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D E E T H I C A

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 270 members from more than 30 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.

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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.

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From the Editors

Like much of the rest of the world, *De Ethica* is making a new start this year. After a few, but long, years of hoping for normality to return, we are re-launching the journal. However, the focus remains the same. *De Ethica* is a journal devoted to publishing articles in philosophical, theological, and applied ethics.

It is commonplace to refer Socrates saying, in *The Republic*, that it is no small question we are investigating, but how to live (352b), however for *De Ethica* it is also topical. The general question of how to live is a hard question that ethicists have been working on for millennia without reaching agreement on the answer. There are, of course, giants in the history of ethics, but no fully agenda-setting giants like in, say, physics or biology. Approaches to ethics are plural, and it would be counter-productive to settle on one such approach a priori. This is why *De Ethica* has taken a pluralist approach to the articles we publish. We look forward to publishing articles from philosophy and theology, continental and analytical philosophy, as well as from east, west, north, and south.

We also look forward to publishing articles that are clear in exposition. The distinction between different traditions in ethics is not helpfully understood as delineating a difference between clarity and obscurity, but as concerning different ideas about how to approach the problem of how to live. *De Ethica* will emphasizes clarity in argumentation and exposition and welcome articles from all philosophical and theological traditions.

The present issue contains articles that deal with the moral status of the fetus, the status of self-ownership and its relationship to freedom, the foundation of ethics, and the relationship between ethics and policy.

William Simkulet investigates the moral status of the fetus by looking closer at the technology of ectogenesis. This is a technology that allows the fetus to survive outside of the womb of the mother. It is also a technology that raises issues regarding the implications of Judith Jarvis Thomson's violinist argument; the gestational mother has a right to disconnect herself from the fetus, but ectogenesis could mean that the child could live on after abortion. Simkulet takes issue with an argument proposed by Joona Räsänen to the effect that parents have a right to secure the death of a fetus. He argues that this position ignores the moral status of the fetus. If the fetus has moral status, then even if there is a right to abortion, parents will not have a right to secure the death of the fetus. However, Simukulet argues, if the fetus lacks moral status, then the right to secure its death may be philosophically uninteresting.

With Jesper Ahlin Marceta, we move from moral status to self-ownership. In his article, Ahlin Marceta takes issue with a common way of arguing for libertarianism in political philosophy. This is the argument that self-ownership can ground liberty claims. However, Ahlin Marceta claims that self-ownership is insufficient to protect freedom, since people can use their self-ownership to interfere with others' actions and subject them to arbitrary dominance. This seems to leave libertarians with two options. Either they should offer an independent defense of freedom, outside of the argument from self-ownership, or they need to bite a bullet and agree that they value freedom less than self-ownership. If neither of these positions are palatable, Ahlin Marceta directs this kind of libertarian to re-evaluate the moral basis of his or her political views.

One of the libertarians that Ahlin Marceta is arguing against is, of course, Robert Nozick. His approach to ethical theory was among other things an attempt to spell out the political implications of Kantianism. In Samuel Kahn's article, we turn to the core of Kant's theory. Kahn's goal is to show that the universalization formulations of the Categorical Imperative are unable to ground obligations. He makes this strong claim by examining five different approaches to deriving obligations from the universalization. He argues that each fail due to failures regarding understandings of concepts of obligations and maxims, problems regarding action descriptions, or misunderstanding of the universalization formulations.

From these negative results, we move to the sphere of policy where action must be taken regardless of philosophical results. Wibren van der Burg investigates how researchers can go from ethical normative judgments to recommendations for legal reform. He outlines the issues to be address in going from ethics and law and clarify three stages in this process: the translation of ethical claims into judicial terms, the transformation of ethical analysis to make it directly relevant to the law, and the incorporation of such analyses and claims into policy. This work implies the need to address empirical and legal issues in addition to only the ethical question. Finally van der Burg argues that we should pay more attention to pluralism and variation.

We hope that we have provided the reader with an issue that offers just that: pluralism and variation.

Lars Lindblom, Executive Editor
Elena Namli, Editor in Chief

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Ectogenesis and the Moral Status of the Fetus

William Simkulet

Many people believe the morality of abortion stands or falls with the moral status of the fetus. Judith Jarvis Thomson's violinist argument bypasses the question of fetal moral status; even if the fetus has a right to life, she argues the gestational mother has a right to disconnect herself from the fetus. However, should ectogenesis – a technology that would allow the fetus to develop outside the womb – become sufficiently advanced, the fetus would no longer need a gestational mother to live. Recently, Joona Räsänen has argued that parents have a right to secure the death of a fetus that has been removed from the mother's body, and that this right might extend to infanticide. However, here I argue Räsänen's position ignores the moral status of the fetus; if the fetus is morally comparable to beings like us, then of course parents lack a right to the death of their children. However, if the fetus is morally comparable to a tumor, then the right to kill it is philosophically uninteresting.

I. Introduction

Most opposition to abortion is grounded on the belief that the fetus is a person, broadly construed, from conception or soon afterwards. In ""Why Abortion is Immoral,"" Don Marquis notes that many of the most insightful authors on abortion agree that the moral permissibility of abortion "stands or falls on whether or not a fetus is the sort of being whose life it is seriously wrong to end."[1] However, Judith Jarvis Thomson's argument in "A Defense of Abortion," undermines this consensus.[2] Thomson assumes the fetus is a person with a full right to life, but argues the right to life is not a positive right to be given what one needs to survive, such as the right to use another's body.[3]

Advancements in technology promise an alternative to abortion. Current surrogacy technology allows for women to become surrogate gestational mothers to children they are not genetically related to. Advances in surrogate technology may allow for a fetus to be moved from the body of one woman to that of a surrogate mother. Similarly, *ectogenesis* – a technology that would allow a fetus to develop outside the womb – would allow for a fetus to be moved from a woman's body to an artificial womb that would carry it to term.

[1] Don Marquis. Why abortion is immoral. *The Journal of Philosophy* 1989; 86:183–202.
[2] Judith Jarvis Thomson. A defense of abortion. *Philosophy & Public Affairs* 1971; 1(1): 47–66.
[3] Many philosophers believe there is a morally relevant distinction between killing and letting die; that killing is *prima facie* deeply wrong and "merely" letting die *prima facie* morally acceptable. To avoid this debate, for the purposes of this paper *abortion* will refer to medical interventions that involve disconnecting the fetus from the mother's body before it is independently viable. If we assume a distinction between killing and letting die, then it seems fair to say that abortion by disconnect kills nothing; if the fetus is not saved by ectogenesis, it is "merely" allowed to die.

For Thomson, women are said to have the right to abortion because they have the right to disconnect the fetus from their body. However, if either ectogenesis or advanced surrogacy were possible, disconnecting need not be fatal. At present, a woman's choice to disconnect herself from the fetus normally determines whether it lives or dies, but with such advances in technology, this wouldn't be the case – a woman may choose to disconnect, and the fetus may continue to develop outside her womb.

Historically, disconnecting a fetus from the mother has usually resulted in the fetus's death, but new technologies like surrogacy and ectogenesis would break this connection, adding a new wrinkle to the abortion debate – is a woman's right to abort merely a right to disconnect the fetus, or is it a right to secure the death of the fetus?

Recently Eric Mathison and Jeremy Davis look at three arguments that women have a right not just to disconnect the fetus, but to secure its death – the biological parents rights argument, the property rights argument, and the genetic privacy argument – concluding that these arguments are unpersuasive.[4] Joona Räsänen discusses the same three arguments, but contends they succeed in showing that genetic parents have a right to secure the death of the fetus[5] (and perhaps one's infant[6]).

