

De Ethica

A Journal of Philosophical,
Theological and Applied Ethics

Vol. 4, No. 2 (2017)

- 1-3 **From the Editors** (*English*)
5-8 **From the Editors** (*German*)
9-20 **Shaun Young**
Wage Desert and the Success of Organisations
21-34 **Jenna Zhang**
*Unethical Laws and Lawless Ethics: Right and
Virtue in Kant's Rechtslehre*



DE ETHICA

A JOURNAL OF PHILOSOPHICAL, THEOLOGICAL AND APPLIED ETHICS

De Ethica seeks to publish scholarly works in philosophical, theological and applied ethics. It is a fully peer-reviewed, open-access publication hosted by Linköping University Electronic Press. We are committed to making papers of high academic quality accessible to a wide audience.

De Ethica is published in cooperation with *Societas Ethica, the European Society for Research in Ethics*. *Societas Ethica* was founded in Basel, Switzerland in 1964; today it has more than 200 members from more than 20 countries, representing a variety of theological and philosophical traditions. The annual conferences of *Societas Ethica* draw speakers from across the globe and provide a lively forum for intellectual exchange. Like *Societas Ethica*, *De Ethica* aims to create dialogue across national, political, and religious boundaries.

We welcome contributions from all philosophical and theological traditions. While we do welcome historically and empirically oriented work, our focus is on normative ethical questions. We also have a special interest in papers that contribute to ongoing public debates.

It is our aim to facilitate intellectual exchange across disciplinary and geographical boundaries and across the gaps between different philosophical and theological traditions. Thus we seek to publish papers that advance a clear and concise argument, avoid jargon, and are accessible to a non-specialized academic audience.

De Ethica is an Open Access publication with no publication fee. This means that the contents of the journal are published free of charge for authors, and can be accessed free of charge by readers. *De Ethica* uses Creative Commons BY-NC licencing, meaning that anyone may make full use of an article for non-commercial purposes as long as a full reference (including DOI) is given to the original publication. Additionally authors are free to archive the copy-edited version of the article at his or her web page, or at their university's web page.

By publishing exclusively online, *De Ethica* is not only more accessible than most traditional journals, but its production is also considerably more environmentally friendly. *De Ethica* is a not-for-profit operation; hence we welcome donations that might help us to improve the journal's quality, but we do not rely on them.

Editor in Chief *Elena Namli* (Uppsala University, Sweden)
Executive Editor *Marcus Agnafors* (University of Borås, Sweden)
Associate Editor *Maren Behrensen* (University of Münster, Germany)
Assistant Editor *Heidi Jokinen* (Åbo Akademi University, Finland)

Editorial Board *Tina Beattie* (University of Roehampton, United Kingdom)
 Göran Collste (Linköping University, Sweden)
 Marcus Düzwell (Universiteit Utrecht, The Netherlands)
 Raimond Gaita (University of Melbourne, Australia; and King's College London, United Kingdom)
 Hille Haker (Loyola University Chicago, United States)
 Lena Halldenius (Lund University, Sweden)
 Robert Heeger (Utrecht University, The Netherlands)
 Neil Messer (Winchester University, United Kingdom)
 Michael Northcott (University of Edinburgh, United Kingdom)
 Philip Pettit (Princeton University, United States)
 Pamela Slotte (Helsinki University, Finland)
 Hans Ulrich (Friedrich-Alexander-Universität Erlangen-Nürnberg, Germany)
 Peter Vallentyne (University of Missouri, United States).

De Ethica was founded in 2013. It published its first issue in 2014, under the guidance of its first Editor-in-Chief, distinguished professor Brenda Almond.

Cover photo courtesy of [Freemages.com/Alfonso Diaz](https://www.freemages.com/Alfonso-Diaz).

From the Editors

A number of controversies have recently occurred in the world of academic publishing, several of them sharing the characteristic of putting the editors' choices and responsibilities in the limelight. However, while you can find detailed ethical argumentation on topics that are only slightly related to real world problems, few volumes have been authored on the subject of publication ethics. According to one of the few empirical studies in the area, journal editors are simply 'not very concerned' about publication ethics.¹ This lack of interest in publication ethics is unfortunate. After all, publishing articles is arguably the most prominent way of disseminating and discussing research. Add also that the routines and policies of a journal, and the actions and decisions of an editor, could make or break the career of an aspiring scholar.

We can speculate why ethicists have not been very eager to turn their critical eye inwards, to their own distribution channels and cherished outlets. One not entirely implausible reason is that publication ethics does not enjoy a very high disciplinary or social status: While the ethicist may get to be the center of attention at the dinner party after informing the crowd that he or she specializes in, say, the ethics of killing, the ethics of sex, or distributive justice, the professor who publishes books on the ethics of academic publication will get considerably less attention. Some areas of ethics are simply not very attractive, and hence have much less status and appeal than other areas.

Another reason, perhaps a bit cynical, is that the individuals and organizations best positioned to take on the subject of academic publication ethics are the ones that have the least incentive to do so. If professor X has earned his rank and status through publications in high-ranked journals, X would presumably engage at his or her own peril with ethical issues that affects what get published, since X's position is the result of that very system of academic publishing. Similarly, editors may have little motivation to take a shot at the structure that they are a part of.

The recent developments and 'scandals' within scholarly publication also seem to underscore the importance of a well-reasoned publication ethics. Let me offer three examples of controversies that put publication ethics in the center, although they were not always recognized as doing so.

Some years ago, the journal *Synthese* published a thematic issue on Intelligent Design, 'Evolution and Its Rivals'.² In a disclaimer included in the print version – published two years after the online version of the issue – the editors wrote what

¹ E. Wager, S. Fiack, C. Graf, A. Robinson and I. Rowlands, 'Science journal editors' views on publication ethics: results of an international survey', *Journal of Medical Ethics* 35 (2009), pp. 348-353.

² *Synthese* 178:2 (2011).

essentially was an apology for the content of the issue, as they noted (in my view correctly) that the usual standard of respect and politeness was not followed in all papers. Although the disclaimer mentioned papers in the plural, everyone draw the conclusion that it was one paper in particular that caused the disclaimer. For adding the disclaimer, the *Synthese* editors were accused of giving in to the demands of the Intelligent Design lobby, and a boycott was quickly organized.

One might debate whether or not the boycott was justified, but the ethical issue that arose in the controversy was what responsibility the editors-in-chief had in relation to the authors. Was the disclaimer an appropriate excuse after failing to screen the guest editors' chosen papers, or did it mark a failure to stand up for controversial papers, when pressure was applied from external actors?

That very question become the center of another recent controversy; the *Hypatia* affair. Rebecca Tuvel had published a paper entitled 'In Defense of Transracialism' in *Hypatia*, by far the most prominent journal in feminist philosophy.³ The paper soon became the object of sharp criticism, and after the criticism had circulated for some time on the Internet, the critics sent an open letter calling for retraction of Tuvel's article.⁴ Feeling the pressure, the associate editors went public with an apology for publishing the paper, essentially saying that the paper should not have been published. The associate editors failed to defend the paper, caving in to external pressure whipped up through social media and the Internet. But most importantly, the whole controversy seemed to play out over social media such as Facebook. There was (at least not initially) no critical reply submitted to *Hypatia* in response to Tuvel's article.

My third example is somewhat different. When the *Journal of Medical Ethics* published an article named 'After-Birth Abortion: Why Should the Baby Live?', it drew a substantial amount of criticism.⁵ Unlike the two previous cases however, a large part of the criticism came as philosophical replies submitted to the journal, rather than outbursts in social media.⁶ The ethical issue raised by the article's publication however, is that of what can be described as 'lure publication'. In lure publication, a substandard article is published solely in order to draw attention to the journal, preferably to boost its citation rate. Now, I do not claim that this was the case in the *Journal of Medical Ethics*; my point is that a true lure publication would look quite similar.⁷ Lure publication would thus have the benefit of actually boosting the discussion, but at the cost of publishing something that does not ought to be published.

In my view, academic publishing is facing substantial challenges; challenges that are often ethical in nature. The examples above are mentioned here only because of the controversies they have generated. To these examples, add the issues of open access, biases in editorial decision-making, imperfect peer-reviews, commercial publishing, and

³ Rebecca Tuvel, 'In Defense of Transracialism', *Hypatia* 32:2 (2017), pp. 263-278.

