

## Unethical Laws and Lawless Ethics: Right and Virtue in Kant's *Rechtslehre*

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*In this paper, I examine the relation between law and morality within the context of Kant's late work *The Metaphysics of Morals*. I argue that Kant's conception of the law is based on a fundamental distinction between Right and Virtue, which respectively correspond to his legal-political theory and moral philosophy. My analysis is two part: in the first part, I examine the relationship between the Doctrines of Right and Virtue within the Kantian architectonic; in the second, I evaluate two cases of adjudication in the *Rechtslehre* that exemplify the distinction between law and morality explicated in the preceding section. I begin by showing that Kant's legal and moral philosophies are normatively distinct, insofar as Right and Virtue belong to incommensurable realms of freedom and necessity. From this distinction, I derive Kant's conception of the legal state as principally concerned with external freedoms and the preservation of the lawful condition itself. The second part of this paper analyzes Kant's views on two cases of criminal justice, revealing his prioritization of the political over independent ethical considerations in juridical decision-making. Here, the conceptual barrier between law and morality serves as a caveat against facile recourse to Kantian ethics as means of legitimizing juridico-political decisions.*

### Introduction

Kant's theory of right, introduced in his late work *The Metaphysics of Morals*,<sup>1</sup> has conventionally been regarded as the most obscure and partial component of the Kantian architectonic. Often construed as the externalized application of Kantian ethics, the Doctrine of Right, or *Recht*, was conceived by Kant himself as a constitutive element of his two-pronged practical moral philosophy, complementing his antecedent work on the

<sup>1</sup> Immanuel Kant, *The Metaphysics of Morals* (henceforth, *MM*), translated by Mary Gregor (Cambridge: Cambridge University Press, 1996).

categorical imperative.<sup>2</sup> Although Kant viewed Right as commensurate in significance with the moral philosophy of *Groundworks* and his second *Critique*, the concept of Right has largely been sidelined in Kantian scholarship, partly due to the philosopher's own neglect to sufficiently explicate its relation to morality qua Virtue (*Ethik*).<sup>3</sup> Insofar as *The Metaphysics of Morals* elides an explicit deduction of Right from the categorical imperative, Kant scholars have drawn radically different conclusions about the relation between Right and Virtue. Some scholars have chosen to interpret Right as an externalized iteration of the categorical imperative, while others have argued to the contrary that there is no normative relation between Right and morality. The former analysis is often taken as the 'traditional' interpretation, to the extent that it appears to be most concordant with Kant's own philosophical self-conception, whereas the latter is regarded as the less orthodox 'separation' reading.<sup>4</sup>

Recent decades have witnessed a revitalization of interest in Kant's theory of right, precipitated by the renaissance of deontological theories in analytic and legal philosophy.<sup>5</sup> Against this background, a careful evaluation of Right may contribute to not only the current Kant scholarship, but also perennial debates over the law-morality relationship in legal analysis. This paper conducts an investigation of the normative relationship between Kantian right and Kantian ethics, as a means of gaining insight into the analogous connection between law and morality. Here, I work forward and backward—from the conceptual to the specific, and vice versa—such that the analysis in this paper is structured into two parts. In the first part, I examine the normative relation between the categorical imperative and Right within the Kantian architectonic. I begin by evaluating whether Right necessarily presupposes a direct deduction from the categorical imperative or stands on its own as a distinct and independent normative system. I conclude that while the *concept* of Right may indirectly presuppose the domain of morals, the universal *principle* of right nonetheless cannot be deduced from the categorical imperative; for the two correspond respectively to incommensurable realms of freedom and necessity. Drawing upon Kant's first *Critique*,<sup>6</sup> I argue that Kantian morality is concerned with rational autonomy, whereas Kantian right is solely associated with external or negative freedoms.

From this distinction, I derive Kant's conception of the law as a system of Right. Kant's *Rechtsstaat*, or 'legal state', is predicated on a fundamental separation of law and morality, I argue. Such a basis for the legal system authorizes and indeed enjoins the law to prioritize order, stability, and self-fulfillment in matters of adjudication and

<sup>2</sup> Allen Wood, 'The Final Form of Kant's Practical Philosophy', in *Kant's Metaphysics of Morals: Interpretive Essays*, edited by Mark Timmons (Oxford: Oxford University Press, 2002), pp. 1-21.

<sup>3</sup> Jeremy Waldron, 'Kant's Legal Positivism', *Harvard Law Review* 109:7 (1996), pp. 1535-1566, at p. 1536. Waldron cites Hannah Arendt's view, that Kant's political philosophy may have been impaired by the 'decrease of his mental faculties' (p. 1545). Some scholarly interpretations of Kantian right have thus dismissed it as an 'aberration' inconsistent with his earlier work.