This paper devotes a section to each of these arguments (sections III.-V.). However, before doing so it will be practical to devote a section (section II.) to discuss the moral significance of the moral status of the fetus to these arguments.

II. Moral Status

Philosophers disagree on the moral status of human fetuses. Roughly, to have *a moral status* is to be the sort of thing that moral agents may have obligations towards. To have moral status is to be a *moral subject* that can be benefitted or harmed.

For example, one might say that you possess moral status because you are a rational agent with inherent moral worth. But it wouldn't make sense to say that your pencil has moral status, as while snapping your pencil in half might frustrate your interests, the pencil has no interests that can be frustrated or sated.

In short, agents can have moral status, while things cannot. Normal, adult human persons have a robust moral status, possessing a wide range of rights that may generate obligations in others. Differences in moral status might result in different rights and generate different obligations; for example, one might contend that normal, human children persons may have less rights than adults, but their moral status might also create greater obligations in others.

Philosophers disagree about whether non-person animals have moral status, but many believe that if non-person animals have moral status, it is a lower moral status than that of persons. Beings with lesser moral status may have less rights than those with greater

[4]Eric Mathison & Jeremy Davis. Is there a right to the death of the foetus? *Bioethics* 2017; 31(4): 313–320.

[5] Joona Räsänen. Ectogenesis, abortion and a right to the death of the fetus. *Bioethics* 2017; 31:697–702.

[6] Joona Räsänen. Why Pro-Life Arguments Still are not Convincing: A reply to my critics. *Bioethics* 2018: 32(9): 628-633.

moral status, or the rights of beings with greater moral status may take priority over those with lesser moral status.

Rescue cases are thought experiments that may help illustrate our intuitions regarding moral status. Consider the following case from Michael Sandel:

> [A] fire breaks out in a fertility clinic, and you have time to save either a five-year-old girl or a tray of 10 embryos. (Sandel 245)[7]

If you believe you should prioritize the life of one five-year-old girl over that of 10 human embryos, this is evidence you believe a five-year old girl has more moral status than 10 human embryos, and presumably far greater moral status than just one human embryo.

However, many anti-abortion theorists contend that such cases can be misleading. Henrik H. Friberg-Fernros contends that we might believe that embryos in such cases have the same moral status as the child, but that other factors might obligate us to prioritize the child over the embryos.[8] Friberg-Fernros notes that children have developed greater interests than embryos, such that a single child's death may lead to more evil than multiple embryos. Friberg-Fernros's response here is somewhat problematic, as it suggests that the additional evils of interest-frustration are doing most of the work here, rather than the being's moral status. Despite this, our intuitions in rescue cases might not perfectly capture our intuitions about moral status, as contingent features about the situation might obligate us to prioritize one being over another even when both have identical moral status. Consider the following case:

> [A] fire breaks out in a school, and you have time to save either a healthy five-year-old girl or a terminally ill five-year-old girl.

By assumption, both five-year-olds have the same moral status, but the terminally ill five-year-old girl probably benefits less from rescue than the healthy five-year-old girl, explaining why we might reasonably prioritize the healthy five-year-old girl.

Most opposition to abortion rests on the belief that fetuses, from conception or soon afterwards, have a moral status comparable to that of adult human persons because they *are* persons, broadly construed, where *person* is meant to pick out one of a broad range of categories that assorted theorists ground moral worth in, whether being a human organism[9], a rational substance[10], having a possible future it would be wrong to deprive

[7] Michael J. Sandel. The Ethical Implications of Human Cloning. *Perspectives in Biology and Medicine* 2005 48(2): 241–247. George Annas and Rob Lovering discuss similar cases. See: George Annas. A French Homunculus in a tennessee Court. *Hastings Center Report* 1989; 19(6): 20–22. and Rob Lovering. The Substance View A Critique. *Bioethics* 2012; 27(5): 263-270

[8] Henrik Friberg-Fernros. A Critique of Rob Lovering's Criticism of the Substance View. *Bioethics* 2015; 29(3): 211–216.

[9] Jack Mulder. A Short Argument against Abortion Rights. *Think*. 2013;12(34): 57-68.

[10] Patrick Lee & Robert P. George. The Wrong of Abortion. in *Contemporary Debates in Applied Ethics*. Andrew I. Cohen & Christopher Health Wellman eds., 2005; Francis J. Beckwith *Defending Life: A Moral and Legal Case Against Abortion Choice*. New York, NY:Cambridge University Press. 2007; Robert P. George & Christopher Tollefsen. *Embryo: A Defense of Human Life*. New York, NY: Doubleday. 2008.

one of[11], etc. On this view, the fetus is numerically identical to the person that will develop from it, and has the same moral status as a normal, adult human person.

Many defenders of abortion rights believe that a fetus may become a person at some point during pregnancy, but that at least during early stages of development, a fetus is not a person, broadly construed, or not yet a person, and thus has a different moral status.

The question of fetal moral status turns on empirical questions regarding fetal development and complex metaphysical questions regarding personhood and personal identity over time. In light of this, many writers try to bypass the debate entirely. Thomson set the standard for bypassing this debate; assuming what the anti-abortion theorists seeks to argue – that a fetus is a person, broadly construed, with the same moral status and rights as you or I.[12] Thomson asks us to consider the following case:

> *Violinist*: The Society of Music Lovers kidnaps you and attaches your circulatory system to a famous, innocent, unconscious violinist suffering from a kidney ailment that will kill him unless he remains connected to you for 9 months. (Adapted from Thomson 1972: 49–50)[13]

Here, the violinist is a person with a right to life. However, Thomson contends the right to life doesn't give the violinist the freedom to use your body without your permission. If we assume the fetus has the same moral status and rights as the violinist, then it seems that it is no more entitled to use the woman's body without her ongoing consent than the violinist would be to use yours in this case.

Mathison and Davis wish to "remain agnostic" about the moral status of the fetus. Similarly, Räsänen contends that the moral status of the fetus is outside the scope of his inquiry, merely noting that if the fetus is a person "it might change the outcome of the debate".[14]

The problem with this move is that in cases of ectogenesis, the moral status of the fetus makes all the difference. Thomson bypasses the debate regarding the moral status of the fetus by assuming what abortion critics argue and arguing the right to life is not a positive right to be given what one needs to survive. However, whether a biological mother has a right to kill a disconnected fetus stands or falls on the moral status of the fetus.

Räsänen seeks to argue that parents have a right to do more than just disconnect a fetus – they have the right to kill it. If the fetus lacks moral status, its death is relatively trivial. However, if a fetus is a person with full moral status, then Räsänen must show something *prima facie* absurd, that parents have the right to kill their children.

Most opposition to abortion turns on the claim that fetuses are persons, broadly construed, from conception or soon afterwards, with a comparable moral status and right to life as you or I. The reason for this is clear – as Marquis notes, killing *us* is one of the worst crimes.[15] He says "Killing is especially wrong, because it deprives the victim of more

[11] Marquis, *op. cit.* note 1.
[12] Thomson, *op. cit.* note 2.
[13] *Ibid* 49-50.
[14] Mathison & Davis, *op. cit.* note 4, p. 314; Räsänen 2017, *op. cit.* note 5, p.701.
[15] Marquis, *op. cit.* note 1, p. 190.

than perhaps any other crime."[16] Marquis contends that killing is wrong because it deprives them not only of what they currently value about their future, but anything about their future that they can come to value.[17]

In contrast, the violation of rights to property, privacy, or the like are trivial by comparison. They are lesser violations, and so draw less philosophical attention and carry less normative force. To illustrate this, suppose that you learned that one of your neighbors was a murderer, another a lawn gnome thief, and a third likes to go through your trash to speculate on your diet. Each revelation is disturbing, but only one is a matter of life and death.