⁴Open Letter to Hypatia', online at https://docs.google.com/forms/d/1efp9C0MHch_6Kfgtlm0PZ76nirWtcEsqWHcvgidl2mU/viewform?ts=59066d20&edit_requested=true (accessed 2017-08-12).

⁵ Alberto Giubilini and Francesca Minerva, 'After-birth abortion: why should the baby live?', *Journal of Medical Ethics* 39:5 (2013), pp. 261-263.

⁶ Unfortunately, the editors also received a large amount of threats and hate mails.

⁷ That said, in my view the article was not a very good one, and should therefore have been rejected. Many ethicists would of course disagree with me.

'invited' contributions. These issues need to be systematically engaged with, not only to ensure a just and fair publication process, but to make certain that good research does not go to waste.

In this issue, we offer two articles. The first article, 'Unethical Laws and Lawless Ethics: Right and Virtue in Kant's *Rechtslehre*', authored by Jenna Zhang, examines Kant's Doctrine of Right. The relation between virtue and right in Kant's philosophy is a controversial topic, and Zhang provides us with a valuable contribution. Against the mainstream interpretation, she argues that in Kant's later work, *The Metaphysics of Morals*, there is a fundamental distinction between Right and Virtue. Instead of seeing right as normatively implied by virtue, Zhang argues that the two are normatively separate. Hence, the distinct and separate natures of law and ethics prevent grounding juridico-political decisions in Kantian ethics. Although Zhang stresses that Kant's account of law is essentially positivistic, she also points out that law and ethics are not entirely separated: 'Morality is, as it were, the undercurrent that buoys Right, providing the impetus for moral beings to become legal-political subjects.'

The second article, 'Wage Desert and the Success of Organisations' by Shaun Young, argues that wage desert is both an ethically and prudentially sound policy for the employing organisations. The topic of how much remuneration an employee ought to be paid is an intricate ethical question and one that can cause heated discussions among colleagues. According to Young, the relevant consideration when determining an employee's wage level is backward-looking desert. Wage desert is a matter of respect for the employee, as it allows the employee autonomy to determine his or her wage. Granting the employee autonomy in relation to his or her wage, a sense of responsibility and accountability is also fostered. The respect entailed by realizing wage desert is an ethical argument in its favour. However, there is also a prudential argument presented by Young. Wages determined on the basis of individual desert also makes the organisation attractive and provide powerful incentives for the employees to perform at their best. Such characteristics make the organization more attractive to ambitious workers, and are therefore more likely to make it more successful. Given Young's account, we thus have a two-fold implication: That, in regard to wages, the ethical organization will also be successful, *ceteris paribus*, and that the prudential organisation can achieve its goals without violating ethical requirements.

From the Editors

Mehrere Kontroversen haben in der letzten Zeit den akademisch-publizistischen Bereich erschüttert, und einige davon teilten die Eigenschaft, dass sie die Entscheidungen und die Verantwortung von Herausgeber*innen in den Fokus rückten. Während es ausgiebige Untersuchungen zu ethischen Fragen gibt, die nur peripher mit tatsächlichen Problemen zu tun haben, gibt es relativ wenige Veröffentlichungen zur publizistischen Ethik. In einer der wenigen empirischen Studien zur Thematik heißt es, dass Herausgeber*innen von Zeitschriften schlicht ‚nicht besonders interessiert‘ an ethischen Fragen seien.¹ Dieser Mangel an Interesse ist bedauerlich. Schließlich ist die Veröffentlichung von Zeitschriftenartikeln der wichtigste Kanal zur Verbreitung und Diskussion von Forschungsergebnissen; und noch dazu können die Arbeitsweise und die Arbeitsabläufe einer Zeitschrift und die Handlungen und Entscheidungen ihrer Herausgeber*innen entscheidenden Einfluss gerade auf die Karrieren von Nachwuchswissenschaftler*innen haben.

Wir können darüber spekulieren, warum Ethiker*innen nicht besonders motiviert sind, ihren kritischen Blick nach innen zu wenden, auf die jeweils geschätzten Informationskanäle und -plattformen. Eine plausible Erklärung dafür ist, dass die publizistische Ethik keinen hohen Status innerhalb der Disziplin genießt: In gemütlicher akademischer Runde kann die Philosophin, die sich auf die Ethik des Tötens, Sexualethik oder Verteilungsgerechtigkeit spezialisiert hat, auf Aufmerksamkeit hoffen, aber der Professor, der Bücher über publizistische Ethik schreibt, ist hingegen relativ uninteressant. Manche Bereiche der Ethik sind schlicht nicht besonders attraktiv und bieten wenig akademische Aufmerksamkeit und akademischen Status.

Ein anderer, vielleicht etwas zynischer Grund ist, dass diejenigen Individuen und Organisationen, die am ehesten in der Position wären, sich des Themas anzunehmen, den geringsten Anreiz haben, die auch zu tun. Wenn ein Professor X seinen akademischen Grad und seinen beruflichen Status durch Veröffentlichungen in hoch angesehenen Zeitschriften erlangt hat, dann würde es vermutlich X' eigener Position schaden, wenn er sich mit der ethischen Dimension von Entscheidungen darüber, was publiziert wird, beschäftigte – da X' eigene Position ja ein Resultat dieses Systems ist. Entsprechend haben auch Herausgeber*innen keinen besonderen Anreiz, Strukturen anzugreifen, zu denen sie selber gehören.

The neueren Entwicklungen und ‚Skandale‘ im Bereich des akademischen Publizierens scheinen die Wichtigkeit einer gut durchdachten publizistischen Ethik noch

¹ E. Wager, S. Fiack, C. Graf, A. Robinson and I. Rowlands, ‚Science journal editors‘ views on publication ethics: results of an international survey‘, *Journal of Medical Ethics* 35 (2009), S. 348-353.

zu unterstreichen. Ich möchte drei Beispiele für Kontroversen anführen, die publizistische Ethik in den Fokus rücken, obwohl dies nicht immer erkannt wurde.

Vor einigen Jahren veröffentlichte die Zeitschrift *Synthese* eine thematische Nummer zu *Intelligent Design*, ‚Die Evolution und ihre Rivalen‘.² In einer Erklärung in der gedruckten Ausgabe, die zwei Jahre nach dem Erscheinen der Online-Version der thematischen Nummer veröffentlicht wurde, entschuldigten sich die Herausgeber geradezu für den Inhalt des Heftes und merkten an (meiner Meinung nach zu Recht), dass den üblichen Standards von Respekt und Höflichkeit nicht in allen Artikeln Genüge getan wurde. Obwohl die Erklärung von Artikeln in der Mehrzahl sprach, wurde allgemein der Schluss gezogen, dass sie sich nur auf einen Beitrag bezog. Aufgrund der Erklärung wurde den Herausgebern von *Synthese* vorgeworfen, dass sie vor der Intelligent-Design-Lobby eingeknickt seien, und ein Boykott war schnell organisiert.

Man kann darüber streiten, ob ein Boykott gerechtfertigt war, aber die eigentliche ethische Frage, die sich in dieser Kontroverse stellte, drehte sich um die Pflichten der verantwortlichen Herausgeber gegenüber den Autor*innen. War die Erklärung eine angemessene Entschuldigung dafür, dass die verantwortlichen Herausgeber die von den Gastredakteuren ausgewählten Artikel nicht noch einmal überprüft hatten; oder hatten sie es versäumt, kontroverse Artikel zu verteidigen, nachdem Druck von externen Akteuren aufgekommen war?

