubiquitous. We speak of constitutional rights, individual rights, human rights. And in the conventional view of the matter, there are moral rights as well as legally recognized rights. The philosophy of rights stands as the bulwark against the communitarian thrust of utilitarian schemes for maximizing the common good.⁴⁸ Rights stand for the sanctity of the individual and the private.

Advocates of rights draw heavily on Kant's deontological, nonconsequentialist moral theory. Yet this reliance is misplaced. Kant's liberal legal theory builds, of course, on the Right as well as on individual rights. But the moral theory, the inspiration for those pitted against utilitarian ethics, rests on the notion of duty rather than on individual rights. True, in the legal sphere, rights correlate with duties, precisely as Hohfeld would have it.⁴⁹ In the moral sphere, however, there are

44. J. Rawls, *supra* note 12, at 136-42.

45. See *supra* note 12 and accompanying text.

46. J. Rawls, *supra* note 12, at 11-12.

47. *Id.* at 136-42 (on the veil of ignorance).

48. See R. Dworkin, *Taking Rights Seriously* xi (1977).

49. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16, 30-32 (1913).

duties but no corresponding rights.

No particular individual has a right that I act out of duty. Of course, one might speak loosely of the right of humanity that I act morally. But rights characteristically have a differentiating function. The holder of the right distinguishes himself from those who do not have the performance coming to them. Rights in this sense do not exist in Kant's moral theory.⁵⁰

In support of the claim that rights are foreign to the Kantian moral system, consider the following example. I take it to be my duty to visit a sick friend in the hospital. I am told that he is recuperating in *Le Sacré Dieu*, a hospital in Paris. Naturally, I think that he is to be found in the hospital by that name in the 17th *arrondissement*, and I journey to France in order to visit him. As I engage in this act I concentrate as much as I can on acting out of my duty to visit the sick. When I arrive, my friend is nowhere to be found. It turns out that my informant meant Paris, Texas and not Paris, France. By the time I return to the States, he has recovered. Now the question is: Is it possible that I have acted morally even though my friend is disappointed? Yes it is. The criterion for acting morally is not the way in which the intended action comes off, but my internal posture in the course of acting. So long as I thought he was in Paris, France, and I acted out of my duty to visit a sick friend, I might well have acted morally.⁵¹

Could it be the case that my sick friend in Paris, Texas has a moral right that I visit him, a moral right that correlated with my moral duty to visit the sick? I think not. If he had the right, one would have to say that right was violated when I failed to show up. That would be an implausible construction in view of my arguably having acted morally.⁵² I take it to be part of the concept of a right that if the person who owes me the correlative duty fulfills his duty, it cannot be the case that my right is violated. My sick friend might, together with the rest of humanity, have a right that I act morally. But this is not a right to claim any particular performance.⁵³

50. Kant does use the term *Recht* in a few instances in the Foundations. See Foundations of the Metaphysics of Morals, supra note 9, at *442, where he asks whether promising with an intent not to repay is *recht* (written as an adjective with a small "r"). When he returns to the same case in id. at *430, he describes the fraudulent promisor as someone who infringes the *die Rechte der Menschen* ("the rights of men"). These passages are hardly sufficient to infer a principle of moral rights. They are compatible with the view that the obligee has only a legal right to repayment of the debt.

51. The statement is qualified because there is no way of establishing that the act was not influenced by external stimuli. See supra notes 17–19 and accompanying text.

52. Of course, one could argue that my moral behavior serves to generate merely an excuse, leaving intact the violation of my friend's right to be visited. This distinction—between breaching an obligation and affixing responsibility for the breach—reflects the orientation of Kant's legal rather than his moral thinking. See, e.g., the discussions of attribution and responsibility in *Metaphysical Elements of Justice*, supra note 7, at *228, *235–36.

53. One might also say that a moral duty to visit the sick implies a right in the

That there are legal but no moral rights in the Kantian system forces us to reflect on the nature of legal as opposed to moral action. The matrix of interpersonal rights reconciles conflicting assertions of external freedom. It is because one individual's choices come into conflict with those of his fellow citizens that we need rights to define respective spheres of freedom. In the context of moral action, the conflict that the individual faces is not with other people,⁵⁴ but with his own impulses toward action on the basis of inclination and desire.⁵⁵ The theory of moral action resolves this internal conflict by positing a sphere of internal freedom: the autonomous realm of action based on reason.