Räsänen seems to be aware of this precarious dichotomy, proposing that his argument is aimed at those who believe the fetus has "some but not a full moral status," which he contends are "most people."[18] Räsänen positions partial moral status as something of a middle ground between the traditional anti-abortion and prochoice theorists; but this is misleading.

First, to say a fetus has partial moral status is to say either (i) it has less rights than a normal, adult human person, or (ii) that it has the same rights but the rights of full persons trump those of persons with only partial moral status. The former might characterize fetuses as morally comparable to non-person animals; the latter as comparable to second-class citizens.

Second, most opposition to abortion turns on one claim about the moral status of the fetus – that it has a right to life comparable to those with full moral status. To say a fetus has partial moral status in either sense is to reject the traditional anti-abortion position, and thus cannot serve as a middle ground.

There can be sensible disagreement about the moral status of a fetus. Thomson-style arguments in favor of abortion rights bypass this controversy by assuming what the critic attempts to show, but arguments in favor of the right to kill a disconnected fetus that can be saved by ectogenesis do not have this luxury. If the fetus has no moral status, then its death is morally irrelevant, while if the fetus has full moral status, then its death is a substantive moral loss.

The next three sections of this paper explore three arguments that Räsänen believes show that parents have a right to secure the death of their fetus derived from three distinct rights – a right to property, a right to procreation, and a right to privacy. However, if the fetus has little or no moral status then it's destruction is trivial; as such if Räsänen seeks to bypass the debate regarding the moral status of the fetus, then like Thomson he ought to assume what his critics will argue – that fetuses are persons. In the following sections I will show that if we assume fetuses are persons, then like Mathison and Davis argue, and contra Räsänen, parents have no right to secure the death of their fetuses.

III. The Property Rights Argument

Räsänen summarizes the property rights argument as follows:

[16] *Ibid.*
[17] *Ibid*: 189-190.
[18] Räsänen 2017, *op. cit.* note 5, p.701 note 33.

1. The fetus is property of the genetic parents.
2. People can destroy their property.
3. Therefore, genetic parents can destroy their fetus.[19]

In support of premise 1, Räsänen contends that genetic parents own surplus embryos created during in vitro fertilization, such that no-one can use them without their parent's consent.[20] Furthermore, he contends that the genetic parents have a right to destroy these frozen embryos.[21] However, both claims are dubious.

The first is comparable to a parent exclaiming "That's my child," but, as Räsänen says, "Obviously, children are not parents' property... Children are not property because children are persons: morally valuable individuals."[22] Thus, when a parent makes such an exclamation, it would be uncharitably to interpret her as asserting a property right rather than noting genetic or historic relatedness.

Of course, Räsänen intends to skirt discussion of the moral status of fetuses, but he seems to suggest that beings with any moral status cannot be property. Thus, even if fetuses have only partial moral status, premise 1 is false on his view.

Similarly, the second claim need not imply the fetus is property. We often err on the side of caution regarding parental authority when it comes to their children's medical treatment. To illustrate this, consider a scenario discussed by James Rachels:

> In the United States about one in 600 babies is born with Down's syndrome. Most of these babies are otherwise healthy - that is, with only the usual pediatric care, they will, proceed to an otherwise normal infancy. Some, however, are born with congenital defects such as intestinal obstructions that require operations if they are to live. Sometimes, the parents and the doctor will decide not to operate, and let the infant die.[23]

Here we treat parents as though they have the authority to refuse life-saving medical treatment of their children – to let them die. The right to refuse others access to one's surplus embryos, and to let those embryos go unused, is consistent with such a parental right to let one's child die.

But what of the claim that these genetic parents have the right to destroy these frozen embryos? Rachels contends there is no morally significant difference between killing and letting die, such that if parents have the right to let their children die, there is good reason to think they might also have the right to kill them; doing so, at least, would be more humane and would lead to life and death decisions being made on less arbitrary grounds.[24] By this reasoning, parental authority may allow parents to have their embryos killed.

Note that Mathison and Davis contend that although many people believe they have the right to secure the destruction of cryopreserved embryos, they don't believe they

[19] Räsänen 2017, *op. cit.* note 7, p. 700.
[20] *Ibid*: 700.
[21] *Ibid.*
[22] *Ibid:* 701.
[23] James Rachels. Active and Passive Euthanasia. *The New England Journal of Medicine 1975;* 292: 78-80.
[24] *Ibid.*

have the right to secure the death of the fetus.25 This is consistent with the view that fetuses are not persons at conception, but at become persons later.

The property rights argument stands or falls on the moral status of the fetus. If we assume fetuses lack moral status, there is little reasonable opposition to their destruction – whether in the womb, cryopreserved outside the womb, or during ectogenesis. However, if fetuses have any moral status, they *belong* to nobody and are not property!

IV. The Genetic Parental Rights Argument

Most philosophers agree that moral agents have a broad right to liberty, from which the right to bodily autonomy and assorted procreative rights (such as a right to pursue a morally legitimate interest in procreation[26] and the right to refuse to procreate) can be derived form.

A person is a *genetic parent* of their child if and only if the child develops from a significant portion of that person's genetic makeup. In normal sexual reproduction, parents contribute half of their child's nuclear DNA (nDNA); however, in cases of cloning and parthenogenesis the genetic parent would contribute all of the child's nDNA.27 Genetic parenthood includes a historical element; genetic parents directly contribute genetic material to their children. For example, this means that identical twins are not the genetic parents of their siblings' children, despite their genetic similarity.

Historically, becoming a genetic parent without your consent has involved rape – a violation of your right to liberty and one of the worst rights violations. As such, it has made sense to say that one has a right to refrain from becoming a genetic parent, and that this right is derived from one's broader rights to liberty. However, advances in technology might lead to one becoming a genetic parent through significantly lesser rights violations. Existing assisted reproductive technologies make it possible to use stolen sperm or eggs cells to create a child. Theft of such genetic material from medical storage need not involve the direct violation of one's liberty, but merely one's property right. Future cloning and/or genetic engineering technologies might allow for one to become a genetic parent with even less violation; as one might be able to create a clone and/or genetically engineered child from a naturally discarded cell, such as shed skin cells or a drop of blood.

Although existing assisted reproductive technologies and possible future technologies might allow for nonconsensual creation of genetic children without the violation of one's right to liberty, it strikes me that such unwanted reproduction still violates a commonsense right of some sort. Call this the right to genetic parental autonomy (GPA); the right to decide whether one becomes a genetic parent.28 Actions that might

[25] Mathison & Davis, *op. cit.* note 4, p. 317

[26] George W. Harris. Fathers and Fetuses. *Ethics* 1986; 96(3): 594-603.

[27] Note that in cases of cloning, and other assorted assisted reproduction technologies, mitochondrial DNA from the donor egg is passed down to the child. In cases of cloning, this DNA does not belong to cloned parent unless the cloned parent is also the egg donor; thus clones will often not be genetically identical to their genetic parent.