<sup>4</sup> For an overview of the literature on Kant's theory of right, see Christoph Horn, 'Kant's Political Philosophy as a Theory of Non-Ideal Normativity', *Kant-Studien* 107:1 (2016), pp. 89-110, and Marcus Willaschek, 'Right and Coercion: Can Kant's Conception of Right Be Derived from his Moral Theory?', *International Journal of Philosophical Studies* 17:1 (2009), pp. 49-70.

<sup>5</sup> Waldron, p. 1535.

<sup>6</sup> Immanuel Kant, *The Critique of Pure Reason* (henceforth, *CPR*), translated by Paul Guyer and Allen Wood (Cambridge: Cambridge University Press, 1998).

institutional structuring. The preceding analysis of Right thus serves as a segue into the second part of this paper, which focuses on two concrete cases of legal adjudication addressed in *The Metaphysics of Morals*. Here, I work backward from the ‘boundary’ case to the general concept of Right, elaborating on Kant’s own argument emphasizing stability over ethical compulsion in both situations. In both cases, the law reveals its primary concern to be the preservation of the state as embodying a ‘rightful’ condition. Kant’s concept of right thus supports a positivist account of the law, belying surface-level interpretations of Kantian philosophy as consistent with natural law theory.<sup>7</sup>

### The Doctrines of Right and Virtue

The distinction between morality and Right, which Kant discusses extensively in his late work, serves as the foundation for his legal and political philosophy. From the Kantian corpus on practical philosophy, it is plausible to assume that Kant originally conceptualized Right as following directly from the moral theory laid out in *Groundworks* and the second *Critique*.<sup>8</sup> The structure of the work, which comprises the *Rechtslehre* on Right and the *Tugendlehre* on Virtue, exemplifies Kant’s original intention of reconciling the two doctrines under a comprehensive ‘metaphysics of morals’. Kant, however, abandons the endeavor of producing a full deduction at some point in the early 1790s and focuses instead on developing Right as a self-standing system.<sup>9</sup> His late work has consequently generated much dispute over the appropriate interpretation of the Right-Virtue relation, such that the system of Right presently occupies a somewhat uncertain position within Kant’s broader architectonic. Notwithstanding its ambiguity and methodological limitations, the *Rechtslehre* furnishes rich insights into the practical implications of Kantian philosophy, which has indeed been accused of being overly rigid and abstracted. That Kant himself did not succeed in integrating Right into his earlier philosophy should not deter Kant scholars from directing commensurate attention to the *Rechtslehre*; for such a failure itself evidences and provides a deeper understanding into the chasm between law and morality.

According to Kant, there are two elements in all lawgiving: first, the law that prescribes the duty, and second, the incentive to perform the duty.<sup>10</sup> Whereas Virtue requires moral agents to take the law itself as their incentive, Right merely calls for external conformity. Hence, ‘pathological’ determining grounds of choice such as inclinations or aversion, which Kant explicitly precludes from consideration in his moral theory,<sup>11</sup> amount to legitimate incentives for rightful conduct. While the Doctrine of Virtue encompasses all moral propositions derived from the categorical imperative, the Doctrine of Right comprises only those laws for which ‘an external lawgiving is

<sup>7</sup> Hans Kelsen counts Kant among those who have conventionally been stereotyped as natural law philosophers. See Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (Cambridge, MA: Harvard University Press, 1945), p. 416.

<sup>8</sup> Willaschek, ‘Right and Coercion’, p. 52.

<sup>9</sup> *Ibid.*

<sup>10</sup> *MM* 6:218.

<sup>11</sup> Kant, *Grounding for the Metaphysics of Morals* (henceforth, *GMM*), translated by James Ellington (Indianapolis: Hackett Publishing Company, 1993), 4:396-399.

*possible*'.<sup>12</sup> On this basis, one may construe the difference between juridical and ethical lawgiving as predicated upon an epistemic problem: namely, that of ascertaining the motivation behind any action. The Doctrine of Right, in this interpretation, merely concerns the externalized implementation of Virtue, insofar as the latter's motivational component can neither be effectively confirmed nor coherently formulated as a juridical mandate.

Kant's universal principle of right would seem to reinforce the interpretation of Right as a corollary to the supreme moral principle. Stating that 'Any action is right if it can coexist with everyone's freedom in accordance with a universal law',<sup>13</sup> the principle of right exhibits a perspicuous resemblance to the second formulation of the categorical imperative.<sup>14</sup> Right thus appears, at first blush, to be an applied version of the moral imperative, wherein maxims have been translated into concrete actions. In this view, the categorical imperative determines which maxims may serve as viable rules for action, whereas the principle of right determines which concrete actions are permissible based on the aforementioned rules.<sup>15</sup> This interpretation of the Right-Virtue relationship is perhaps the most obvious one; however, it is largely untenable, given the difficulty or implausibility of enforcing certain ethical injunctions, such as rules against lying or breaking non-legal contracts. Furthermore, the categorical imperative and the principle of right are not entirely homologous in that Right establishes the conditions of appropriate non-interference without prescribing any positive duties: in other words, the principle of right determines which actions are *permissible* rather than what a person *ought* to do.<sup>16</sup> In this regard, the rules derived from the categorical imperative and the principle of right cannot be fully coextensive. The boundaries of rightful action would indeed appear to be far more expansive than those of ethical comportment.