C. Promising and Contracting

Readers struggling with the implications of the categorical imperative understandably latch on to four prominent examples in the *Foundations of the Metaphysics of Morals*.⁵⁶ These examples reveal Kant's views about the possibility of moral action in four situations. The first and the third—suicide and developing one's own talents—pose the problems of moral duties relative to humanity in oneself. The second and the fourth—fraudulent promising and rendering aid to others in distress—turn on duties towards others. I shall concentrate here on the latter two. Because they pertain to duties between persons, they aptly illustrate the dissonance between Kant's moral and legal thinking.

In the second example, a person in financial distress considers whether he should borrow money without repaying it. His maxim would be to engage in the pretence of promising while secretly intending not to repay the loan. Kant argues that this maxim would not lend itself to universalization, because if everyone engaged in fraudulent promising, their inconsistent behavior would destroy the institution of promising.⁵⁷ Therefore, absent a consistent universalization of his maxim, there would be no way for the actor to take the (non-existent) law-like nature of his maxim as the determining ground of his action.⁵⁸

patient that the person subject to the duty make an effort, even the maximum effort possible under the circumstances, to visit the particular sick patient. A right to an effort, however, is not the same as a right to a particular performance.

54. On the relationship between morality and confronting other individuals, note the problems raised supra note 41.

55. Kersting puts the distinction between the moral and the legal succinctly: "Morality is a predicate not of acts, but of the will." W. Kersting, *Wohlgeordnete Freiheit* 45 (1984).

56. The examples are discussed twice. *Foundations of the Metaphysics of Morals*, supra note 9, at *421-23 and *429-30.

57. *Id.* at *422.

58. The alternative account in *Foundations of the Metaphysics of Morals*, *id.* at *429-30, stresses the fraudulent promisor's using the promisee as means to his own ends.

We can extend the force of this analysis to a case in which after the promise is made, the obligor, caught in unexpected financial difficulty, contemplates breaching his promise. Universalizing the maxim of breach would pose the same difficulty that infected promising with an intention *ab initio* not to perform. If everyone intentionally breached his promise, the practice of promising would collapse under the weight of frustrated expectations. Therefore one could not act morally in breaching a promise on grounds of financial distress. We can summarize this analysis by saying that there is a moral duty to keep one's promises.⁵⁹

It is tempting to take this moral duty as the foundation of the legal institution of contracting. After all, what is a contract but two reciprocal promises? Kant attributes this view to Mendelssohn and squarely rejects it.⁶⁰ His reasoning is important. In a contractual relationship, each side acquires control over the choices (*Willkür*) of the other. Each suffers a restraint on his freedom by placing his capacity to act in the power of the other. Each vests the other with a right to compel his performance. The acquisition of this power over another person could not occur by a unilateral act, either by obligor or obligee, any more than one can acquire property belonging to another by a unilateral act. A "common will" is required for each to transfer his power of choice to the other.⁶¹ This is the deeper sense of the phrase "meeting of the minds" once used to characterize the widely misunderstood "will" theory of contracts.

In the analysis of promising, the relevant perspective is the internal consistency of the promisor's willing; in contracting under law, the focus shifts to the right of the obligee to control the choices of the obligor. The different outcomes under the moral and legal theory highlight divergent concerns: the former with the promisor's internal struggle and the latter with the problem of power and control between two distinct individuals.

D. *The Duty to Rescue*

Kant's fourth example points to another divergence between the

59. Kant says that everyone would grasp this duty and that the categorical imperative requires the keeping of promises. This passage does not appear in Ladd's translation of the *Rechtslehre*, but can be found in I. Kant, *Philosophy of Law* 103 (W. Hastie trans. 1887) (*Rechtslehre*) [hereinafter *Philosophy of Law*].