Genau diese Frage stand auch im Zentrum einer anderen aktuellen Kontroverse um die Zeitschrift *Hypatia*. Rebecca Tuvel hatte einen Artikel mit dem Titel ‚In Defense of Transracialism‘ in *Hypatia* veröffentlicht, der mit Abstand prominentesten Zeitschrift für feministische Philosophie.³ Schnell wurde der Artikel zur Zielscheibe scharfer Kritik, und nachdem diese Kritik einige Zeit im Internet kursiert war, wurde ein offener Brief an *Hypatia* gerichtet, in dem die Rücknahme von Tuvels Artikel gefordert wurde.⁴ Unter diesem Druck wandten sich die Mitherausgeberinnen mit einer Erklärung an die Öffentlichkeit, in der sie sich für die Veröffentlichung des Artikels entschuldigten und zum Ausdruck brachten, dass dieser niemals hätte veröffentlicht werden dürfen. Die Mitherausgeberinnen gaben so externem Druck nach, der vor allem im Internet und auf sozialen Medien erzeugt worden war, und verteidigten die Autorin und ihre Arbeit mit keinem Wort. Besonders auffällig dabei war, dass die gesamte Kontroverse sich hauptsächlich auf sozialen Medien – insbesondere Facebook – abspielte, und dass es (zunächst) keine kritische Auseinandersetzung mit Tuvels Artikel im wissenschaftlichen Forum von *Hypatia* gab.

Mein drittes Beispiel unterscheidet sich etwas von den anderen beiden. Als das *Journal of Medical Ethics* einen Artikel mit dem Titel ‚Abtreibung nach der Geburt: Warum sollte das Baby leben dürfen?‘ veröffentlichte, hatte dies eine Reihe kritischer Reaktionen zur Folge.⁵ Im Gegensatz zu den bereits besprochenen Fällen waren jedoch ein Großteil dieser Reaktionen an die Zeitschrift gerichtete philosophische Repliken und nicht

² *Synthese* 178:2 (2011).

³ Rebecca Tuvel, ‚In Defense of Transracialism‘, *Hypatia* 32:2 (2017), S. 263-278

⁴ ‚Open Letter to Hypatia‘, online unter: https://docs.google.com/forms/d/1efp9C0MHch_6KfgtM0PZZ76nirWtcEsqWHcvgid12mU/viewform?ts=59066d20&edit_requested=true (Zugriff am 12.08.2017).

⁵ Alberto Giubilini and Francesca Minerva, ‚After-birth abortion: why should the baby live?‘, *Journal of Medical Ethics* 39:5 (2013), S. 261-263.

Stellungnahmen oder Aufrufe auf sozialen Medien.⁶ Die ethische Frage, die sich hier stellt, ist jedoch die einer ‚Lockveröffentlichung‘. Eine ‚Lockveröffentlichung‘ ist ein eigentlich minderwertiger Artikel, dessen Veröffentlichung nur dazu dient, der Zeitschrift Aufmerksamkeit zu verschaffen und damit ihre Zitationsrate zu erhöhen. Ich behaupte nicht, dass dies beim *Journal of Medical Ethics* der Fall war; mein Punkt ist aber der, dass eine tatsächliche Lockveröffentlichung sehr ähnlich aussehen würde.⁷ Eine Lockveröffentlichung regt zwar die Diskussion zu einem Thema an, allerdings zu dem Preis der Veröffentlichung eines Beitrags, der nicht hätte veröffentlicht werden sollen.

Meiner Meinung nach sieht sich der Betrieb des wissenschaftlichen Publizierens mit substantiellen Herausforderungen konfrontiert, die oft ethischer Natur sind. Die hier besprochenen Beispiele sind deshalb gewählt worden, weil sie öffentlich ausgetragene Kontroversen generierten. Zu diesen Beispielen können wir auch Diskussionen um *open access*, Voreingenommenheit in der Entscheidungsfindung von Herausgeber*innen, mangelhafte Gutachten, kommerzielles Publizieren und ‚Gastbeiträge‘ zählen. Diese Themen bedürfen der systematischen Auseinandersetzung, nicht nur, um einen gerechten und fairen Veröffentlichungswettbewerb zu garantieren, sondern auch, um sicherzustellen, dass gute Forschung tatsächlich an die Öffentlichkeit gelangt.

In der vorliegenden Ausgabe präsentieren wir zwei Artikel. Der erste, ‚Unmoralische Gesetze und gesetzlose Ethik: Recht und Tugend in Kants *Rechtslehre*‘ von Jenna Zhang widmet sich dem im Titel genannten Werk Kants. Das Verhältnis von Recht und Tugend in Kants Philosophie ist ein kontroverses Thema, und Zhangs Artikel stellt einen wertvollen Beitrag dar. Gegen die vorherrschenden Interpretationslinien argumentiert sie, dass Kants Spätwerk *Die Metaphysik der Sitten* eine fundamentale Unterscheidung von Recht und Tugend beinhaltet. Das Recht sei keine Implikation der Tugend, so Zhang, sondern normativ von diesem unabhängig. Damit verunmöglichen es die unterschiedlichen und getrennten Wesenskerne von Rechtswesen und Moral, juristische und politische Entscheidungen auf Kants Ethik zu gründen. Obwohl Zhang betont, dass Kants Rechtsbegriff im Wesen positivistisch sei, stellt sie auch klar, dass Recht und Moral nicht völlig getrennt seien: „Moralität ist die Strömung, auf der das Recht schwimmt und die den Anstoß für moralische Wesen gibt, zu juristisch-politischen Subjekten zu werden“.

Im zweiten Artikel, ‚Lohn, Verdienst und erfolgreiche Organisationen‘, argumentiert Shaun Young, dass verdienstorientierter Lohn für Arbeitgeber ein ethisch und ökonomisch stimmiges Prinzip ist. Die Frage danach, welche Bezahlung für Arbeitnehmer angemessen ist, ist nicht leicht zu beantworten und sorgt oft für hitzige Diskussionen unter Kollegen. Young meint, dass der relevante Faktor in der Bestimmung von Lohnniveaus die bisherigen Verdienste seien. Verdienstorientierter Lohn sei ein Ausdruck von Respekt für den Arbeitnehmer, da er diesem ermögliche, sein Lohnniveau durch eigene Anstrengung zu beeinflussen. Diese Form der Autonomie fördere einen Sinn für Verantwortung und Verantwortlichkeit beim Arbeitnehmer. Der Respekt, der in verdienstorientiertem Lohn zum Ausdruck komme, sei auch ein ethisches Argument, dass für dieses Prinzip spreche – Young entwickelt jedoch auch ein nutzenorientiertes Argument: verdienstorientierter Lohn mache den Arbeitgeber attraktiver und stelle einen

⁶ Leider erhielten die Herausgeber*innen auch viele Drohungen und Hassmails.

⁷ Meiner Meinung nach war der besagte Artikel aber kein besonders guter und hätte durchaus abgelehnt werden können. Viele Ethiker*innen würden mir natürlich widersprechen.

Anreiz für Arbeitnehmer dar, ihr Bestes zu geben. Das wiederum mache den Arbeitgeber attraktiver für ambitionierte Arbeitnehmer, was dem Arbeitgeber auch ökonomischen Nutzen bringe. Nach Young haben wir damit eine doppelte Implikation: Was ihre Lohnniveaus angeht, wird eine ethische Organisation, *ceteris paribus*, auch erfolgreich sein; und eine an wirtschaftlichem Erfolg und Effizienz orientierte Organisation kann ihre Ziele erreichen, ohne ethische Normen zu verletzen.

Wage Desert and the Success of Organisations

Shaun Young

People often apply the concept of desert when deciding how to respond to various circumstances and they believe it is appropriate and morally required that they do so. More specifically, desert has long been a prominent (if not the paramount) feature of discussions concerning just compensation. In this essay I argue that providing employees the compensation (remuneration) they deserve – that is, realising wage desert – is essential to demonstrating adequate respect for employees, which, in turn, greatly facilitates the ability of organisations to attract and retain qualified, competent employees and provides employees with a powerful motivation for performing to the best of their ability. In so doing, wage desert offers an effective means for helping to secure and maintain an organisation's capacity to function as desired and, by extension, be successful. Hence, both for moral and prudential reasons it seems preferable for all involved that the concept of desert be used when determining employee remuneration.

Introduction

Desert is typically understood as giving to people what they are 'due' – whether it be a reward or a punishment. Unsurprisingly, the concept of desert has long been a prominent feature of discussions concerning compensation: i.e., the 'payment' one receives for doing something. In what follows, I use the topic of employee remuneration – understood as the wage¹ received by an employee – as a vehicle for examining the concept of desert and elements of the debate related to its use, and consider the relationship between realising wage desert and the ability of organisations to function successfully.