This seeming incongruity between the parameters of freedom qua permissibility delineated by Right and Virtue can be explained by the idea of strict right—a conceptual heuristic for determining 'with mathematical exactitude' the external rights and freedoms that would be assigned to each individual in the lawful condition.<sup>17</sup> Strict right is tantamount to the equipoise of everyone's spheres of external freedom through 'a fully reciprocal and equal coercion', which demarcates the boundaries of these spheres so that their radii are respectively commensurate.<sup>18</sup> In this sense, one may conceive of the juridical system as collectively embodying the coercive potentials of the society's constituents. Here, any Person A's right to X would be tantamount to the capacity of the

<sup>12</sup> *Ibid.*, 6:229.

<sup>13</sup> *MM* 6:231.

<sup>14</sup> From *GMM* 4:429, on the second formulation of the categorical imperative: 'Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.'

<sup>15</sup> Paul Guyer rejects this as a plausible interpretation of the right-morality relationship. For more, see Paul Guyer, 'Kant's Deductions of the Principle of Right', in *Kant's Metaphysics of Morals: Interpretive Essays*, edited by Mark Timmons (Oxford: Oxford University Press, 2002), pp. 25-67, at pp. 25-26.

<sup>16</sup> Allen Wood, 'The Final Form of Kant's Practical Philosophy', in *Kant's Metaphysics of Morals: Interpretive Essays*, edited by Mark Timmons (Oxford: Oxford University Press, 2002), pp. 1-25, at p. 5.

<sup>17</sup> *MM* 6:231.

<sup>18</sup> *Ibid.*

body politic, as embodied in the juridical system, to impede any potential offenders from hindering A.<sup>19</sup> A's obligation to do Y, on the other hand, would equate with an authorization of the body politic to coerce A into fulfilling his duty. The two significations of Right—as either the external law (*das Recht*) or 'a right' (*ein Recht*)<sup>20</sup>—become inextricable, insofar as the existence of social and political rights depends upon the authorization of the political collectivity to defend or enforce those rights through the law. Given that coercion is analytic to Right, moral and juridical laws cannot be entirely coterminous, insofar as the boundaries of freedom modeled through strict right are broader than those that would be upheld were juridical laws merely the external reflection of ethical laws.<sup>21</sup> For instance, there are ethical obligations, such as the duty against lying or slander, that might be enforced by juridical systems; yet Kant explicitly precludes them from juridical lawgiving in accordance with Right.<sup>22</sup>

The traditional interpretation of Right as deduced from the categorical imperative presently holds ascendancy in the debate on Kant's *Rechtslehre*. This category of interpretation may be further divided into 'strong' and 'weak' positions on the Right-Virtue relationship. The strong position is instantiated by Allen Rosen's reading of the *Rechtslehre*, which construes right as merely an 'externalized version' of the categorical imperative.<sup>23</sup> Although this interpretation is not uncommon, more recent discussions raising the issues previously mentioned have destabilized the strong position. Paul Guyer's interpretation, on the other hand, exemplifies the weak position, insofar as he rejects the possibility of directly deducing the principle of right from the categorical imperative.<sup>24</sup> Guyer nonetheless maintains that Right is grounded in morality, though the former may not be derived from the latter in the strict sense. Both the categorical imperative and the principle of right, he argues, flow directly the concept of human autonomy<sup>25</sup>: the categorical imperative determines the form that maxims must take in accordance with freedom as an unconditional value, whereas the principle of right determines the form that actions must take in accordance with the freedom of others.<sup>26</sup> 'Thus the universal principle of right may not be derived from the Categorical Imperative, but it certainly is derived from the conception of freedom and its value that is the fundamental principle of Kantian morality', Guyer concludes.<sup>27</sup>

Guyer's analysis, according to Marcus Willaschek, lacks a satisfying explanation of how coercion can contribute to a condition of universal freedom.<sup>28</sup> Insofar as coercion and Right are analytically connected, an argument that upholds the normative validity of Right on the basis of freedom's unconditional value must also show how coercion advances human autonomy.<sup>29</sup> Any such justification of coercion is, however, unavoidably incoherent insofar as it implicitly affirms one form of constraint on freedom over

<sup>19</sup> Willaschek, 'Right and Coercion', p. 57.

<sup>20</sup> Mary Gregor, 'Translator's Note on the Text', in Immanuel Kant, *The Metaphysics of Morals*.