[28] For the purposes of this paper, I will remain agnostic about whether the right to parental autonomy is limited to genetic parenthood, or if it extends to any kind of parenthood. Most non-genetic parents become parents through some consensual act of their own – they come to take responsibility for the children of others; however it is not inconceivable that there can be circumstances beyond one's

reasonably cause one to become a genetic parent without one's consent would violate this right. Sexual assault would violate both one's right to liberty and one's right to GPA; in contrast a mad scientist who clones you from a discarded genetic skin cell only violates the latter right.

Does this right yield the right to kill one's unwanted genetic offspring? To answer this, consider what Räsänen calls the "Right Not to Become a Biological Parent Argument:"[29]

1. Becoming a biological parent causes harm to the couple because of parental obligations towards the child.
2. The couple has the interest to avoid the harm of parental obligations.
3. Therefore, the couple has a right to the death of the fetus to avoid the harm of parental obligations.[30]

There are several problems with this argument. First, premise 1 suggests that mere genetic parenthood is sufficient to generate moral obligations, but this is far from obvious. Don Marquis suggests something similar, contending that gestational mothers, *qua* biological mothers, come to have a special moral obligation to the fetuses they carry.[31] However, elsewhere I challenge this view, noting that Marquis has failed to show that a mere biological category makes a moral difference.[32]

However, if we assume that mere genetic parenthood generates special parental moral obligations towards the child then killing the fetus wouldn't avoid these obligations, but rather fail them!

Rather than avoidance, Räsänen seems to be interested in rectification, proposing that after some previous rights violation resulted in one becoming a genetic parent without their consent, one could remove these special parental obligations by killing one's genetic child. However, this is deeply confused. Consider the following case:

> *Gnome Theft:* Smith asks his neighbor, Jones, to house-sit while he is away for the week. During this time Jones steals Smith's lawn gnome and sells it for a tidy sum. However, he later regrets his action and wishes to rectify his wrongdoing. He replaces the stolen gnome with a brand new one, and Smith never finds out.

Most would agree Smith's property rights were violated, even though he is seemingly not worse off. Suppose, though, that Jones confesses and apologizes. Smith might reasonably respond "no harm done" and forgive him, and for many of us, this might be the end of the matter. However, suppose that Smith reveals the gnome was an antique, that it had sentimental value, or that he had hidden his life's savings inside. Jones's replacement gnome and confession fail to fix any of this. But now consider:

control that causes to become a (non-genetic) parent without one's consent in such a way that does not violate this right.

[29] Räsänen, *op. cit.* note 5, p. 698.

[30] *Ibid.*

[31] Don Marquis. A defence of the potential future of value theory. *Journal of Medical Ethics* 2002; 28, 198–201; Don Marquis. Manninen's defense of abortion rights is unsuccessful. *American Journal of Bioethics* 2010; 10(12), 56–57.

[32] William Simkulet. The Parenthood Argument. *Bioethics* 2018; 32(1), 10-15.

> *Life Theft:* Smith asks his neighbor, Jones, to house-sit while he is away for the week. However, unbeknowst to Smith, Jones is an assassin hired to kill him, and uses this opportunity to kill Smith and dispose of the body without being caught. However, he later regrets his action and wishes to rectify his wrongdoing…

Uncontroversially Smith has the right to life, and Jones violates this right. However, as with many rights violations, there is no "undoing" this – Jones cannot give Smith his life back. The lesson here is clear – it isn't always possible to rectify a rights violation.

Suppose that you become a genetic parent without your consent, violating your right to GPA. Would killing your genetic offspring rectify the problem? I think not; the death of your genetic offspring doesn't mean you're not a genetic parent, it means your genetic child is dead.

Note, however, that Räsänen is not really concerned with the right to GPA; rather he seems to be concerned exclusively with the right not to incur parental obligations, and contends that the death of the fetus removes these obligations (or, at least, dramatically reduces them… perhaps the genetic parent is obligated to pay for the funeral, but may be relieved they need not change the child's diapers).

Here Räsänen conflates being a moral parent with being a genetic parent. Genetic parents have a historical and genetic connection to a child, but moral parents care for and raise their children. Adoptive parents are moral parents; many genetic parents abdicate parental responsibility and cannot reasonably be said to be moral parents to their genetic children. To paraphrase Marquis, to treat genetic parents as moral parents would be treating a mere biological category as a moral category.[33]

Of course, when we learn about deadbeat parents – those who abandon their children without support – we are rightfully outraged. However, many governments allow genetic parents to surrender their default legal parental rights and duties to the state, care agencies, or adoptive parents. There are compelling reasons in favor of adopting such social policies; if nothing else, they disincentivize genetic parents from illegally killing or abandoning their children. There can be reasonable moral disagreement as to whether, and when, it is morally acceptable to give up one's genetic children; but merely having the option to do so undermines the first premise of Räsänen's argument, as becoming a genetic parent needn't harm that person by burdening them with moral parental responsibility.

Of course, some genetic parents might feel bad about abandoning their genetic offspring. Mathison and Davis note that many genetic parents who give their children up for adoption feel they are failing their moral obligations, and that they can be psychologically harmed by failing to satisfy what they see as their obligations to their children – even when these obligations are merely self-imposed or socially-imposed.[34] These harms are morally significant, but trivial compares to the harm of killing a person.

If the fetus lacks any moral status, we might tarry here with a discussion of what one's moral obligations might be when faced with false moral beliefs and/or unreasonable social pressures.[35] However, if we assume a fetus has full moral status, the harm that would

[33] Marquis, *op. cit.* note 1, p. 186.
[34] Mathison & Davis, *op. cit.* note 4, p. 315
[35] Consider, for example, the work of Jonathan Bennett and Allison McIntyre with regards to Huckleberry Finn's "failure" to turn in his escaped slave friend Jim. Jonathan Bennett. The Conscience of Huckleberry Finn. Philosophy 1974; 49: 123-134; Allison McIntyre. Is Akratic Action

be caused by killing the fetus far outweighs the minor psychological harms the genetic parents experiences. Furthermore, if a genetic parent would feel bad about abandoning their child, surely they'd feel worse about killing it!

Consider a variation of this argument: the procreative autonomy argument:

1. Persons have a right to life.
2. Persons have a right to procreative autonomy.
3. Violating the right to procreative autonomy is worse than violating the right to life.
4. If violating the right to procreative autonomy is worse than violating the right to life, then violated genetic parents have the right to kill their nonconsensually produced genetic children.[36]
5. Therefore, genetic parents have the right to kill their nonconsensually produced genetic children.

How plausible is this argument? Consider the following case:

> *One Lie:* Jack and Jill, once a passionate couple, meet again at their college reunion and hit it off. Jack confides to Jill that he has refrained from sexual activity since learning that he is genetically predisposed to alcoholism because he is deeply against passing on such genes. Jill, wanting one last night of passion, lies to Jack, claiming she is infertile. They have sex, Jill becomes pregnant, has a child – a son – and never tells Jack. Thirty years later, Jack discovers the existence of his son using a genetic heritage website, then kills his child.

Jill violates Jack's procreative autonomy; but the notion that this gives him the authority to kill his son is absurd. The problem with this argument is that premise 3 is far from obvious, and premise 4 seems dubious; the violation of a right might entitle one to retribution or restitution, but it's not license to harm innocent people. A victim of such an assault doesn't obtain the right to violate the rights of other, unrelated innocent people; for example, such a victim doesn't have a right to break into my home, eat my porridge, and nap in my bed. I'm free to allow such rights violations to go unaddressed, but it would be quite silly for such a person to argue that because he or she was the victim of a grievous assault, my rights don't apply.