I begin by identifying the fundamental features of the concept of desert and offering a number of reasons – moral and prudential – as to why it is important to apply it when determining employee remuneration; principal among those reasons is the claim that providing employees the remuneration they deserve is essential to demonstrating adequate respect for them, which, in turn, is critical to securing and maintaining an organisation's capacity to function effectively (i.e., as desired) and be successful. That

¹ I use the terms 'remuneration', 'wage', 'pay', and 'salary' interchangeably.

claim involves both moral and prudential reasons for using the concept of desert when determining employee remuneration. It might be suggested that combining the two types of reasons is undesirable insofar as it complicates any effort to assess the strength of the argument presented for consideration. However, as is detailed in the following pages, not only are both types of reasons essential for making the case as to why the realisation of *wage desert*² is critical to the success of organisations, but they are inextricably intertwined.

The Concept of Desert

As noted, the concept of *desert*³ concerns giving people their 'due',⁴ and it is understood by many as a fundamental component of everyday morality.⁵ People often explicitly or implicitly apply the idea of desert when deciding how to respond to various circumstances⁶ and they believe it is appropriate and *morally* required that they do so.⁷ Desert can have a *positive* or a *negative* value;⁸ which is to say, it is possible to be

² The term 'wage desert' represents a synthesis of the terms 'wage justice' (Jeffrey Moriarty, 'Deserving Jobs, Deserving Wages', in *Normative Theory and Business Ethics*, edited by Jeffery Smith (Lanham: Rowman and Littlefield, 2009), pp. 119-146, at p. 119) and 'theories of desert of wages' (Owen McLeod, 'Desert and Wages', *Utilitas* 8:2 (1996), pp. 205-221, at p. 205).

³ Henceforth, references to 'desert' should be understood as being concerned solely with *personal* desert – i.e., 'the deserts of persons'; see Jeffery Moriarty, 'Against the Asymmetry of Desert', *Nous* 37:3 (2003), pp. 518-536, at p. 519.

⁴ There are various possible understandings of precisely what is entailed in fulfilling that condition. In a significant sense, then, desert is an *essentially contested concept* – i.e., a concept the 'proper use of which inevitably involves endless disputes about ... [its] proper ... [use] on the part of ... [its] users' (Walter Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* 56 (1956), pp. 167-198, at p. 169). Accordingly, there is no suggestion that the description promoted herein represents a universally accepted characterisation.

⁵ For example, see James Rachels, 'Punishment and Desert', in *Ethics in Practice: An Anthology*, 3rd edition, edited by Hugh LaFollette (Oxford: Blackwell, 2007), pp. 510-518, at p. 510; Moriarty, 'Deserving Jobs, Deserving Wages'; Jeffrey Moriarty, 'Justice in Compensation: A Defense', *Business Ethics: A European Review*, 21:1 (2012), pp. 64-76; Owen McLeod, 'Desert' (2014), in *The Stanford Encyclopedia of Philosophy*, edited by Edward Zalta, online at <http://plato.stanford.edu/entries/desert/> (accessed 2014-02-11); John Kleinig, 'The Concept of Desert', *American Philosophical Quarterly* 8:1 (1971), pp. 71-78; and Saul Smilansky, 'Responsibility and Desert: Defending the Connection', *Mind* 105:417 (1996), pp. 157-163.

⁶ Desert has often been identified as a matter of *distributive justice* – i.e., the justness of the distribution of benefits and burdens, and the resultant state of affairs (this characterisation represents a synthesis of the concerns both of political philosophers [i.e., the distribution of benefits and burdens] and of organisational theorists [i.e., states of affairs]; for example, see Moriarty, 'Deserving Jobs, Deserving Wages', p. 139, n.5). However, some – most famously, John Rawls – have argued that desert is not an appropriate component of a theory of distributive justice. See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971). The resolution of that debate is not essential for the purposes of this paper.

⁷ See, for example, Louis Pojman, 'Justice as Desert', *Queensland University of Technology Law & Justice Journal* 1:1 (2001), pp. 88-109, at p. 88; and Ryan Jenkins, 'You've Earned It!: A Criticism of Sher's Account of Desert in Wages', *Social Philosophy Today* 27 (2011), pp. 75-86, at p. 75.

⁸ For example, see Moriarty, 'Deserving Jobs, Deserving Wages'; Rachels, p. 512; and Kleinig, p. 72.

deserving of praise *or* blame, reward *or* punishment.⁹ Determining desert – whether an individual is *deserving* of something – is an evaluative process that involves three aspects: a *subject*, a *basis*, and an *object*.¹⁰ When it is determined that an individual (i.e., the subject) possesses a quality or attribute or has acted in a manner that possesses value (i.e., the basis), they are properly considered to be deserving of a particular thing or treatment (i.e., the object). In order to serve as a legitimate *basis* for desert, the facts about the *subject* must satisfy two conditions: they must be *valuable* ('the value condition') and the subject must be able to claim *credit* for them ('the credit condition').¹¹

As implied by the preceding description, desert is *backward-looking*: people are properly considered to be deserving of something as a consequence of what they have previously done or qualities that they already possess.¹² Hence, X can be *deserving* of A only as a consequence of certain existing facts (i.e. *desert-bases*) about X. But, as already noted, not all facts can serve as legitimate desert-bases. For example, the mere fact that X *needs* A does not mean that X *deserves* A. Someone might need a wage of £7500 per month in order to afford the mortgage for a house they have purchased, but that does not mean that they *deserve* that money. Assuming the absence of any circumstances that demonstrate otherwise, it seems likely that most would conclude that in such a situation the individual's need is a result of financial foolishness or ineptitude, not desert. Even if we assume that someone possesses a 'legitimate' need (i.e., one for which they cannot be 'blamed'), that does not by itself generate desert, though it can be understood as a *reason* for assisting the individual¹³ – e.g., one's feelings of sympathy for the individual's plight might motivate the sympathiser to provide assistance.

Similarly, the fact that X might be considered *entitled* to A does not necessarily mean that X is *deserving* of A.¹⁴ For example, were it the case that the employment contract signed by a hospital orderly guaranteed them a wage equal to that of the head of

⁹ The categories of 'praise or blame' and 'reward or punishment' are meant to capture 'anything which is pleasant or unpleasant' (Kleinig, p. 72). Of course, other taxonomies are possible and, indeed, exist. For example, see Joel Feinberg, 'Justice and Personal Desert', in *Doing and Deserving* by Joel Feinberg (Princeton: Princeton University Press, 1970), pp. 55-94, at p. 62.

¹⁰ McLeod, 'Desert'; see also, for example, Moriarty, 'Deserving Jobs, Deserving Wages', p. 120.

¹¹ Moriarty, 'Deserving Jobs, Deserving Wages', p. 127. It should be noted that for the past 45 years it has been a point of significant debate as to whether individuals can legitimately claim credit for a given characteristic or action. I address this matter more substantively later in this paper.

¹² For example, see Kleinig, p. 73; Rachels, p. 511; and Moriarty, 'Deserving Jobs, Deserving Wages'. David Schmidtz has argued for a 'promissory' approach to understanding desert, which allows that agents can be deserving of something as a consequence of potential future actions or behaviour, as when someone suggests an individual is deserving of an opportunity to *prove* themselves worthy of a raise; for example see David Schmidtz, 'How to Deserve', *Political Theory* 30:6 (2002), pp. 774-799. However, it is not clear how such a conclusion can avoid relying upon a backward-looking assessment insofar as it seems implausible to suggest that the decision to provide (in this example) the opportunity is not itself based upon some *existing* reason(s) for deeming the individual deserving of the opportunity; as John Kleinig argued, 'It is logically absurd for X to deserve A for no reason in particular, or for no reason at all' (see Kleinig, p. 73). And even a justification that refers to a possible future outcome or state of affairs as the reason for providing the opportunity will need to rely upon an *existing* fact or situation as the reason for wanting to realise the possible future outcome or state of affairs used to justify providing the opportunity.

¹³ Moriarty, 'Deserving Jobs, Deserving Wages', p. 122.