<sup>21</sup> Willaschek, 'Right and Coercion', p. 51.

<sup>22</sup> *MM* 6:238.

<sup>23</sup> Allen Rosen, *Kant's Theory of Justice* (Ithaca: Cornell University Press, 1996), p. 13.

<sup>24</sup> Guyer, pp. 25-28.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Willaschek, 'Right and Coercion', pp. 54-56.

<sup>29</sup> *Ibid.*

another.<sup>30</sup> The analytic relation of coercion to Right thus constitutes the basis for the separation reading, for which Thomas Pogge,<sup>31</sup> Willaschek,<sup>32</sup> and Allen Wood<sup>33</sup> have each made distinctive cases. Here, I will not attempt to do full justice to these views, in light of their complexity and the constraints of my argument. The shared premise, however, is worth noting: namely, that Right concerns freedom in the external sense rather than autonomy.

In this respect, Guyer's grounding of Right and coercion in 'freedom' is misguided, as external freedom and autonomy cannot be reduced to a monolithic value. His remark—that any rightful condition fulfills the 'supreme moral principle of the absolute value of freedom in its external *as well as* internal use'<sup>34</sup>—bypasses the problem of coercion's analytic connection to Right by means of syntactic legerdemain: in conflating internal and external forms of freedom, Guyer implicitly ascribes the moral purchase of the former to the latter. There is, however, no sense in which the empirical conditions of external freedom have any impact on moral autonomy; for as Kant himself observes, the free will is, by definition, independent of any inclinations or aversions aroused by objects in the phenomenal world.<sup>35</sup> Here, I have shown that neither strong nor weak versions of the traditional interpretation can be maintained in view of the fundamental connection between Right and the external realm. In the following section, I draw upon Kant's distinction between noumena and phenomena in order to construct a deeper explanation for the incommensurability of Right and Virtue.

### Freedom and Necessity

In the *Critique of Pure Reason*, Kant posits the existence of two realms as a means of reconciling the third antinomy.<sup>36</sup> Freedom and necessity can exist concurrently, Kant observes, insofar as they belong to separate realms.<sup>37</sup> The phenomenal or 'sensible' world consists of appearances, whereas the noumenal world is entirely independent of the senses and grounds the laws of the phenomenal realm.<sup>38</sup> As members of the phenomenal world, human beings are subject to laws of necessity; only as members of the noumenal realm are humans free, in the sense of being autonomous moral legislators. While moral laws are produced by a free will, and in that sense belong to the noumenal realm, material principles or hypothetical imperatives are generated by empirical experiences

<sup>30</sup> *Ibid.*, pp. 58-59.

<sup>31</sup> Thomas Pogge, 'Is Kant's *Rechtslehre* a Comprehensive Liberalism?', in *Kant's Metaphysics of Morals*, edited by Mark Timmons (Oxford: Oxford University Press, 2002), pp. 133-158.

<sup>32</sup> Willaschek, 'Right and Coercion'. See also Marcus Willaschek, 'Why the Doctrine of Right Does Not Belong in the Metaphysics of Morals—On Some Basic Distinctions in Kant's Moral Philosophy', *Annual Review of Law and Ethics* 5:205 (1997), pp. 205-227.

<sup>33</sup> Wood, 'The Final Form of Kant's Practical Philosophy'. See also Allen Wood, 'Kant's Practical Philosophy', in *The Cambridge Companion to German Idealism*, edited by Karl Ameriks (Cambridge: Cambridge University Press, 2005), pp. 57-76.

<sup>34</sup> Guyer, p. 64.

<sup>35</sup> *GMM* 4:447.

<sup>36</sup> *CPR* A447/B475.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

associated with the sensible realm.<sup>39</sup> Against this backdrop, it is essential to distinguish between the concept of moral autonomy delineated in *Groundworks* and the second *Critique* and the concept of external freedom discussed in the *Rechtslehre*. These are not commensurable aspects of a unified concept of freedom, but on the contrary, essentially distinct by virtue of their exclusive correspondence to disparate and nonintersecting planes of human agency.

Insofar as morality is associated with participation in the noumenal kingdom of ends, it cannot be affected, positively or negatively, by the realm of necessity. Conversely, Right, as a rational arrangement of subjectively contingent ends, bears no direct relation to realm of freedom; for the latter can only be accessed through a free and objective willing.<sup>40</sup> Moral laws are thus objectively necessary, while the rational ordering of external freedoms in juridical legislation is predicated upon empirical and subjective necessity – that of negotiating between competing claims where rights cannot be shared, such as in the case of property ownership.<sup>41</sup> My ownership of any object ‘A’ automatically deprives you of control over A, whereas my maxim of treating others as ends unto themselves does not preclude you from acting on the same principle. The difference between Right and morality can accordingly be summarized: ethical maxims cannot conflict under any circumstance, whereas concrete actions motivated by subjective ends are often unavoidably conflicting.<sup>42</sup> In this context, the function of Right, as embodied in law, is to maximize each individual’s capacity to pursue his or her personal ends while minimizing dispute. It follows that Right and morality cannot be seen as comparable systems of value, normatively speaking, given that the former orients itself around subjective necessity and the former, around the unconditional value of autonomy.