60. *Id.*

61. At this point the argument becomes more subtle. Kant insists that the "common will" or the "meeting of the minds" could not be rendered manifest by any of the common rituals by which parties typically seek to express their mutual consent. *Id.* at 101-03. The offer and acceptance can never be precisely simultaneous. Therefore Kant turns to a transcendental deduction of the possibility of acquisition by contract. For contractual binding to be possible, the will as a "legislative capacity of reason" must abstract from all the empirical conditions of contracting and treat the process of offer and acceptance as simultaneous and expressive of the common will to contract. *Id.*

moral and the legal theory.⁶² The question is whether the categorical imperative requires us to come to the aid of another person in distress. Kant concedes that if my maxim is that each should be as happy as he can but I will not contribute to his welfare, this maxim could well become a universal law of nature.⁶³ The proposition bears no logical contradiction. Yet Kant maintains that I could not *will* the practice of hard-heartedness to be a law of nature. I would thereby deprive myself of assistance when I needed it, and somewhat obscurely, reason prohibits me from willing self-deprivation.⁶⁴

Kant returns to this example after he formulates the categorical imperative as the mandate to treat humanity, in oneself and in others, as an end in itself.⁶⁵ The natural end of all humans is happiness, and therefore I must recognize this end in others as well as in myself. Recognizing this end in others requires that I render aid to those who need it. This second cut at the problem strikes me as more convincing than the mysterious reliance on what rational humans are capable of willing. The logical laxity of Kant's reasoning in this and the other examples has been a fit target for criticism.⁶⁶ Though the inferences are less than rigorous, I shall accept Kant's conclusions at face value. What should interest us is why he might come out differently in the analysis of legal obligation.

Though Kant never squarely addresses a legal duty to render aid to others, his definition of Right readily yields the conclusion that there should be no such duty. Failing to render aid is compatible with the external freedom of the person in distress. There is no violation of his freedom if he is left to cope with his own difficulties. Further, the claim that the Right requires rescue runs afoul of other tenets in Kant's exposition of his legal theory. It would impose an obligation on one person by virtue of the unilateral wants of the other. If promising cannot by itself subject one to a binding legal duty, it is hard to see how the other person's desiring or needing one to perform could have that effect. Also, Kant makes it clear that the law serves to reconcile conflicting

62. Foundations of the Metaphysics of Morals, supra note 9, at *423, *430.

63. Id. at *423. In this passage, Kant relies on a variation of the categorical imperative that adds the notion of the universalized maxim's obtaining as law of nature. On the implications of this shift in formulation, see H. Paton, supra note 30, at 146-62.

64. In Foundations of the Metaphysics of Morals, supra note 9, at *421-22, Kant analyzes the first example of suicide in parallel language. The defect in willing self-destruction would not be self-contradiction but that because nature prescribes the furtherance of life, a universal law of suicide could not obtain as a law of nature.

65. Id. at *430.

66. See, e.g., R. Wolff, supra note 24, at 162 ("[Kant's] effort [with regard to suicide and developing one's talents] is trebly misguided, for in the first place, his beliefs are false; in the second place, his arguments are invalid; and worst of all, he misleads us as to the meaning of the Categorical Imperative."); id. at 171 ("[O]nly the example of false promising can be shown to be a valid application of the Categorical Imperative."); H. Paton, supra note 30, at 154 (the analysis of suicide "is the weakest of Kant's arguments").

assertions of choice. Needs and desires do not amount to acts of choice. They are below the threshold of legal relevance.

Kant confirms this way of thinking about aiding others in his argument about the limits of self-defense.⁶⁷ If a wrongful aggressor threatens my life, I can protect myself by killing him.⁶⁸ If there is to be any moderation of this right to use force to vindicate my freedom, the criteria of moderation belong, Kant tells us, to "ethics" (or the moral theory)⁶⁹ rather than to the law.⁷⁰ As a contemporary German theorist points out, a compelling analogy links moderation of the absolute right of self-defense and the duty to rescue.⁷¹ The person defending the Right and the potential rescuer may both realize their rightful positions (either by using necessary force or abstaining from intervention), but they may be under a moral duty to recognize the humanity of the other party. This recognition would lead in one case to moderating the use of force and in the other, to intervening and rendering aid.

This extensive discussion of distinctions between the moral and the legal in Kant's thinking make a good case for treating the two spheres as unfolding on distinct normative planes. So far as a duty is moral, it pertains to the inner struggle of each individual considered apart from others. This is the account that we might give of the apparent judicial assumption—prominent in the rescue cases—that labelling a duty moral hardly provides a good judgment for incorporating the duty in the ambit of judicial coercion.⁷² The case for the separation of law from morality in the Kantian sense having been made out, we turn now to several considerations that render the relationship between the two spheres more complex.