¹⁴ For example, see Moriarty, 'Deserving Jobs, Deserving Wages'; Schmidtz; and Kleinig, p. 75.

neurosurgery at the hospital, the orderly could legitimately be said to be *entitled* to the wage (assuming they fulfil any conditions contained in the contract), but they are unlikely to be considered *deserving* of the wage, and the resulting state of affairs is unlikely to generally be considered 'good' or 'just' or, consequently, preferable to one in which the head of neurosurgery received a wage significantly greater than that of the orderly. The difference between desert and entitlement can be understood as follows: entitlement concerns a *right* to something, while desert concerns the worthiness of a resulting *state of affairs*.¹⁵ That does not mean that entitlement cannot be a legitimate consideration when determining desert, but by itself it does not satisfy the requirements of desert.

Desert has also been differentiated from *merit*.¹⁶ For some, such as Louis Pojman, desert is properly considered a species of merit¹⁷: according to Pojman, merit essentially concerns value, but desert necessitates both value *and* credit. For others, merit is a basis for desert.¹⁸ Alternatively, others argue that whereas merit relates to qualities, desert concerns actions.¹⁹ When applied to the topic of employee remuneration, it is typically argued that legitimate desert-bases must refer to an employee's *effort* or *contribution*²⁰ – personal characteristics cannot serve such a function.²¹

The preceding description generates the following understanding of wage desert: an employee deserves a particular wage in virtue of their having demonstrated certain valuable behaviour for which they can legitimately claim credit or be held responsible.

The Importance of Wage Desert

There are a variety of moral and prudential reasons that support using the concept of desert to determine employee remuneration (i.e., to realise *wage desert*). Primary among those reasons is that realising *wage desert* offers one of the most effective means for securing and maintaining an organisation's capacity to function as desired and, by extension, be successful, insofar as the realisation of wage desert greatly facilitates the ability of organisations to attract and retain qualified, competent employees, and provides those employees with a powerful motivation for performing to the best of their

¹⁵ Moriarty, 'Deserving Jobs, Deserving Wages', p. 121.

¹⁶ An excellent brief description of the potential relationship between desert and merit is provided in Moriarty, 'Deserving Jobs, Deserving Wages', pp. 136-137. See also Pojman, 'Justice as Desert', pp. 92-98.

¹⁷ Pojman, 'Justice as Desert', p. 92; Louis Pojman, 'Does Equality Trump Desert?', in *What Do We Deserve? A Reader on Justice and Desert*, edited by Louis Pojman and Owen McLeod (New York: Oxford University Press, 1999), pp. 283-297.

¹⁸ George Sher, *Desert* (Princeton: Princeton University Press, 1987).

¹⁹ For example, see J. R. Lucas, *Responsibility* (Oxford: Clarendon Press, 1993); and John Roemer, *Equality of Opportunity* (Cambridge, MA: Harvard University Press, 1998).

²⁰ See, for example, Moriarty, 'Deserving Jobs, Deserving Wages'; Jenkins; George Sher, 'Effort and Imagination', in *Desert and Justice*, edited by Serena Olsaretti (Oxford: Clarendon Press, 2003), pp. 205-217; and George Sher, 'Effort, Ability, and Personal Desert', *Philosophy & Public Affairs* 8:4 (1979), pp. 361-376.

²¹ However, it should be noted that personal characteristics are typically understood as legitimate desert-bases for other types of desert (e.g., whether an individual deserves to be hired for a specific job or position).

ability. How does it do that? Among other things, using the concept of desert to determine employee remuneration provides a noteworthy degree of *autonomy* to employees by allowing them to help determine the wage they will receive. Assuming that increases in salary (whether via promotions or other means) are premised upon the possession of certain qualifications, skills, knowledge or behaviour, employees can alter the wage they receive by acquiring certain characteristics or exhibiting certain behaviour. In turn, by providing autonomy to employees, the notion of desert also makes them *responsible* and, consequently, *accountable* for their behaviour. That fact is important for a couple of reasons.

First, it helps to promote 'good' behaviour (e.g., competent work) and discourage 'bad' behaviour (sloppy or negligent work).²² Treatment on the basis of desert entails the expectation that one will be treated in the same manner in which they treat others.²³ Accordingly, if an employee wishes to be treated well, then they will need to treat their employer well – each party will need to engage in behavioural reciprocity. Behaving well will include (among other things) completing one's assigned tasks to the best of one's ability and remaining loyal to one's employer, behaviours that will help to maintain the organisation's capacity to function effectively and its ability to be successful. Second, responsibility and accountability help to facilitate an egalitarian distribution of benefits and burdens.²⁴ Within the context of employee remuneration, one can think of benefits as taking the form of a higher wage, and burdens representing a stagnation of, or decrease in, one's wage. By making it possible to both assign responsibility to employees for their behaviour and, in turn, hold them accountable for that behaviour, desert makes it legitimate for employees who shoulder a relatively greater share of the burdens to receive proportionally more benefits than those who assume fewer burdens.²⁵ As James Rachels argues, despite superficial appearances that might be interpreted as suggesting otherwise, providing more benefits to those who shoulder a greater share of the burdens generates 'equality' by compensating those employees for the 'benefits' they forsook as a consequence of shouldering burdens.²⁶

²² For example, see Moriarty, 'Deserving Jobs, Deserving Wages', pp. 126-127.

²³ See, for example, Rachels, p. 513.

²⁴ *Ibid.*

²⁵ Such a position embodies a *comparative* approach to desert: an employee who, *compared* to other employees, shoulders a greater share of the burdens deserves to receive a correspondingly greater share of the benefits relative to those other employees. An alternative is a *non-comparative* approach to desert, which would be concerned with ensuring that each employee receive what they 'absolutely' deserve (Shelly Kagan, 'Comparative Desert', in *Desert and Justice*, edited by Serena Olsaretti (Oxford: Clarendon Press, 2003), pp. 93-122, at p. 97), a determination that is made with reference to only the individual employee under consideration – i.e., the share of burdens shouldered by other employees and the share of benefits they receive do not factor into said determination. The preceding is a very simplistic depiction of the distinction between comparative desert and non-comparative desert and focuses solely on wage desert. For a more detailed examination of the concepts of comparative desert and non-comparative desert see Kagan, 'Comparative Desert'.

²⁶ Rachels, p. 513. This argument reflects Aristotle's idea of 'proportional equality', which suggests that justice is achieved when equals are treated equally (Aristotle, *Nicomachean Ethics*, translated by W.D. Ross (Kitchener: Batoche Books, 1999 [350 B.C.E.]), Bk. V, Chs. 3-5, online at <https://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/aristotle/Ethics.pdf> (accessed 2016-10-24)). Aristotle also labels such equality as equality 'according to merit' (*ibid.*, Ch. 3), an approach that

Hence, by providing autonomy to employees and making them responsible and accountable for their behaviour, wage desert both enables employees to be the architects of 'their own fates' with regard to their remuneration, and produces an egalitarian distribution of benefits and burdens.²⁷ In so doing, wage desert demonstrates *respect* for employees by ensuring that they are treated 'never simply as a means but always at the same time as an end'²⁸ – for example, the wages of employees will never be decreased *merely* to increase the profitability of the organisation. By treating employees respectfully, wage desert helps to engender 'good' behaviour and generate a state of affairs that recognises and adequately accommodates human dignity and, consequently, enables an organisation to maintain its capacity to function effectively and be successful.²⁹

You Don't Deserve That!

Despite the intuitive appeal of, and widespread support for, using the concept of desert as the basis for distributing praise and blame and 'rewards' and 'punishments',³⁰ the proposal to do so has not been immune to criticism.³¹

One of the most prominent and influential criticisms has been offered by John Rawls, who argues that it is unfair to use the notion of desert as the basis for distributing benefits and burdens, because any number of the 'facts' that will serve as desert-bases are (in some important sense) the result of characteristics and circumstances (e.g., athletic

treats 'all relevant persons in relation to their due' (Stefan Gosepath, 'Equality' (2007), in *The Stanford Encyclopedia of Philosophy*, edited by Edward Zalta, online at <http://plato.stanford.edu/entries/equality/#ProEqu> (accessed 2016-10-19)). In other words, with respect to employees 'who shoulder a greater share of the burdens', as long as all who do so 'receive proportionally more benefits than those who assume fewer burdens', then the resulting state of affairs is one that realises 'equality' (properly understood) and, by extension, justice. To adopt a different approach would be to treat unequals equally.