At the same time, it does not follow that the *concept* of Right must be entirely divorced from Virtue. For on the contrary, one may conceive of morality as the substructure upon which Right is erected. The essential relation between Right and Virtue resides in innate right, which Kant describes as the ‘only original right belonging to every man *by virtue of his humanity*’.<sup>43</sup> The concept of innate right thus evokes a more fundamental grounding of Right, as proceeding from the value of human dignity. For Kant, moral lawgiving preconditions the idea of humanity, in which innate right and in turn, all other external rights are grounded. Man ‘knows himself, in himself, through moral laws’, insofar as his humanity is constituted and affirmed by virtue of his participation in the kingdom of ends as a moral lawgiver.<sup>44</sup> Consequently, though Right and external freedom belong essentially to the realm of appearances, they nonetheless presuppose the noumenal world as the grounding source of rightful relations. The realm of autonomy provides the basis for moral personhood, which in turn, characterizes and constitutes the subjects to which Right addresses itself. In sum, Kantian ethics establishes the basic conditions wherein human beings may act *in the capacity of moral lawgivers*, while Kantian right prescribes the fundamental conditions of respect *between* moral

<sup>39</sup> *Ibid.*

<sup>40</sup> CPR A447/B475 and *Critique of Practical Reason* 5:29. In the latter volume, see also Stephen Engstrom, ‘Introduction to Critique of Practical Reason,’ in Immanuel Kant, *The Critique of Practical Reason*, translated by Werner Pluhar (Cambridge: Hackett Publishing, 2002), pp. i-iv.

<sup>41</sup> Willaschek, ‘Right and Coercion’, pp. 63-64.

<sup>42</sup> *Ibid.*

<sup>43</sup> MM 6:238.

<sup>44</sup> GMM 4:435.

lawgivers as such. The former concerns the subject's self-constitution, whereas the latter concerns the predicate forms of external interaction between moral, autonomous, and dignified beings.

### **Kant's Account of the State**

Having thoroughly examined the normative relation between Right and Virtue, I proceed onto Kant's conception of particular external rights as foundational to his legal-political philosophy. Here, I use Kant's derivation of external rights from innate right to make a case for the priority of the political in juridical lawgiving. I begin by offering a deduction of private property rights from innate right, and subsequently demonstrate how property disputes serve as the impetus for establishing the *Rechtsstaat* or 'legal state'.<sup>45</sup> Kant's account of the state, I argue, supports a positivist view of the law's conservatizing role,<sup>46</sup> whereby the objective of legislation and adjudication is to preserve essential political functionings.

The concept of innate right underlies Kant's account of the state-of-nature transition, with private property rights playing an intermediary role in his exposition.<sup>47</sup> The only innate right, according to Kant, is freedom in the sense of 'independence from being constrained by another's choice'.<sup>48</sup> Innate right can subsequently be broken down into innate equality, or the 'independence from being bound by others to more than one can in turn bind them', and the authorization to 'do to others anything that does not in itself diminish what is theirs'. In the state of nature, property ownership in itself violates innate equality; for in the absence of law, my claim to any material good 'A' is as valid as the claim of anyone else. I cannot assert my exclusive ownership of A without implicitly imposing a non-reciprocal bind on all others who might wish to make the same claim. The principle of innate equality thus entails that my possession of A is merely provisional, devoid of either legal or moral purchase.<sup>49</sup> Anyone may legitimately challenge my ownership 'right', until all potential claimants have acknowledged it as such. Here, the second principle of innate right, which enjoins moral agents to avoid diminishing what belongs to others, does not apply since A is not really 'mine'. It belongs to me in the empirical sense and not in the 'intelligible' one, whereby A can be recognized as legitimately mine even when it is not physically in my possession.<sup>50</sup> Indeed, the only thing that belongs to me 'intelligibly' in the state of nature is what is internal to me and thus cannot be owned by others in any comprehensible sense, such as my life.<sup>51</sup> To possess anything that is external to my corporeal self, I require the consent of all other persons within the society in question. In this regard, intelligible possession guaranteed by 'acquired rights' can only be established through an act of the general

<sup>45</sup> For more on the concept of the *Rechtsstaat* as proceeding from Kant, see Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (London: University of California Press, 1970), pp. 312-313.

<sup>46</sup> Judith Shklar discusses the conservative function of the law in *Legalism* (Cambridge, MA: Harvard University Press, 1964), p. 142.