The two examples presented above—contracting and the duty to rescue—illustrate the problem of securing a moral foundation for an institution of private law. Other issues arise in considering moral restrictions both for private transactions and for legislative programs. One could imagine a whole range of contracts that degrade one of the participants: contracts of prostitution or agreements in which one party agrees to commit suicide or consents to being killed by the other (even as an act of euthanasia). Kant does not explicitly address these problems but he does have this to say about prisoners consenting to allowing themselves to be used for medical experimentation:

67. *Metaphysical Elements of Justice*, supra note 7, at *235–36 (the discussion of necessity).

68. *Id.*

69. In this passage Kant uses the term *Ethik* to refer to the sources of constraints on the legal right of defense. See *id.* at *235. Numerous terms in the German original can be translated as either "ethics" or "morals," including: *Sitten, Moral, Ethik, Sittliche*. Would that I could offer a better account of the differences among these terms.

70. For an analysis of this two-staged procedure of legal analysis, see Fletcher, *The Right and the Reasonable*, 98 *Harv. L. Rev.* 949, 967–69 (1985).

71. See K. Marxen, *Die "Sozialethischen" Grenzen der Notwehr* 39–43 (1979).

72. See supra note 5.

What should one think of the proposal to let a condemned criminal remain alive if he has consented to dangerous experiments on his body and if he were lucky enough to survive, and if the doctors thereby gained fruitful information of benefit to the common good? A court would dismiss the medical college that made this proposal with contempt, for justice ceases to be justice if it is given away for a price.⁷³

To put this passage in its most charitable light,⁷⁴ we should think of the medical college's proposing an agreement whereby the criminal would be spared if he should consent to the dangerous experiments on his body. The implication of Kant's comments is that courts would refuse to enforce the agreement even though both sides concurred voluntarily and thereby realized their external freedom. It does not matter whether we consider the agreement from the perspective of the doctors or from that of the criminal. The doctors seek to use the body of the prisoner as a means to their socially beneficial end; the prisoner agrees to let himself be degraded in this way. Both violate the categorical imperative, which in its substantive version requires that we respect the humanity both in ourselves and in others as an end in itself. While the doctors seek to exploit the prisoner, the prisoner allows himself to be exploited.

It is difficult to know whether this example permits us to infer the general legal principle that exploitative contracts, such as those for prostitution and exorbitant interest, should be unenforceable. The example of the prisoner is embedded in a general discussion of the imperative to punish everyone equally according to his offense, without conceding special benefits to some for the sake of furthering the common good. It is the prospect of deviation from the principle of equal punishment for all that moves Kant to make his extravagant claims about the imperative of doing justice. Immediately preceding the discussion of the prisoner's desperate bargain, he says: "If justice perishes there is no point to life on earth."⁷⁵ It is doubtful that he would engage in the same rhetorical flourish in discussing other contracts that we regard as hard or degrading bargains.

Significantly, punishment is the only legal institution that Kant treats as a duty of justice as well as a vindication of the Right. Therefore some comments are in order on the relationship between these two easily confused concepts.

One way to think about the difference between justice and the

73. Translation by the author of 8 I. Kant, *Werke in Zwölf Bänden* 197 (Suhrkamp ed. 1956). For a slightly different version, see *Metaphysical Elements of Justice*, *supra* note 7, at *332.

74. As it reads, the passage suggests that even though the prisoner has, in reliance on the agreement, undergone the medical experiments and survived, he ought to be executed.

75. *Metaphysical Elements of Justice*, *supra* note 7, at *332 (translation modified by author).

Right is to trace, in this context, the distinction between substance and form. Corrective and retributive justice have a substantive dimension that attracts our attention to what the individual deserves for having engaged in a specific transaction. In contrast, the Right focuses on reconciling, formally, the assertions of independent actors. The question posed by the theory of justice is: What do the individual's actions tell us about how we should treat him? The question posed by the demands of the Right is: Is the conduct in question compatible with the choices of others under a universal law of freedom? The former question is substantive; the latter, a matter of formal harmony.