At this point, we can compare Räsänen's biological parent argument with the procreative autonomy argument. The former argument is invalid, as premises 1 and 2 do not necessitate the truth of the conclusion – to illustrate this, consider the following argument:

1. Standing in line at the post office causes the harm of me being late to work.
2. I have an interest to avoid the harm of being late to work.

Always Irrational? in Identity, Character, and Morality. , O. Flanagan and A. Rorty (eds.), Cambridge, MA: MIT Press, 1990; 379-400.

[36] Alternatively, one could entertain the premise that nonconsensually produced genetic children persons do not have a right to life, or that they have less of a right to life than persons produced consensually. See Thomson 1971, *op. cit.* note 2, p. 49.

3. Therefore, I have a right to the death of anyone who would stand in line in front of me at the post office.

This argument shares the same logical form with Räsänen's, but the conclusion is ridiculous and doesn't follow from the premises. Räsänen's argument narrowly skirts the obvious absurdity of this argument only by remaining silent about the moral status of the fetus. In contrast, the parental autonomy argument is valid; the truth of the premises guarantees the truth of the conclusion. However, premise 3 is far from obvious, and intuitively premise 4 is false; the wrongness of one rights violation doesn't provide the victim with license to violate the rights of morally tangentially related innocent people. Jack's son is not morally responsible for the sins of his mother, and Jack's killing his son doesn't relieve him of any real or imagined parental obligations to his son so much as utterly fail them while also violating his son's right to life.

V. The Genetic Privacy Rights Argument

It is generally accepted that people have a right to privacy, and that violating that right can cause serious harm. James Rachels contends that privacy is valuable because the ability to control information about ourselves is related to our ability to create and maintain a variety of social relationships.[37] People can create an intimacy by freely divulging private personal information about one's desires, fantasies, history, or experiences. Privacy rights violations can hinder our ability to relate to others, cause psychological harm, and hinder our freedom to live our lives as we see fit.

Consider the physician/patient relationship. This relationship is awkward, and patients have valid medical reasons to disclose intimate personal information in a professional setting – including their daily physical routines, diets, and their sexual activities; but such information is otherwise usually reserved for intimate settings with close friends or loved ones. Physicians have a professional moral obligation to keep this information confidential, and not to use this information for anything other than the medical benefit of their patient.

Briefly consider the following abuses – (1) a physician jokes with her colleagues about her patient's sexual history, (2) a physician divulges a patient's medical history to a drug company for use in direct marketing, and (3) a physician refuses to treat a patient because of the patient's sexual orientation. The first two abuses involve the physician divulging private information for non-medical reasons, while the third involves a physician using confidential medical information for something other than the benefit of the patient.

As it so happens, one can learn a lot about a person from studying her genetics and divulging this information – like other private information – can cause serious harm to that person. Hence, there is compelling reason to think that we have a right to genetic privacy. If advances in technology makes it easier to read one's genetic information without their consent (much as advances in surveillance technology has made it easier to listen or watch people without their consent), there is good reason to think reading this information

[37] James Rachels. Why Privacy is Important. *Philosophy and Public Affairs 1975; 4(4):* 323-333.

without consent, or during extenuating circumstances (perhaps even during a crime scene investigation) would be morally unacceptable, as would divulging such information indiscriminately.

Räsänen contends that this right to genetic privacy gives genetic parents the right to secure the death of their fetus, asking us to consider the following case:

> For example, if a mad scientist finds a way to clone humans, steals my DNA and creates a fetus that is genetically identical to me, which he then gestates in an artificial womb, my right to genetic privacy is violated. Therefore, in such a case, I have a right to the death of the fetus.[38]

The most important feature of Räsänen's case is that unlike normal sexual reproduction, which results in a fetus with a unique genetic code (derived from those of its parents, but not identical to either), clones possess identical nDNA to their genetic parent.

However, this case contains a variety of extrinsic details that might bias the reader – notably (I) Räsänen's scientist steals (*prima facie* morally wrong) and (II) creates a clone (many people believe cloning is itself *prima facie* immoral; for example, consider the debate about a child's right to an open future[39]). Before I redress these issues, consider the following case:

> *One Clone:* Donald is genetically predetermined to go bald and he doesn't want anyone to know. As it so happens, a mix up at the hospital led to a clone being created with Donald's nDNA. Twenty years later, Donald discovers the existence of this cloned, genetically identical offspring on a genetic heritage website. He breaks into his clone's home and kills him.

Much as it is somewhat absurd to suggest that Jack can kill his adult child because Jill violated his procreative autonomy, so too does it seem absurd to think Donald can kill his adult clone on the basis that the lab mix up violates Donald's genetic privacy. But now suppose the case played out a bit differently.

> *One Father:* One day Hank discovers the existence of his genetically identical genetic father on a genetic heritage website. After confirming this, he breaks into his genetic father's home and kills him.

If each of us possesses a genetic privacy right to our DNA, then it strikes me that both Hank and Donald each own their own DNA. Thus, if Donald is justified in killing Hank to protect his genetic privacy, it seems to follow that Hank has the same right to kill Donald. If this genetic privacy right extends to sexually produced children with distinct DNA, then it seems that not only do parents have a moral right to the death of their genetic children, but their genetic children also have a moral right to the death of their genetic parents!

Räsänen contends that the right to the death of the genetic child should be seen as a collective right, such that both parents have to agree on the death of the child.[40] If true, this might introduce some asymmetry into which family members can kill which… but

[38] Räsänen, *op. cit.* note 5, p. 699.
[39] Joel Feinberg. The child's right to an open future. in *Whose Child? Children's Rights, Parental Authority, and State Power*, William Aiken, Hugh LaFollette (eds.), Totowa, NJ: Rowman and Littlefield, 1980.
[40] Räsänen, *op. cit.* note 5, p. 700.

this is utterly inconsistent with his previous contentions regarding parental autonomy – suppose that the mad scientist doesn't clone Räsänen, but instead genetically engineers a child using half of Räsänen's nDNA, and half the nDNA of someone who had consented to releasing her private genetic information – perhaps someone with unique genetical features that she hoped would lead to medical breakthroughs. If Räsänen's right to the death of his genetically engineered genetic offspring is collective in this sense, then to exercise this right he can only kill his child if he gets the consent of the other genetic parent! Note that this means that if Räsänen *does not want* to divulge his genetic information, he ought to prefer that a mad scientist clone him, rather than just use his genetics to genetically engineer a child.

But, of course, all this is ridiculous. Much as Thomson asks us to imagine a conflict of rights between you and a famous violinist who has been attached to you without your permission that will die if disconnected; in One Lie and One Clone we're asked to imagine a conflict of rights between an agent and their adult person genetic child. Thomson contends that it would be outrageous to think that the violinist has a right to use your body without your permission.[41] The violinist uncontroversially has a right to life, but this right to life doesn't give him a right to continue using your body. However, it is similarly outrageous to think that genetic parents have the license (collective or otherwise) to kill their adult genetically related offspring.

This disparity in our intuitions between these cases is easy to explain – in Thomson's case, your right to liberty has been violated – the society of music lovers have abducted you and attached you to a violinist without your consent. Being forced to stay attached to the violinist would be a continuous violation of that liberty. In contrast, the rights violations in One Lie and One Clone are transitory. – In One Lie, Jill violates Jack's right to procreative liberty once. His son might remind Jack of this violation, but his son's continued existence doesn't constitute a further violation of this right).