<sup>47</sup> *MM* 6:249.

<sup>48</sup> *Ibid.*, 6:238.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*



will.<sup>52</sup> The 'collective general (common) and powerful will', Kant writes, imposes an equal and reciprocal bind upon all constituents of the body politic putting all under obligation to recognize an agreed-upon set of legal rights.<sup>53</sup>

For Kant, the establishment of a juridico-political system is not only prudential, but necessary in accordance with the demands of Right itself. Acquired rights lack intrinsic moral value, insofar as they merely concern the distribution of empirical goods; however, the violations of innate right or bodily integrity resulting from disputes over acquired rights nonetheless provide sufficient grounds for a deterrent system. Thus proceeds the postulate of public right: 'when you cannot avoid living side by side with others, you ought to leave the state of nature and proceed with them into a rightful condition', Kant states.<sup>54</sup> The ground of public right, he continues, can be 'explicated *analytically* from the concept of right in external relations, in contrast with *violence*'.<sup>55</sup> The analytic relation of legal coercion to public right follows from the principle of contradiction, whereby constraints inhibiting violations of Right must be in accordance with Right.<sup>56</sup> Hence, the normative validity of legal coercion—and accordingly, of the state as a fundamentally coercive mechanism—is inherent to Right and to innate right in particular.

Some scholars have attributed conflict in Kant's state of nature to moral disagreement rather than property disputes,<sup>57</sup> and yet the role of dispute within the theoretical structure of Kant's political philosophy remains the same: regardless of its cause, violent conflict involves infringements upon innate right. Hence, human beings 'do wrong in the highest degree' by remaining in a condition of insecurity.<sup>58</sup> Here, the 'wrongfulness' of remaining in an unlawful condition is not directly based on the categorical imperative, for which compliance is solely a matter of free willing unaffected by empirical constraints. Instead, Right demands the instatement of coercive mechanisms not only as a matter of subjective necessity, but one of concern for the fundamental conditions of respect for and between moral persons. It is worth observing that Kant merely denotes the wrongfulness of remaining in an unlawful *condition*, in which the basic demands of respect between persons cannot be maintained.<sup>59</sup> Once a juridico-political system has been installed, however, one may reasonably conclude that Virtue-oriented concepts such as dignity and moral autonomy no longer have any immediate salience in relation to particular cases of adjudication. The normative function of the state and its attendant system of laws is now perspicuous. The state exists principally to protect moral actors from violations of external freedom resulting from competing claims; beyond this, its jurisdiction can only be regarded as tenuous. Here, I have shown how Right serves as the underlying basis for Kant's conception of the law and state. In the following section, I expand upon the implications of Kant's concept of Right by examining two cases of legal adjudication.

<sup>52</sup> *Ibid.*, 6:268.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, 6:307.

<sup>55</sup> *Ibid.*

<sup>56</sup> Willaschek, 'Why the Doctrine of Right Does Not Belong in the Metaphysics of Morals', p. 218.

<sup>57</sup> Waldron, p. 1537.

<sup>58</sup> *MM* 6:307.

<sup>59</sup> *Ibid.*

### Crime and Punishment: Kant on Law and Retributivism

This section is structured around two exceptional cases that Kant discusses in *The Metaphysics of Morals*. The first reveals the importance of law's deterrent function, as opposed to its misconceived role as moral arbitrator, while the second highlights the implications of Kant's legal positivism in extraordinary circumstances where the law is defunct or absent. One may suggest, as Kant does himself, that these unusual cases are tangential to his core philosophy.<sup>60</sup> I would argue, however, that these 'fringe' cases are nonetheless worthy of attention, insofar as they bring to the forefront limitations in the normative legal system. As observed by jurist Carl Schmitt, these limitations are typically concealed under ordinary circumstances of political stability; yet it is at the boundaries of normality that the law reveals its true underlying conditions.<sup>61</sup> In the two cases of juridical decision-making examined, the priority of the political arises into manifestness from hitherto unobtrusive fissures within the legal system. Both of these examples expose Kant's prioritization of the political in juridical decision-making.

#### *Shipwreck: Law and Conscience*

First, Kant analyzes the case of a shipwrecked man who pushes another off a plank in order to save himself.<sup>62</sup> There cannot be a law which assigns the death penalty in this situation, he argues, as no punishment could impose a cost higher than the certain loss of one's life. Such a law would inevitably fail to satisfy its own deterrent purpose. As Kant suggests, the juridical system is less concerned with the fulfillment of moral justice in a particular instance than the enforcement of public justice generally. A law enabling murder in exceptional circumstances would be self-contradictory, yet the juridical decision allowing for subjective impunity in this specific instance nonetheless accords with the rightful *condition* of public justice. Legal impunity does not, however, amount to moral vindication. In Kant's words: 'the deed of saving one's life by violence is not to be judged *inculpable* but only *unpunishable*.'<sup>63</sup> Here, the distinction between Right and Virtue emerges into perspicuity: whereas the former is concerned with the preservation and fulfillment of the law, the latter is concerned with the assessment of moral worth based on the categorical imperative. From this example, it is clear that the law's preoccupation with Right in the broad sense precludes moral deservingness from principal consideration in questions of adjudication.