This distinction is further illuminated by Kant's separation between punishment and self-defense. Punishment, as Kant argues, is a matter of justice; the offender is punished because he deserves it. Self-defense also inflicts harm on those who aggress against others, but it would be wrong to treat self-defense as an institution of justice. Legitimate acts of self-defense need not be justly related to the punishment the offender deserves. The death penalty is not inflicted for rape,⁷⁶ but that does not preclude our recognizing the right of women to use deadly force to fend off a threatened, imminent rape. If the rapist does not deserve death for the completed rape, he surely does not deserve to die for attempting the rape.

Self-defense has to be understood exclusively as an institution designed to secure the Right, the framework securing the maximum freedom of all. The threatened woman may resist a rape, even to the point of killing the aggressor, because the vindication of her freedom requires no less.⁷⁷ Like securing the performance of contracts, self-defense accomplishes something: it negates a threat to freedom and thereby contributes to the freedom of all.

So far as Kant thinks about punishment as an institution of justice, he seems not to care whether it accomplishes anything beyond inflicting harm on those who cause harm. He deploys numerous ingenious arguments to support his view of punishment as an imperative of justice.⁷⁸ Among these is the argument that punishing everyone according to his due is required by the categorical imperative. Perhaps the multiplicity of arguments testifies to the particular difficulty of artic-

76. Indeed, the Constitution forbids it. See *Coker v. Georgia*, 433 U.S. 584, 592 (1976).

77. But compare the discussion, *supra* text accompanying notes 67-71, of the ethical restraints on legitimate self-defense.

78. In addition to treating punishment as a matter both of Right and of justice, Kant develops four distinct arguments for fitting the punishment to the crime. Space permits me only to mention them: (1) equal punishment for the same crime is required by the categorical imperative, (2) fitting the punishment to the crime is the only precise legal standard, (3) some punishments, e.g., imprisonment for thieves, are derived by universalizing the wrongdoer's maxim of action, (4) not punishing murders imposes "bloodguilt" on those who tolerate the omission. See generally *Metaphysical Elements of Justice*, *supra* note 7, at *331-37.

ulating a coherent and persuasive case for a practice that many people simply accept on faith.⁷⁹ It may be, therefore, that Kant's views on the connection between the categorical imperative and the demands of the Right and of justice have little bearing on other areas of legal thought.

Beyond the areas of punishment, Kant applies the categorical imperative in only one significant area: explaining the required posture of legislators in enacting laws. He argues that the legislature is bound by the moral law to realize its well-being as an "autonomous" agency of government. Yet legislators should not confuse the well-being of the state with the happiness of its citizens. Rather, the state's well-being consists in "that condition in which the constitution conforms most closely to the principles of justice, that is, the condition that reason through a categorical imperative obligates us to strive after."⁸⁰

Invoking the categorical imperative as a restraint on legislation means simply that officials should not be distracted by the pursuit of worldly concerns, i.e. human welfare, in fashioning the laws. Rather they should seek exclusively to realize the structure of Right in positive legislation. Suppose the public as a whole were willing to have the legislature deviate from principles of Right in the interest of achieving a higher level of welfare in the society. Their consent—like the consent of the condemned criminal to medical experiments—would not affect the duties of the legislature. Principles of Right would have little independent force if they could be traded off against increments of welfare. Rawls argues in a similar fashion when he posits a lexical ordering between the first principle of justice, modeled after the concept of Right, and the second principle, designed to achieve a just distribution of material benefits.⁸¹ Like Kant, Rawls rules out—at least for a "well-ordered society under favorable circumstances"—incremental sacrifices of liberty for the sake of augmenting human welfare.⁸²

The institution of punishment and the general practice of legislation are both constrained by the categorical imperative. It does not follow, however, that both practices raise issues of justice and personal desert. Punishment is an imperative of justice, but not so the legislators' duty to realize the principles of Right in legislation. The latter seems to follow, in Kant's thinking, simply from the logical primacy of the Right.⁸³ We can see from this discussion that the notions of Right,

79. See Mackie, *Morality and the Retributive Emotions*, 1 *Crim. Just. Ethics* 3 (1982).

80. *Metaphysical Elements of Justice*, *supra* note 7, at *318.

81. J. Rawls, *supra* note 12, at 60–61.

82. *Id.* at 243–48.