²⁷ For the record, Rachels' assertion was not restricted to the issue of employee remuneration.

²⁸ Kant's second formulation of the categorical imperative as quoted in Robin Dillon, 'Respect', in *The Stanford Encyclopedia of Philosophy*, edited by Edward Zalta, online at <http://plato.stanford.edu/entries/respect/> (accessed 2014-02-19).

²⁹ It should be noted that I am not suggesting that realising wage desert represents the *most* powerful possible motivation for employees to exert maximum effort. It might be argued that paying employees *more* than they deserve (assuming they recognised that to be the case) would provide a more powerful motivation than merely realising wage desert. However, it seems more plausible to argue that the problems produced by adopting such an approach to employee remuneration – e.g., a decrease in profits or an inability to effectively justify the wages provided – will be greater than the benefits. I thank one of the anonymous reviewers for identifying the need to address this matter.

³⁰ For example, see Norman Feather, *Values, Achievement, and Justice: Studies in the Psychology of Deservingness* (New York: Kluwer Academic, 1999); also see David Miller, *The Principles of Social Justice* (Cambridge, MA: Harvard University Press, 1999), esp. Ch. 4; Moriarty, 'Deserving Jobs, Deserving Wages', p. 128; Schmitz, p. 775; and John Stuart Mill, *Utilitarianism*, in *On Liberty and Other Essays*, edited and introduction by John Gray (Oxford: Oxford University Press, 1998 [1863]), pp. 131-201, at p. 179.

³¹ Generally speaking, the debate about the desirability of using the concept of desert as the basis for distributing praise or blame and rewards or punishments is a relatively recent development, emerging most notably after the 1971 publication of John Rawls' *A Theory of Justice*.

ability, intelligence, the social, political and economic circumstances into which one is born) that have been arbitrarily distributed via natural and social *lotteries*;³² in other words, the presence or absence of those characteristics or circumstances is a matter of luck and, consequently, beyond an individual's control.

The most extreme interpretation of Rawls' argument suggests that, if no one can legitimately claim *sole* credit for any of their characteristics, then no one can properly be considered *deserving* of anything related to possessing those characteristics – including the effort they exert in their job – thereby rendering the concept of wage desert nonsensical and illegitimate.³³ Such an argument seems problematic in at least one important sense: namely, taken to its logical extreme, it essentially suggests that individuals play no assignable or non-debatable role in the *development and use* of the characteristics they possess as a consequence of the natural and social lotteries. But surely whether and how people *choose* to develop and use their characteristics is both within their control to some noteworthy degree and often matters significantly with respect to the quality of the abilities or characteristics they possess. If that is true, then it seems incorrect to suggest they cannot in some genuine and significant sense claim credit for the products of those abilities or characteristics (e.g., the effort they exert in their job) and, by extension, be considered legitimately deserving as a consequence of possessing them.

Some have suggested that even *the ability to choose wisely* with regard to whether and how one develops and uses their characteristics or abilities is itself affected by factors that are not within their control and, consequently, not something for which they can legitimately claim credit.³⁴ However, it again seems dubious to contend that individuals' ability to choose wisely is something over which they have absolutely no noteworthy non-contingent control. Rather, a more plausible proposition is that individuals' decisions (and traits and actions) – wise or foolish – 'are *partly* the product of their own *free* choices and *partly* the product of natural factors outside of their control'.³⁵ It might still be argued that only something for which an individual can claim *sole* credit can constitute a legitimate desert-base. George Sher offers the following effective rebuttal to such a suggestion:

If deserving the benefits of our actions did require that we deserve everything that makes our actions possible, then all such desert would immediately be canceled by

³² Rawls, pp. 74-75.

³³ To be clear: that is not to suggest that Rawls would have accepted such a characterisation of his argument. However, numerous others have suggested that his argument does, indeed, generate such a conclusion. See, for example, Alan Zaitchik, 'On Deserving to Deserve', *Philosophy & Public Affairs* 6:4 (1977), pp. 370-388; John Hospers, 'What Means this Freedom?', in *Determinism and Freedom in the Age of Modern Science*, edited by Sidney Hook (New York, NY: Collier, 1961), pp. 126-142; Eric Tam, 'The Taming of Desert: Why Rawls' Deontological Liberalism is Unfriendly to Desert', paper presented at the Annual General Meeting of the Canadian Political Science Association, Dalhousie University, Halifax, Nova Scotia (2003); and Moriarty, 'Against the Asymmetry of Desert', p. 524.

³⁴ See, for example, Moriarty, 'Deserving Jobs, Deserving Wages', p. 129; and Stuart Hampshire, 'A New Philosophy of the Just Society', *New York Review of Books* 24 February (1972), pp. 34-39. I thank one of the anonymous reviewers for identifying the need to address this matter.

³⁵ Moriarty, 'Against the Asymmetry of Desert', p. 524, emphasis added.

the fact that no one has done anything to deserve to be alive or to live in a life-sustaining environment.³⁶

A more moderate interpretation of Rawls' argument suggests that *justly* determining desert will require identifying the precise extent to which an employee can legitimately be considered responsible for their characteristics (i.e., satisfying the credit condition) and, consequently, genuinely deserving of the wage provided in virtue of those characteristics. But arguably, such a requirement effectively renders desert *impracticable* because it is simply not possible to collect the information needed to make with certainty the type of accurate assessments demanded.

While it certainly seems unrealistic to suggest that it is possible to determine with pinpoint precision either the degree to which an employee can legitimately claim credit for their characteristics or the exact extent to which those characteristics contributed to a particular relevant outcome, it also seems extreme and unnecessary to conclude that such a situation offers no alternative other than completely abandoning the use of the concept of desert. It seems more reasonable to suggest that, when making determinations regarding employee remuneration, organisations develop and use assessment rubrics that consciously utilise characteristics that can with reasonable confidence be attributed *in a meaningful sense* to the employee, such as educational achievements, relevant experience, and job performance, for example. While it might be true that the employee's possession of such characteristics has been assisted by the natural and social lotteries, it might also be the case that the employee has acquired or operationalised those characteristics *despite* those lotteries. At minimum, as noted above, an employee's decisions (e.g., whether to pursue post-secondary education; whether to seek employment in a field in which their natural talents will be advantageous) will have played a meaningful role with regard to the development and use of the characteristics they possess and, by extension, their job performance, and thus it seems legitimate to use such characteristics as desert-bases. Indeed, many organisations collect such information and employ such rubrics.³⁷ Hence, it seems that the use of desert need only be considered impracticable if one demands the utmost precision in terms of identifying the characteristics for which an employee can legitimately claim credit.³⁸

Even if one accepts the preceding proposal, it might still be suggested that a more efficient alternative is to base employee remuneration on the *market value* (MV) of the employee's contribution to the organisation;³⁹ in other words, 'the wage one deserves for

³⁶ Sher, 'Effort, Ability, and Personal Desert', p. 364.

³⁷ Moriarty, 'Deserving Jobs, Deserving Wages', p. 132.

³⁸ That is not to say that translating desert calculations into wage levels will be an unproblematic process, especially when 'contribution' is used as a desert-base and the employee's organisation has a large number of employees. In such circumstances trying to determine each employee's individual contribution would be an extremely challenging task, to say the least; realistically, it is likely that the most that could reasonably be expected is that desert and related wage estimations be aggregated and averaged for specific types or categories of positions. While such an approach is less than ideal in terms of ensuring the realisation of *individualised* desert, it continues to use the concept of desert as the general basis for determining wages.