The same is true in One Clone; the mix up at the lab violates Donald's right to keep his genetic predisposition to baldness secret. However, now that this information has been disclosed, Donald's right to privacy isn't being continuously violated. Of course, Donald might suffer further indignities because of this; perhaps Hank shares his genetic heritage with the world, proudly proclaiming he is bald and that he is a clone. These revelations might inconvenience Donald; prospective dates might refuse to date a bald man, date a father, or might "opt for the younger model," much to his dismay. But these harms are not themselves violations of his right to privacy. The idea Donald can kill Hank to keep his private information private is on par with the idea that he can kill anyone who accidentally overheard his physician talking about his genetic predisposition to baldness.

Note, though, that our intuitions about these cases might be biased by unnecessary features of the cases; to avoid these consider the following case:

> *Twins:* Alice and Alyce are (poorly named) genetically identical twins. One day, Alice kills Alyce, claiming that she "knew too much" about Alice's private genetic information.

[41] Thomson, *op. cit.* note 2, p. 49.

No clones; no theft. By assumption Alice has a right to genetic privacy. Alyce has access to Alice's private genetic information without her consent. Despite this, it is absurd to conclude that this entitles her to kill her sister. Thus, it is absurd to conclude that one's right to genetic privacy gives them the right to secure the death of anyone sharing their genes.

Most of us would agree that we have a right to genetic privacy. Violation of this right generally involves willful or negligent sharing of private genetic information, as illustrated by the cases of physician misconduct above. The problem is that Räsänen would have us believe that there mere possibility that children, or others, could come to learn facts about their genetic heritage is sufficient to violate this right *and* that such a violation is sufficient to justify the killing, effectively leading to the absurd conclusion that people can kill all of their genetic relatives to protect their genetic privacy.

V. Conclusion

At times the abortion debate seems intractable; but developments like ectogenesis promise a solution that will satisfy both sides; women seeking abortion can disconnect from a fetus, and prolife theorists can provide ectogenesis.

Räsänen argues that the availability of ectogenesis may not end the abortion controversy, as genetic parents may wish to do more than disconnect from a fetus, they may wish to kill that thing. He argues that the right to terminate a fetus outside the womb can be derived from a right to property, a right to parental liberty, and/or a right to privacy.

There are two substantial problems with Räsänen's approach. First, it's not clear that the right to terminate a fetus outside the womb can be so easily derived from the rights in question. Second, his discussion suffers by ignoring the moral status of the fetus.

If we assume the fetus has full moral status, then killing a fetus undergoing ectogenesis would be morally comparable to killing an adult human person with full moral status. It would be absurd to conclude that genetic parents have a right to kill their adult human offspring. One might try to ground the wrongness of killing an adult human person in something other than its moral status, as Friberg-Fernros does when discussing rescue cases[42], but this would merely trivialize moral status with little to show for it.

Meanwhile, if we assume the fetus lacks moral status, at least early on, then killing a fetus undergoing ectogenesis is morally trivial, perhaps akin to breaking one's own property or keeping a secret. The right to secure the death of your fetus would be comparable to the right to break your own garden gnome and face little moral opposition. Even if we assume a fetus has partial moral status, then the right to secure the death of your fetus would be of relatively little interest, perhaps on par with the right to kill your own pet, though it's far from obvious that pet owners have such a right

I've argued the right to kill one's fetus likely stands or falls on its moral status. If we assume a human fetus has a moral status comparable the moral status of beings like

[42] Friberg-Fernros *op. cit.* 8 note p 216.

you or I, it would be absurd to think that parents have a right to secure their child's death. But if we assume a human fetuses lack a moral status, the topic is trivial.

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Does Libertarian Self-Ownership Protect Freedom?

Jesper Ahlin Marceta

Many libertarians assume that there is a close relation between an individual's self-ownership and her freedom. That relation needs questioning. In this article it is argued that, even in a pre-property state, self-ownership is insufficient to protect freedom. Therefore, libertarians who believe in self-ownership should either offer a defense of freedom that is independent from their defense of self-ownership, make it explicit that they hold freedom as second to self-ownership (and defend that position), or reconsider the moral basis of their political views.

According to the libertarian self-ownership thesis individuals have a right to bodily integrity, a so-called self-ownership right (see, e.g., van der Vossen 2019). In short, a human being's skin, nails, hair, teeth, eyeballs, and so on, together form a moral boundary that others may not cross without their permission. The self-ownership right is usually assumed to entail the protection of individuals' freedoms; their freedom of speech, association, religion, movement, and so on. The assumption leads to the belief that individuals in societies which respect self-ownership are free.

The article begins by discussing the self-ownership thesis and the common assumption that it is closely related to freedom. The discussion proceeds to question whether self-ownership is sufficient to protect freedom. Thereafter, the strategies which are most likely to be proposed in libertarianism's defense are discussed critically. A brief, final, section concludes the article.

Libertarians on self-ownership and freedom

The first sentence in Robert Nozick's influential book *Anarchy, State, and Utopia* reads: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)" (p. ix). One of these rights is a person's full and exclusive right to control and power over her own person (p. 172). This has later become known as the self-ownership right. According to the self-ownership thesis, no one is entitled to interfere with what another person does with her body against her permission (the only exception being the protection of self-ownership).

The self-ownership right has been defended as a natural right (Hoppe 2006, pp. 314–8; Rothbard 2006 [1973], pp. 33–5), as an implication of utilitarian calculations (Epstein 1998, p. 24), as a way to avoid self-contradiction (Kinsella 1996), and as an element of common-sense morality (Huemer 2013, p. 172), among other things. Eric Mack offers one of the

strongest, and most recent, defenses of libertarian self-ownership (Mack 1995, 2002a, 2002b). Below, I take Mack (1995) as starting point for the main argument in this article.

It is common among libertarians to assume that there is a close relation between self-ownership and freedom. For instance, Jason Brennan and Bas van der Vossen writes that "self-ownership offers the freedom (in the form of Hohfeldian liberties) to use one's person" (Brennan and van der Vossen 2018, p. 209). In his interpretation of Nozick, Richard Arneson writes that "[f]reedom to move as one chooses arises from the fact that, according to Nozick, each person is the full rightful owner of herself" (Arneson 2018, p. 60). Ann E. Cudd writes that "libertarian political theory offers the prospect of freedom from lopsided, unchosen obligations," and that the normative foundation "for asserting this radical freedom from the claims of others is the idea that individuals are sovereign over their own bodies and therefore cannot be made to use their bodies for any purpose that they do not choose" (Cudd 2018, p. 127). Nicolás Maloberti writes that rights theories "allocate control to each individual over a specific set or range of actions" and that those ranges of actions "might then be understood as configuring areas of freedom. Within those areas, the individual is taken to be fully sovereign in terms of what may be done" (Maloberti 2018, p. 157). He concludes (ibid):

> If there is a clear case in which we are not able to lead our own lives, it is when we are deprived of control over the bodies in which we are actually embodied. This is the fundamental and uncontroversial sense in which libertarianism sees individuals as self-owners.

Libertarians have also suggested that freedom should be *defined* in terms of self-ownership. For instance, Murray Rothbard writes that "every man enjoys absolute freedom—pure liberty—if […] his 'naturally' owned property (in his person and in tangibles) is free from invasion or molestation by other men" (Rothbard 1998 [1982], p. 41). He then proceeds to suggest a definition of freedom as "*the absence of invasion* by another man of any man's person or property," clarifying in a footnote that the "ownership title to one's self" is one of the things he has in mind (ibid, p. 42; footnote 4). Similarly, Jan Narveson writes in a discussion of "property in oneself" that "it is plausible to suggest that Liberty is Property, and in particular that the libertarian thesis is really the thesis that *a right to our persons as our property is the sole fundamental right there is*" (Narveson 2001 [1988], p. 66; emphasis in original).