83. On the logical relationship of the right and the good, the legal and moral, in Kant, see Weinrib, *Law as a Kantian Idea of Reason*, 87 *Colum. L. Rev.* 472, 487–91. This theme is carried forward in J. Rawls, *supra* note 12, at 446–52. Sandel takes the logical priority of the right over the good as the defining feature of Kant's liberalism. For his critique of this logical separation, see M. Sandel, *Liberalism and the Limits of Justice* 1 (1982).

justice and morality have distinctive though sometimes overlapping domains in Kantian thinking.

The relationships among these three concepts require further reflection. It seems fairly clear that not every moral duty is a legal duty (e.g., keeping one's promises), and that legal duties can be performed non-morally (performing a contract for fear of liability). In view of the general duty to obey the law,⁸⁴ it might be that every legal duty can be executed as a moral duty, by taking the duty to obey the law as the determining ground of one's action.⁸⁵ The precise relationship between justice and either law or morality is not so easily stated.⁸⁶

The respective range of these three concepts must be kept distinct from their logical interdependence. Is either law or morality logically prior to the other? Does one provide the foundation for the other? These are the questions that will now engage us.

IV. THE UNITY OF KANT'S MORAL AND LEGAL THOUGHT?

Despite the deep divisions between Kant's moral and legal thought, one regularly encounters the tendency to treat the Right as an application and extension of moral concepts. As one German writer put it recently, "Despite [all the arguments to the contrary], the interpreters of Kant hold steadfastly to the misunderstanding that there is a

84. See *Metaphysical Elements of Justice*, supra note 7, at *318-23.

85. *Id.* at *218-19.

86. My inclination is to think that the difference between law (Right) and justice is best explained as the difference between form and substance. See the discussion of self-defense and punishment supra notes 76-77 and accompanying text. A possible relationship of these concepts to morality is suggested by the following chart:

FORMAL STANDARDS		
I N T E R A L	categorical imperative as expressed in the principle of universalization 1	The Right 2
	categorical imperative as expressed in the obligations to respect others as ends in themselves 3	Justice 4
	£	E X T E R N A L
SUBSTANTIVE STANDARDS		

This chart suggests, tentatively, that right and justice relate to each other as the formal and substantive versions of the categorical imperative.

moral foundation for the Right."⁸⁷ This is an understandable thrust in reading Kant, for so far as his philosophy stands as a unified and integrated whole, it represents a more compelling system. If the parts of the system are connected in some deep way, then those who regard one aspect as persuasive should be receptive to other, connected emanations of Kant's thinking.

There is little textual support either for the logical independence or dependence of the moral and legal theory. Indeed it is unclear which of these branches of Kant's thought should be treated as more basic. Should we seek to derive the moral from the legal, or the legal from the moral theory? It is true that Kant wrote the *Foundations of the Metaphysics of Morals* in 1785 before he turned in 1797, at the end of his productive life, to questions of law. Yet in structuring the *Metaphysics of Morals*, he treats legal theory before he elaborates on virtue and practical ethics. Nevertheless, the texts are inconclusive. What we have to do today is probe Kant's ideas for their logical interdependence. The problem is whether a connection inheres in the moral and legal theory that runs deeper than the common subjects of duty and various forms of freedom. I shall consider three different ways that law and morality might intersect.

A. Law and Morality as Identical Sets

Law and morality can be brought into tandem either by reducing legal rights to the range of moral duties or by expanding the notion of moral autonomy to correspond with the scope of external freedom as protected by the Right. The first approach generates a philosophical grounding for fascism; the latter, for modern liberalism.

There were in fact German writers who, during the third Reich, argued that external freedom, in the Kantian sense, exists only so that we may fulfill our moral duties. As the philosopher Karl Larenz put it in 1943: "The individual right to free action . . . is not a right to act arbitrarily, but merely a right to the unfettered fulfillment of the moral will; it is a right to performance of one's duty."⁸⁸ Other writers criticized "despiritualized democratic states" for not recognizing the "high spiritual vocation" of the state to compel citizens to perform their moral duty.⁸⁹

If we were externally free only to act in conformity with the moral law, our range of permissible behavior would be limited to the single act that reason dictated. There would be no room for private purposes, no linking of divergent desires and purposes behind the common form of contract. Indeed, in the fascist utopia of enforced moral law, con-

87. Gerhardt, *Recht und Herrschaft. Zur gesellschaftlichen Funktion des Rechts in der Philosophie Kants*, 12 *Rechtstheorie* 53, 73 (1981).