³⁹ For example, see McLeod, 'Desert and Wages', p. 208; and Moriarty, 'Deserving Jobs, Deserving Wages', p. 124.

providing a service is equal to the free market value of that service'.⁴⁰ Such an approach requires collecting and analysing a *relatively* limited amount of information, and it offers a seemingly 'objective' method for determining employees' wages. Moreover, the ability of organisations to remain competitive and successful recommends such an approach insofar as organisations that pay a wage that is either lower or higher than market value will either lose employees to their competitors or experience undesirable financial consequences (e.g., decreased profits, decreased re-investment capacity), and either scenario critically undermines the competitive advantage of the organisation.⁴¹

As noted by Owen McLeod, using an employee's MV to determine their wage does not involve abandoning the concept of desert.⁴² However, McLeod uses commodities traders to demonstrate that the MV approach generates a situation in which individuals whom most people would consider deserving of a wage would be deemed undeserving of a wage.⁴³ In an idealised competitive free market, consumers possess 'perfect information about price and wage movements'⁴⁴ and so, regardless of the amount of work they do and the amount of success they achieve in predicting price movements, commodities traders would not *deserve* any remuneration, because the market would place no value on their work, given the universal availability of perfect information about price movements. McLeod argues persuasively that a similar problem plagues MV even when it is applied to a less-than-ideal free market. The appropriate response to the problem, according to McLeod, is not to disavow MV as a legitimate desert-base, but to recognise that there are additional desert-bases that should be considered when determining employee remuneration.⁴⁵

McLeod notes that an employee's effort (among other things) should also be considered when determining the wage they deserve.⁴⁶ That proposal raises another interesting issue: namely, the use of wage-based incentives to stimulate effort and promote certain types of behaviour. Many organisations successfully use *pay-for-performance* bonuses and other types of wage-based incentives to achieve outcomes believed to contribute to the success of the organisation. However, *prima facie*, such incentives seem to be *forward-looking* in nature insofar as they concern *future* outcomes – they motivate people to behave in a certain way. If that is true, and if desert-bases *must* be backward-looking, then such incentives would seem to run afoul of the concept of desert, thereby defeating their status as a type of pay that can be *deserved*. However, a close analysis suggests that the use of such wage-based incentives is perfectly compatible with the concept of desert. In the case of *pay-for-performance* bonuses, for example, the employee receives the bonus only *after* they have demonstrated the relevant behaviour. Alternatively, it is difficult to imagine a situation in which an organisation provides any type of wage-based incentive that is not in some noteworthy sense connected to a *post facto* assessment of behaviour. And, as already observed with regard to Schmitz's proposed 'promissory' approach to desert, even a justification that refers to a possible

⁴⁰ McLeod, 'Desert and Wages', p. 209.

⁴¹ For example, see Jeffrey Moriarty, 'Justice in Compensation: A Defense', *Business Ethics: A European Review* 21:1 (2012), pp. 64-76, at p. 66.

⁴² McLeod, 'Desert and Wages', pp. 208-213.

⁴³ *Ibid.*, p. 211.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 213.

⁴⁶ *Ibid.*, p. 216.

future outcome or state of affairs as the reason for providing (in this case) the incentive will need to rely upon an *existing* fact or situation as the reason for wanting to realise the possible future outcome or state of affairs used to justify providing the incentive.

Conclusion

As Matt Bloom has observed, remuneration systems 'play an important role in shaping whether people feel they are treated with dignity, trust, and respect and whether they believe ... [an organisation is] worthy of their fullest commitment and highest efforts'.⁴⁷ A failure to provide employees a wage that they believe is deserved as a consequence of the requirements of their jobs, is thus likely to be perceived by those employees not only as a form of *disrespect* but also as a violation of the idea of distributive justice (though it might not be articulated in such a manner). Under such circumstances it seems likely that employee loyalty and performance will suffer, especially if the organisation happens to be quite successful and profitable, but that success and profitability does not translate into higher wages for all who believe they have contributed meaningfully to its realisation. The presence of such an attitude can only prove toxic to the effective functioning and, in turn, the success of an organisation. As there seems no compelling reason to conclude that the majority of individuals will cease to believe it appropriate to use the concept of desert when determining employee remuneration, it seems preferable for all involved that organisations do so.⁴⁸

Shaun Young, University of Toronto
shaun.young@utoronto.ca

Bibliography

- Aristotle, *Nicomachean Ethics*, translated by W.D. Ross. Kitchener: Batoche Books, 1999 [350 B.C.E.], online at <https://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/aristotle/Ethics.pdf> (accessed 2016-10-24).
- Bloom, Matt. 'The Ethics of Compensation Systems', *Journal of Business Ethics* 52:2 (2004), pp. 149-152.
- Dillon, Robin. 'Respect' (2014), in *The Stanford Encyclopedia of Philosophy*, edited by Edward Zalta, online at <http://plato.stanford.edu/entries/respect/> (accessed 2014-02-19).
- Feather, Norman. *Values, Achievement, and Justice: Studies in the Psychology of Deservingness*. New York: Kluwer Academic, 1999.
- Feinberg, Joel. 'Justice and Personal Desert,' in *Doing and Deserving* by Joel Feinberg. Princeton: Princeton University Press, 1970, pp. 55-94.

⁴⁷ Matt Bloom, 'The Ethics of Compensation Systems', *Journal of Business Ethics* 52:2 (2004), pp. 149-152, at p. 149.

⁴⁸ I want to thank the anonymous reviewers for this journal for their very helpful and thought-provoking comments. Any remaining errors or omissions are the sole responsibility of the author.

- Gallie, Walter. 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* 56 (1956), pp. 167-198.
- Gosepath, Stefan. 'Equality' (2007), in *The Stanford Encyclopedia of Philosophy*, edited by Edward Zalta, online at <http://plato.stanford.edu/entries/equality/#ProEqu> (accessed 2016-10-19).
- Hampshire, Stuart. 'A New Philosophy of the Just Society', *New York Review of Books* 24 February, 1972, pp. 34-39.
- Hospers, John. 'What Means this Freedom?', in *Determinism and Freedom in the Age of Modern Science*, edited by Sidney Hook (New York, NY: Collier, 1961), pp. 126-142.
- Jenkins, Ryan. 'You've Earned It!: A Criticism of Sher's Account of Desert in Wages', *Social Philosophy Today* 27 (2011), pp. 75-86.
- Kagan, Shelly. 'Comparative Desert', in *Desert and Justice*, edited by Serena Olsaretti. Oxford: Clarendon Press, 2003, pp. 93-122.
- Kleinig, John. 'The Concept of Desert', *American Philosophical Quarterly* 8:1 (1971), pp. 71-78.
- Lucas, J. R. *Responsibility*. Oxford: Clarendon Press, 1993.
- McLeod, Owen. 'Desert and Wages', *Utilitas* 8:2 (1996), pp. 205-221.
- McLeod, Owen. 'Desert', in *The Stanford Encyclopedia of Philosophy*, edited by Edward Zalta, online at <http://plato.stanford.edu/entries/desert/> (accessed 2014-02-11).
- Mill, John Stuart. *Utilitarianism*, in *On Liberty and Other Essays*, edited and introduction by John Gray. Oxford: Oxford University Press, 1998 [1863], pp. 131-201.
- Miller, David. *The Principles of Social Justice*. Cambridge, MA: Harvard University Press, 1999.
- Moriarty, Jeffrey. 'Against the Asymmetry of Desert', *Nous* 37:3 (2003), pp. 518-536.
- Moriarty, Jeffrey. 'Deserving Jobs, Deserving Wages', in *Normative Theory and Business Ethics*, edited by Jeffery Smith. Lanham: Rowman and Littlefield, 2009, pp. 119-146.
- Moriarty, Jeffrey. 'Justice in Compensation: A Defense', *Business Ethics: A European Review* 21:1 (2012), pp. 64-76.
- Pojman, Louis. 'Does Equality Trump Desert?', in *What Do We Deserve? A Reader on Justice and Desert*, edited by Louis Pojman and Owen McLeod. New York: Oxford University Press, 1999, pp. 283-297.
- Pojman, Louis. 'Justice as Desert', *Queensland University of Technology Law & Justice Journal* 1:1 (2001), pp. 88-109.
- Rachels, James. 'Punishment and Desert', in *Ethics in Practice: An Anthology*, 3rd edition, edited by Hugh LaFollette. Oxford: Blackwell, 2007, pp. 510-518.
- Rawls, John. *A Theory of Justice*. Cambridge, MA: Harvard University Press, 1971.
- Roemer, John. *Equality of Opportunity*. Cambridge, MA: Harvard University Press, 1998.
- Schmidtz, David. 'How to Deserve', *Political Theory* 30:6 (2002), pp. 774-799.
- Sher, George. 'Effort, Ability, and Personal Desert', *Philosophy & Public Affairs* 8:4 (1979), pp. 361-376.
- Sher, George. *Desert*. Princeton: Princeton University Press, 1987.
- Sher, George. 'Effort and Imagination', in *Desert and Justice*, edited by Serena Olsaretti. Oxford: Clarendon Press, 2003, pp. 205-217.
- Smilansky, Saul. 'Responsibility and Desert: Defending the Connection', *Mind* 105:417 (1996), pp. 157-163.
- Tam, Eric. 'The Taming of Desert: Why Rawls' Deontological Liberalism is Unfriendly to Desert'. Paper presented at the Annual General Meeting of the Canadian Political Science Association, Dalhousie University, Halifax, Nova Scotia, May 30-June 1, 2003.