The belief that there is a close relation between self-ownership and freedom has also grown popular among libertarian politicians, activists, and voters. One example from present-day politics is from the Libertarian Party in the United States. Article 1.0 in the party's 2020 platform begins: "Individuals are inherently free to make choices for themselves and must accept responsibility for the consequences of the choices they make" (Libertarian Party n.d.). Article 1.1, which I understand is taken to justify the claims in 1.0, reads in its entirety (ibid):

> Individuals own their bodies and have rights over them that other individuals, groups, and governments may not violate. Individuals have the freedom and responsibility to decide what they knowingly and voluntarily consume, and what risks they accept to their own health, finances, safety, or life.

Much philosophical debate about the libertarian self-ownership right has concerned its limits (Agnafors 2015; Arneson 2011; Bornschein 2018; Sobel 2012, 2013), internal coherence

(Attas 2000; Eabrasu 2013; Fried 2004; Murphy and Callahan 2006; Vallentyne et al. 2005), and its role as a moral justification of libertarianism (Arneson 2010; Frederick 2013; Lippert-Rasmussen 2008), among other things. This article does not engage with those debates. It is only concerned with the relation between self-ownership and freedom (if there is one).

Others have argued before that self-ownership is insufficient for the protection of freedom in property societies (see, e.g., Cohen 1995). The reason is that legitimately held private property can be used in ways that restrict others' freedom. For instance, suppose that a rich and socially powerful Nazi organization in a property society decides to buy all the buildings, roads, grounds, and air traffic rights surrounding a Jewish community. The Nazis can expropriate all the material resources required to sustain human life in one delimited geographical area settled by Jews. Thereby, they can deliberately organize the mass death of the Jewish community without violating their rights which, among other things, is a restriction of freedom. While this particular example shows that self-ownership does not protect freedom of religion, other examples can easily be constructed to demonstrate that self-ownership is insufficient to protect freedom also in other instances in property societies. For instance, suppose that Coca-Cola buys all the water supplies on an island populated by poor people so that the company can determine the local market price on water. This enables them to force the poor to choose between moving and spending a large share of their income on drinking water. And so on.

However, the arguments that follow are placed in a hypothetical pre-property society. Ownership over external resources is an extension of the more basic right to bodily integrity, as libertarians develop it with reference to a pre-property state of nature. Restrictions on the use of external resources follow *a fortiori* from restrictions on the use of one's own body. I shall argue that libertarian self-ownership does not suffice to protect freedom in a pre-property society. As it does not suffice in a pre-property society, it does not suffice in a property society either; the logic of the argument, as it is developed without considerations of property, applies also when property is considered. The Nazi and Coca-Cola examples are returned to in the concluding section, as extensions of a logic that applies in pre-property societies.

Self-ownership is insufficient for the protection of freedom in a certain way. As a reviewer of an earlier version of this article has pointed out, protection should be understood as a gradual concept. For instance, both soft cushions and seatbelts protect car passengers, but seatbelts offer *better* protection than cushions. There is a gradual difference between the two. Moreover, seatbelts protect car passengers from *some*, but not *all*, collisions. Seatbelts do not offer *complete* protection. The same applies to self-ownership and freedom; self-ownership is insufficient for the complete protection of freedom. The upshot of this article is just that; something more than self-ownership is needed, if freedom is to be completely protected. This needs to be acknowledged by self-ownership libertarians, as some of their claims about the relation between self-ownership and freedom may not be justified.

Freedom

The notion of freedom can be approached in various ways. Metaphysically, freedom is usually understood as *free will*, i.e., one's theoretical capacity to control one's own decisions and acts. Morally, freedom concerns things one is entitled to control, such as one's own

person and opinions. Empirically, freedom is the actual control one has as a real-world person. It is freedom in the latter, empirical, sense that is of interest in this article.

There are also various theoretical conceptualizations of (empirical) freedom. It is common to analyze freedom in *negative* and *positive* terms (Berlin 1969). I call this approach to freedom *Berlinean*, after Isaiah Berlin. Freedom negatively understood means the absence of obstacles and constraints. A person is free in this sense if there is nothing in her way when she acts. For instance, I am currently free to stand up and sing to my fellow guests at this nice little cafe where I am working from. Factors that may negate freedom include prohibiting laws, force or credible threat thereof, and physical constraint by other agents, among other things. For instance, should one of the waiters at the cafe threaten to pour hot coffee over me if I stand up and sing, my freedom to do so would be negatively influenced.

Freedom positively understood instead means that one has the necessary means of acting, that one is able "to take control of one's life and realize one's fundamental purposes" (Carter 2016). There can be many different prerequisites of freedom in this sense. For instance, a person's freedom may increase with education, physical strength, and self-confidence. It should be noted that most (or all) libertarians reject positive freedom. Their view is that positive freedom requires actions upon third parties, and coerced involvement of third parties violates their self-ownership rights. Or, so the argument goes (cf. van der Vossen 2019). Therefore, in what follows, positive freedom will not be further considered.

It is also common to analyze freedom as *non-domination*. This is called *republican* freedom (Lovett 2018). The republican conception of freedom stems from Roman law. In it, all men and women were considered to be either free or slaves, where slaves were understood to be persons subjected to arbitrary dominion. As Quentin Skinner puts it, "what it means for someone to lack the status of a free citizen must be for that person not to be *sui iuris* but instead to be *sub potestate*, under the power or subject to the will of someone else" (Skinner 2002, p. 249). On the republication conception, freedom is restricted "not only by actual interference or the threat of it, but also by the mere knowledge that we are living in dependence on the goodwill of others" (p. 247).

Philip Pettit illustrates the main difference between the Berlinean and the republican conceptions of freedom with an example from Henrik Ibsen's play *A Doll's House*. The main figures in the play are Torvald and his wife Nora. Under nineteenth-century law Torvald has vast legal power over his wife, but instead of using this power Torvald denies his wife nothing. In her everyday life, Nora enjoys benefits that could be envied by anyone. But, Pettit argues, she does not enjoy freedom. Although Torvald does not interfere with his wife or deny her anything that she may need to realize her fundamental purposes, she is not free; "Nora lives under Torvald's thumb. She is the doll in a doll's house, not a free woman" (Pettit 2014, p. xiv). For a person to be free, Pettit argues, she must be non-dominated by others. Nora is not interfered with, but because she is dominated, she is nonetheless unfree.

Thus, whereas Berlinean freedom builds from the absence of interference, republican freedom instead builds from non-domination. Both conceptions of freedom will be referred to in the arguments below. To be clear, my arguments below *only* concern freedom in the Berlinean and the republican senses of the term. If freedom is understood in some other way, the arguments may not hold.

For the present purposes, I take freedom to be action and decision relative. That is, rather than considering freedom *in general*, agents should be understood to be free relative

to some particular action or decision. For instance, the coffee-pouring waiter's threat would not affect my freedom to leave the cafe and go and sing somewhere else. The threat would specifically target my freedom to sing at *this* cafe. It should also be noted that freedoms need not be utilized. For instance, I will not make use of my freedom to sing, simply because I do not want to.

The decision-relativity of freedom is important for the arguments that follow. It will be shown below that an agent's freedom can be respected in general, while being restricted in some particular instance. Therefore, the arguments that follow should be understood to concern particular freedoms first, and general freedom(s) second (if at all).