The distinction between culpable and punishable also speaks to a critical difference in Kant's philosophy between crimes of conscience and crimes of law. While the two may coincide, it is not necessary for one to accompany the other; an individual, for instance, may justifiably be punished for an unintentional violation of the juridical law, though he may not have offended against the intrinsic or 'higher' moral law. The lawbreaker is not punished for being 'unworthy' in himself but for breaking the juridical

<sup>60</sup> *Ibid.*, 6:236.

<sup>61</sup> Schmitt refers to the 'borderline concept' in *Political Theology*, translated by George Schwab (Chicago: University of Chicago Press, 1985), as constitutive of, rather than extrinsic to, the nature of the normative situation.

<sup>62</sup> *MM* 6:236.

<sup>63</sup> *Ibid.*

law and being unworthy in that regard.<sup>64</sup> If the lawbreaker can be legally punished while remaining morally inculpable, the converse is also true: an offender of the ethical law may not be legitimately punished without having also violated the juridical law. In this respect, the law functions as less a moral adjudicator than a practical deterrent, for it does not exist to inflict suffering upon those who deserve it per se but merely to preserve itself, insofar as it requires a system of penalties to be credible.<sup>65</sup> And yet for the morally culpable, Kant maintains that there are other forms of suffering that generally accompany wrongdoing. Feelings of guilt and shame are important, not for consequentialist reasons, but for their role in affirming the wrongdoer's humanity.<sup>66</sup> In this sense, moral guilt becomes a matter of individual conscience rather than the courts.

For Kant, punishment is inextricable from the rightful condition. Here, it may be helpful to distinguish between coercion and punishment, whereby coercion can be rightfully used even in the state of nature but punishment can only be employed by the state. If you steal object 'A' from my possession, I am authorized to coerce you into returning it, insofar as my claim to A is the same as yours in the state of nature. However, anything beyond simple coercion—in this case, taking A back—is superfluous and potentially illegitimate, where right is concerned.<sup>67</sup> I am authorized to reappropriate A but not to harm you bodily or otherwise violate your innate right.<sup>68</sup> In a civil condition, on the other hand, punishment functions as a deterrent mechanism, so that if you take A, which is rightfully, i.e. lawfully, in my possession, the state is authorized to not only coerce you into returning it, but also to impose punitive sanctions as a means of deterring potential lawbreakers. For Kant, the principle of *lex talionis* is not justified in itself but merely the most consistent principle for determining the content of penal law, to the extent that all other principles are 'fluctuating and unsuited' for the requirements of criminal justice.<sup>69</sup> It follows from this analysis that neither the state nor the individual has the prerogative to punish purely on the basis of moral principle.

#### *Rebellion: State of Emergency*

In the second example, Kant examines a situation in which the juridico-political system has recently experienced a rupture. Here, the legal question at hand is whether the death penalty is appropriate for the instigators of a revolt. Again, the political function of the law overrides any independent moral considerations: a lighter sentence should be pronounced, Kant concedes, if the execution of all the rebels involved would destabilize or even undo the state itself, for the state of nature is still 'far worse because there is no external justice at all in it'.<sup>70</sup> The other consideration here is an affective one: if the sovereign does not want to 'dull the people's feeling by the spectacle of a slaughterhouse', Kant remarks, then he must grant the rebels clemency. Here, Kant recognizes the empirical significance of morality, as essential to the preservation of a rightful condition, though he excludes morals from consideration in the juridical process.

<sup>64</sup> Thomas Hill, 'Kant on Wrongdoing, Desert, and Punishment', *Law and Philosophy* 18:4 (1999), pp. 407-441.

<sup>65</sup> *Ibid.*, p. 414.

<sup>66</sup> *Ibid.*, p. 420.

<sup>67</sup> Willaschek, 'Right and Coercion', pp. 67-68.

<sup>68</sup> *Ibid.*

<sup>69</sup> *MM* 6:332.

<sup>70</sup> *Ibid.*, 6:334.