88. *Reich und Recht in der Deutschen Philosophie* 283 (K. Larenz ed. 1943).

89. See B. Bauch, *Gründzüge der Ethik* 218 (1935).

tract and private consensual arrangements would serve merely to validate the independently binding requirements of reason.

If reducing external to internal freedom restricts our freedom, the common technique for merging moral and legal theory against the backdrop of liberal values is to read the notions of autonomy and internal freedom expansively as though they were equivalent to external freedom. This expansive reading generates a wholly new version of Kant's moral theory, in which autonomy and freedom are taken in their contemporary sense to mean the freedom to set one's own ends, in one's own interest, as a self-legislating agent. Under this reading of Kant, respecting the humanity of others comes to mean respecting others as analogously situated, self-interested actors. Perhaps this is a way of adapting Kant to a culture skeptical about reason as a guide to moral action.⁹⁰ Yet it is not faithful to original text. It merges the moral and the legal in Kant, but only at the price of distorting his moral theory.

B. *Intersecting Sets: Morality as Side Constraint*

A less ambitious intrusion of moral theory in legal transactions would be to treat as void all consensual arrangements that violated the imperative to treat others never merely as means, but always as ends in themselves. Thus we would have an account of the common legal rejection of unconscionable contracts and other arrangements that violate public order and *bonos mores*. Where the moral set intersects with the legal, the moral prevails.⁹¹ Although this restriction on freedom of contract makes good sense on grounds of interpersonal morality and social justice, I have doubts whether it is compatible with Kant's radically liberal theory of contracts.

Kant thinks of contract by analogy to the acquisition of property. As control over chattels is an expression of *Willkür*, so is the control over another person's freedom embodied in a contractual relationship.⁹² If the basic premise of the law of property is that all objects must be subject, in principle, to ownership,⁹³ it should be the basic premise of contract law that every possible bargain should be available to those willing to agree to its terms. As removing chattels from the range of possible ownership restricts freedom, so does the removal of a potential bargain restrict the freedom of the parties to regulate their lives.

This is a rigorous position, an extreme position in defense of the pure theory of Right. In response to this logic of universal freedom,

90. See the debate between Finnis and Richards in this issue.

91. To carry out the metaphor of intersecting sets, it seems that some cases of moral duty, e.g., social promises, would fall outside the set of legal transactions.

92. Ladd omitted the material on contracts from his translation of the *Rechtslehre*. Therefore, see *Philosophy of Law*, supra note 59, at 100–01.

93. *Metaphysical Elements of Justice*, supra note 7, at *246–47.

contemporary European legal systems have developed a technique for integrating moral restraint into the system of Right. As illustrated by the doctrine of abuse of right, the technique consists in reasoning in two lexically ordered stages. At the first stage, the right is affirmed in its pure and absolute form; at the second stage, moral and humanitarian considerations enter into the analysis as a restraint on the scope of the Right.⁹⁴

Kant himself considers possible moral constraints on the right of self-defense.⁹⁵ The absolute right to defend one's external freedom defines the first level of argument; moral restrictions enter as a constraint. The difficult next step for Kant would be to authorize the courts to enforce these moral restraints even if they enter in at a subsidiary stage of analysis.⁹⁶

C. *Morality as a Subset: The Right as a Framework for Moral Action*

A long tradition of argument supports the view that the framework of the Right exists in order to permit the possibility of moral action. In 1795, two years before Kant published his views in the *Metaphysics of Morals*, Paul Johann Feuerbach took this position in a still influential essay.⁹⁷ After considering and rejecting a number of possible connections between Right and morality, Feuerbach concludes that the Right is a "species of freedom sanctioned by reason that serves as a condition for achieving the 'highest purpose' [namely, moral action]."⁹⁸ As though in an unbroken line of influence, Radbruch argues in the contemporary literature: "The Right confers subjective rights on individuals so that they can better fulfill their moral duties."⁹⁹

The view that emerges from the Feuerbach-Radbruch thesis is that the Right creates a field for moral choice. It must be up to the individual who is in the position to exploit others to choose not to do so; it must be up to the person entitled to exercise his right of defense to attend to the humanity and the interests of the aggressor.