Zaitchik, Alan. 'On Deserving to Deserve', *Philosophy & Public Affairs* 6:4 (1977), pp. 370-388.

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

Jenna Zhang

*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*,¹ 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

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

categorical imperative.² 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*).³ 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.⁴

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.⁵ 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*,⁶ 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

² 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.

³ 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.

⁴ 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.

⁵ Waldron, p. 1535.

⁶ 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.⁷

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*.⁸ 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.⁹ 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.¹⁰ 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,¹¹ 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

⁷ 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.

⁸ Willaschek, ‘Right and Coercion’, p. 52.

⁹ *Ibid.*

¹⁰ *MM* 6:218.

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

possible'.¹² 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',¹³ the principle of right exhibits a perspicuous resemblance to the second formulation of the categorical imperative.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ 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

¹² *Ibid.*, 6:229.

¹³ *MM* 6:231.

¹⁴ 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.'

¹⁵ 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.

¹⁶ 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.

¹⁷ *MM* 6:231.

¹⁸ *Ibid.*

body politic, as embodied in the juridical system, to impede any potential offenders from hindering A.¹⁹ 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*)²⁰—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.²¹ 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.²²

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.²³ 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.²⁴ 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 autonomy²⁵: 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.²⁶ '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.²⁷

Guyer's analysis, according to Marcus Willaschek, lacks a satisfying explanation of how coercion can contribute to a condition of universal freedom.²⁸ 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.²⁹ Any such justification of coercion is, however, unavoidably incoherent insofar as it implicitly affirms one form of constraint on freedom over

¹⁹ Willaschek, 'Right and Coercion', p. 57.

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

²¹ Willaschek, 'Right and Coercion', p. 51.

²² *MM* 6:238.

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

²⁴ Guyer, pp. 25-28.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Willaschek, 'Right and Coercion', pp. 54-56.

²⁹ *Ibid.*

another.³⁰ The analytic relation of coercion to Right thus constitutes the basis for the separation reading, for which Thomas Pogge,³¹ Willaschek,³² and Allen Wood³³ 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'³⁴—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.³⁵ 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.³⁶ Freedom and necessity can exist concurrently, Kant observes, insofar as they belong to separate realms.³⁷ 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.³⁸ 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

³⁰ *Ibid.*, pp. 58-59.

³¹ 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.

³² 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.

³³ 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.

³⁴ Guyer, p. 64.

³⁵ *GMM* 4:447.

³⁶ *CPR* A447/B475.

³⁷ *Ibid.*

³⁸ *Ibid.*

associated with the sensible realm.³⁹ 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.⁴⁰ 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.⁴¹ 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.⁴² 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*'.⁴³ 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.⁴⁴ 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

³⁹ *Ibid.*

⁴⁰ 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-liv.

⁴¹ Willaschek, 'Right and Coercion', pp. 63-64.

⁴² *Ibid.*

⁴³ MM 6:238.

⁴⁴ 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'.⁴⁵ Kant's account of the state, I argue, supports a positivist view of the law's conservatizing role,⁴⁶ 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.⁴⁷ The only innate right, according to Kant, is freedom in the sense of 'independence from being constrained by another's choice'.⁴⁸ 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.⁴⁹ 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.⁵⁰ 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.⁵¹ 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

⁴⁵ 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.

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

⁴⁷ *MM* 6:249.

⁴⁸ *Ibid.*, 6:238.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

will.⁵² 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.⁵³

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.⁵⁴ The ground of public right, he continues, can be 'explicated *analytically* from the concept of right in external relations, in contrast with *violence*'.⁵⁵ 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.⁵⁶ 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,⁵⁷ 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.⁵⁸ 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.⁵⁹ 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.

⁵² *Ibid.*, 6:268.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 6:307.

⁵⁵ *Ibid.*

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

⁵⁷ Waldron, p. 1537.

⁵⁸ *MM* 6:307.

⁵⁹ *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.⁶⁰ 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.⁶¹ 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.⁶² 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*.'⁶³ 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

⁶⁰ *Ibid.*, 6:236.

⁶¹ 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.

⁶² *MM* 6:236.

⁶³ *Ibid.*

law and being unworthy in that regard.⁶⁴ 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.⁶⁵ 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.⁶⁶ 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.⁶⁷ I am authorized to reappropriate A but not to harm you bodily or otherwise violate your innate right.⁶⁸ 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.⁶⁹ 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'.⁷⁰ 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.

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

⁶⁵ *Ibid.*, p. 414.

⁶⁶ *Ibid.*, p. 420.

⁶⁷ Willaschek, 'Right and Coercion', pp. 67-68.

⁶⁸ *Ibid.*

⁶⁹ *MM* 6:332.

⁷⁰ *Ibid.*, 6:334.

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

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.⁷² 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.⁷³ This entity is the sovereign, which in exceptional cases, is given discretion with respect to the law's application.⁷⁴

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.⁷⁵ 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.

⁷¹ Wood, 'The Final Form of Kant's Practical Philosophy', p. 2.

⁷² *MM* 6:236.

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

⁷⁴ *MM* 6:320.

⁷⁵ *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.

Jenna Zhang, Duke University
jiemeng.zhang@duke.edu

Bibliography

- Engstrom, Stephen. 'Introduction to Critique of Practical Reason,' in Immanuel Kant, *The Critique of Practical Reason*, translated by Werner Pluhar. Cambridge: Hackett Publishing, 2002, pp. i-liv.
- Guyer, Paul. '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.
- Hill, Thomas. 'Kant on Wrongdoing, Desert, and Punishment', *Law and Philosophy* 18:4 (1999), pp. 407-441.
- Horn, Christoph. 'Kant's Political Philosophy as a Theory of Non-Ideal Normativity', *Kant-Studien* 107:1 (2016), pp. 89-110.
- Kant, Immanuel. *The Critique of Practical Reason*, translated by Werner Pluhar. Cambridge: Hackett Publishing, 2002.
- Kant, Immanuel. *The Critique of Pure Reason*, translated by Paul Guyer and Allen Wood. Cambridge: Cambridge University Press, 1998.
- Kant, Immanuel. *The Metaphysics of Morals*, translated by Mary Gregor. Cambridge: Cambridge University Press, 1996.
- Kant, Immanuel. *Grounding for the Metaphysics of Morals*, translated by James Ellington. Indianapolis: Hackett Publishing Company, 1993.
- Kelsen, Hans. *General Theory of Law and State*, translated by Anders Wedberg. Cambridge, MA: Harvard University Press, 1945.
- Kelsen, Hans. *Pure Theory of Law*, translated by Max Knight. London: University of California Press, 1970.
- Kersting, Wolfgang. 'Kant's Concept of the State', in *Essays on Kant's Political Philosophy*. Chicago: University of Chicago Press, 1992, pp. 143-166.
- Pogge, Thomas. '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.
- Rosen, Allen. *Kant's Theory of Justice*. Ithaca: Cornell University Press, 1993.
- Schmitt, Carl. *Political Theology*, translated by George Schwab. Chicago: University of Chicago Press, 1985.
- Shklar, Judith. *Legalism*. Cambridge, MA: Harvard University Press, 1964.
- Waldron, Jeremy. 'Kant's Legal Positivism', *Harvard Law Review* 109:7 (1996), pp. 1535-1566.
- Willaschek, Marcus. '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.
- Willaschek, Marcus. '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.
- Wood, Allen. '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.
- Wood, Allen. 'Kant's Practical Philosophy', in *The Cambridge Companion to German Idealism*, edited by Karl Ameriks. Cambridge: Cambridge University Press, 2005, pp. 57-76.