That Right excludes morality in its theoretical structure thus does not signify the unimportance of the latter in practice.<sup>71</sup>

As with the previous case, the waiver of legal process cannot be incorporated into the law itself, but can only be done in accordance with judicial—or in this case, sovereign—discretion. In both cases examined, the external law is not absolute, insofar as the preservation of a condition of public justice overrides strict positivist compliance with the law. The renunciation of the lawful condition cannot be permissible according to the principles of Right, for such a permission would be self-contradictory.<sup>72</sup> However, dispensation with the external law under exceptional circumstances does not amount to a contradiction, insofar as it is not the law that dispenses with itself. The law, as an internally consistent system, can neither abrogate itself nor conceive of being abrogated, but this does not mean that it cannot be suspended by an outside entity.<sup>73</sup> This entity is the sovereign, which in exceptional cases, is given discretion with respect to the law's application.<sup>74</sup>

One does not need to subscribe to Kant's particular account of sovereign power in this case: the implications are clear regardless. In the extraordinary case wherein the ordinary legal-political system has been temporarily suspended, what becomes normatively authoritative, in place of the positive law, is not an independent system of moral principles but sovereign authority. Here, the sovereign incarnates the general will, which according to Kant's account of the state of nature transition, is indeed the true basis for any system of Right.<sup>75</sup> The question of ethics never arises; for the priority in this case is not the moral self-determination of individual persons, but rather the reestablishment of the rightful condition by means of a general willing. This act of the general will does not flow directly from the categorical imperative, and yet it nevertheless exhibits a respect for persons—for the right of autonomous beings and moral lawgivers to subject themselves to no restrictions other than those to which they have consented in accordance with Right.

In this section, I have shown the priority of the political in both cases of legal adjudication provided in the *Rechtslehre*: the first with respect to the question of legal sanctions under the aegis of a preexisting law, and the second with respect to the question of legal qua sovereign authority in the temporary suspension of law. In the shipwreck case, Kant's reasoning for the suspension of punitive measures points to the practical role of punishment as part of a system of positive legislation, in contrast to its misconceived function as a moral arbitrator. The rebellion case affirms the conclusion drawn from the previous example by showing that the true basis for the legal system is not a set of ethical principles but rather the contractual agreements constituted by the general will. Both of these cases offer support in favor of interpreting Kant's legal philosophy as positivist in nature.

<sup>71</sup> Wood, 'The Final Form of Kant's Practical Philosophy', p. 2.

<sup>72</sup> *MM* 6:236.

<sup>73</sup> For more on the 'emergency' situation in jurisprudence, see Schmitt, pp. 5-16.

<sup>74</sup> *MM* 6:320.

<sup>75</sup> *Ibid.*, 6:268.

## Conclusion

Here, I conclude that the separation of Right and Virtue is not only a conceptually tenable position, but necessary to the architectonic structure of Kant's philosophy. Insofar as Kantian right and Kantian ethics belong to essential different realms of concern, their substantive content, as well as underlying theoretical structure, cannot be fully coextensive. Whereas the Doctrine of Virtue determines the form of ethical maxims where duties cannot conflict under any circumstance, the Doctrine of Right concerns itself with the compatibility of concrete actions in a world where they inevitably conflict: the former is structured around freedom, and the latter, around necessity. In this regard, Right and Virtue function as essentially incommensurable normative systems. One indeed cannot imagine a world in which the ethical injunction, 'Do not kill', is uniformly enforced across cases of self-defense and manslaughter; conversely, it is perhaps equally absurd to imagine that the negotiation of property claims should invariably be determined as a matter of ethical valuation. In this sense, the Right-Virtue distinction is supported by not only theoretical argument but common intuition.

One may point out that the categorical imperative either holds or does not hold: it cannot be that the supreme principle of morality holds in some cases and not others, for such a partial applicability would automatically transform the categorical imperative into a hypothetical one. This counterpoint can easily be addressed if the difference between Right and Virtue is interpreted as a matter of perspective with respect to particular cases of legal adjudication. As noted earlier, the absence of legal sanction in any particular situation does not denote a lack of moral responsibility. From the standpoint of Virtue, principles derived from the categorical imperative are relevant as ever; these principles merely do not fall under the purview of the law qua Right. That law should be altogether separate from morality is perhaps another point of concern. However, this would not be an accurate interpretation of the argument presented here, for the legal condition is itself a moral priority to be established by the general will. Morality is, as it were, the undercurrent that buoys Right, providing the impetus for moral beings to become legal-political subjects. What the Right-Virtue distinction implies is merely that where a system of positive laws *already exists* on the contractual basis of the general will, the prescriptions of preexisting law should hold precedence over ethical arguments to the contrary.

In this paper, I have shown how Kant's Doctrines of Right and Virtue function as distinct and independent normativities. On this basis, I have demonstrated that Kant's conception of the law is grounded not in an independent set of moral principles, but rather a system of external rights established by the general will. It follows that what is 'moral' about the law is not its particular prescriptions per se, but the very existence of the legal condition, as providing the essential conditions for rightful association between autonomous beings. This paper hopefully contributes to two areas of debate: first, the current discussions over Kant's *Metaphysics of Morals* in philosophy, and second, the enduring debates over the relation between law and morality in legal theory.

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