This view differs significantly from the first claim that collapses law and morality by treating the former merely as a coercive institutionalization of the latter. The appeal of the Feuerbach-Radbruch thesis is that it preserves the notion of morality as self-legislated rather than externally compelled action. That moral action must be free in this sense

94. I have discussed this procedure in greater detail in Fletcher, *supra* note 70.

95. See *supra* notes 67-71 and accompanying text.

96. German courts have done this in the field of self-defense and in other applications of the theory of "abuse of rights." See Fletcher, *supra* note 70, at 952.

97. Feuerbach, *Versuch über den Begriff des Rechts*, 6 *Miethammers Philosophisches Journal* 138 (1795), reprinted in *Begriff und Wesen des Rechts I* (W. Maihofer ed. 1973).

98. *Id.* at 16.

99. G. Radbruch, *Rechtsphilosophie* 140 (6th ed. 1963).

is indispensable to any theory of the relationship of law and morality faithful to the Kantian texts.

The hypothesis that law, the framework of Right, serves only the purpose of facilitating moral action poses problems of another sort. Suppose that some increment of freedom did not serve this instrumental goal. Would that mean that freedom had no value in itself? Kant certainly seems to write about external freedom as though freedom required no justification. But if freedom is important only so far as it serves the "highest purpose" of moral action, it would rest on unsure intellectual foundations.

The yearning for a union between Kant's moral and legal thinking remains unsatisfied. If the two sets collapse into one, the result is either a fascist distortion of law or a liberal distortion of Kantian morality. If morality is a side constraint, an intersecting set, then the state must engage in the task of enforcing moral precepts and thereby undermine the possibility of self-legislated moral action. If freedom and the Right exist merely to facilitate a subset of moral acts, then freedom can no longer claim to be an intrinsic value.

CONCLUSION

Probing the relationship between law and morality requires that we assess at least three distinct questions. The question might be how law and morality relate to each other as a conceptual matter. This inquiry leads us to stress the internal nature of morality and the external nature of law.

Alternatively, despite protestations that Kantian morality is merely a theory about acting out of noumenal necessity, we might take this morality to stand for specific duties, such as the duties not to commit suicide, not to lie, to keep one's promises, to rescue others in distress, and in general never to abuse the humanity of others by treating them merely as means to one's own ends. If this is what morality means in the Kantian sense, then we confront a serious question about the extent to which we should integrate those substantive values into the law.

Third, we might take the issue of law and morality to be the logical primacy of either law or morality and the possibility of deriving one from the other. We have canvassed possible solutions to this conundrum and have found none free from philosophical difficulty.

The integration of moral precepts into law is the version of the problem that taxes us as committed participants in the legal system. We strive for a legal system that gives maximum scope to individual freedom but that at the same time integrates communitarian and humanitarian concerns into the law. We favor party autonomy in contracts, but fear a return to the excesses of *Lochner*.¹⁰⁰ As liberals, we are chary of duties to rescue, but the hypothetical of the passer-by ignoring

100. *Lochner v. New York*, 198 U.S. 45 (1905).

the drowning baby suffices to make the case for communitarian duties to aid others in distress. An absolute right of self-defense, even as against a fleeing, petty thief, follows from the concept of Right,¹⁰¹ but one is hard pressed to find supporters for this degree of rightful hard-heartedness. What are we to do in the face of this endless conflict in our legal theory between the demands of a liberal theory of Right and the communitarian thrust of Kant's morality?

Though Kant does not solve the problem for us, he frames the conflict by articulating two different bodies of thought—the communitarian and the liberal, the moral and the legal. The communitarian values of the moral theory can enter as a corrective to the rigors of the Right, yet there are deep problems that await us in working out that resolution. How far should moral values enter in the second stage of analysis? It is not clear whether there is some systematic way of approaching the problem or whether we must proceed *faute de mieux*, by selective, intuitive inclusion of moral restrictions on the Right.

At the end of this inquiry, we are, alas, but beginning.

101. *Metaphysical Elements of Justice*, supra note 7, at *235–36 (moderation belongs not to Right but only to Ethics). For a discussion of this issue in German law, see G. Fletcher, *Rethinking Criminal Law* 870–74 (1978).