The structure of the argument

In the sections that follow, I argue that libertarian self-ownership is insufficient to ground freedom, as people can use their self-ownership to interfere with others' actions and subject them to arbitrary dominance. The argument builds from a thought example introduced by Mack. This section presents the basic structure of the argument. The subsequent sections develop the argument further in light of a more complex understanding of the self-ownership right.

Mack asks his readers to imagine Zelda, who inhabits "a bountiful pre-property state of nature" (Mack 1995, p. 186). Then, he introduces a number of thought examples that are intended to support the intuition that Zelda has justified complaints against other people in that state, but not as a matter of rights-violations. In one of those thought examples, Zelda is encircled by "a gang of knuckle-scrapers" (p. 195). The knuckle-scrapers "link their tattooed arms to form a human circle around Zelda," who is "unable to scale the resulting human wall so as to escape imprisonment within that circle. When she tries to climb that human wall, she is accused of assault upon the peacefully cooperative individuals who surround her" (ibid).

The upshot of the thought example is that there are two distinct views on self-ownership. According to one view, the knuckle-scrapers do not violate Zelda's self-ownership right by encircling her. The reason why is that self-ownership can only be violated *invasively*, to use Peter Bornschein's terminology (Bornschein 2018, p. 341). On this view, rights are violated if and only if a boundary is crossed, namely that boundary which is formed by the rights-holder's skin, nails, hair, etc. The knuckle-scrapers do not cross Zelda's boundary, and therefore they do not violate her self-ownership right. It is within their rights to imprison Zelda. The knuckle-scrapers' self-ownership grants them a right to assembly, standing, and linking arms; Zelda is "caught between rights" when the knuckle-scrapers imprison her.

Mack supports a second view, arguing that "self-ownership should be construed broadly enough to forbid imprisonments" (Mack 1995, p. 195). On this view, self-ownership can also be violated *noninvasively*, i.e., without crossing any boundaries. The distinction between the two views on self-ownership will be crucial below, but to spell out my argument I will first dig deeper into the view that self-ownership can only be violated invasively.

Let us suppose, for the sake of argument, that the knuckle-scrapers do not violate Zelda's self-ownership right by imprisoning her. If they want to, they can keep Zelda encircled for hours, days, weeks; if she dies, she dies. My argument is that although Zelda's self-ownership right is not violated, per assumption, her freedom is nonetheless restricted.

This shows (or, it will eventually be shown below) that self-ownership is not sufficient to protect freedom.

Bornschein writes that it is "intuitively obvious is that Zelda's freedom to act is severely diminished" (Bornschein 2018, p. 350). I think this is more than intuitive. Zelda's self-ownership right is not violated, yet her freedom is seriously restricted. Some of her freedoms are intact. For instance, the knuckle-scrapers do not prevent her from clapping her hands, jumping up and down, and yelling at her captors. She can utilize those freedoms and others in the little space that their vicious circle grants her. However, she is not free to leave. That is probably the freedom she values most, and which is taken from her by the knuckle-scrapers. Zelda would have had that freedom, had it not been for them. Thus, in at least one important instance, an individual's freedom can be restricted despite that her self-ownership right is not violated. More specifically, the knuckle-scrapers interfere with Zelda, which means that her freedom is restricted in the Berlinean sense. Her freedom is also restricted in the republican sense. Zelda is subjected to the knuckle-scrapers' arbitrary dominance, making her dependent on their goodwill. Her self-ownership right is respected, but Zelda is nonetheless not free.

In what follows, I call this "the freedom challenge." The argument challenges the libertarian view that self-ownership suffices for the protection of freedom.

Finetuning the argument

Many libertarians can be expected to support the view that self-ownership can only be violated invasively (Bornschein 2018, p. 341). This view commits them to accept that self-ownership does not suffice for the protection of freedom, at least not if one of the two most common theories of freedom is true. Many other libertarians, including Mack, take a different stance. According to them, the self-ownership right can also be violated noninvasively. For instance, Mack adds a *proviso* to the self-ownership right that "requires that persons not deploy their legitimate holdings, i.e., their extra-personal property, in ways that severely, albeit noninvasively, disable any person's world-interactive powers" (Mack 1995, p. 187).

Mack's proviso restricts the use of ownership over external resources, but it will here be understood to restrict the use of ownership over one's body. Thus, I understand Mack's proviso as a restriction on the self-ownership right that prevents people from using their bodies "in ways that severely, albeit noninvasively, disable any person's world-interactive powers."

Adding a proviso to the self-ownership thesis takes the edge off the freedom challenge, as it is described above; the knuckle-scrapers *do* violate Zelda's self-ownership right when imprisoning her, as they use their bodies in a way that severely, albeit noninvasively, disable Zelda's world-interactive powers. Mack writes about the ideas that underlie his proviso (Mack 1995, p. 186):

> A person's rights over herself include rights over her talents and energies. Talents and energies are at least largely "world-interactive powers," i.e., capacities to affect her extra-personal environment in accord with her purposes. But such world-interactive powers are essentially relational. The presence of an extra-personal environment open to being affected by those powers is an essential element of their existence.

The reason why the knuckle-scrapers violate Zelda's self-ownership right is that their imprisonment "totally or almost totally nullifies Zelda's capacity to bring her powers, her talents and energies, to bear on the world… [She] is subjected to world-interactive disablement" (p. 196).

Mack develops his proviso to defend the self-ownership thesis from the charge that the thesis allows for arbitrary imprisonment and, therefore, must be false. He writes (p. 198):

> I have formulated the [self-ownership proviso] in terms of "severe" nullification to avoid counting as violations of the [self-ownership proviso] those setbacks that are temporary or subsidiary within an agent's broader field of opportunity, or which would be temporary or subsidiary were the agent herself to be duly adaptive.

I shall assume that Mack's defense of the self-ownership thesis is successful, although Bornschein (2018) convincingly argues to the contrary. My charge is not that the self-ownership thesis is false, but that the thesis is insufficient for the protection of freedom. Mack's strategy to formulate a proviso to defend the self-ownership thesis does not work to save the thesis from the freedom challenge. This can be demonstrated using thought examples.

> **Example 1:** Suppose that the knuckle-scrapers do not encircle Zelda, but that they link their tattooed arms to form a long, straight, wall in front of her. It is not impossible for Zelda to walk around the wall, but because the gang of knuckle-scrapers have many members the walk takes her at least 20 minutes.

The knuckle-scrapers disable Zelda's world-interactive powers, but not *severely* so; their setback of her powers is temporary and surmountable. Therefore, even on the understanding that bodily integrity can be violated noninvasively, the knuckle-scrapers do not violate Zelda's self-ownership right. However, by putting obstacles in her way, their actions arbitrarily restrict Zelda's freedom of movement under both the Berlinean and the republican accounts. The longer wall they form, the more serious is their restriction.

> **Example 2:** Suppose that the knuckle-scrapers do not encircle Zelda or form a wall in front of her, but merely stand in her way very often. The many members of the gang spread out along the path that Zelda is walking so that she must cross between them, and because they are so many it takes Zelda a lot of time to get from point *A* to point *B*. Now, suppose that the knuckle-scrapers are so stubborn that they do this several times a week. After a while, the disturbance is so regular that Zelda begins to plan according to it. She leaves her home 20 minutes early every day to account for the knuckle-scrapers' morning bullying routine and brings roller-skates whenever she can to save travel time when they manage to catch her with surprise.

Again, the gang of knuckle-scrapers interfere with Zelda and subject her to their arbitrary dominance, thus restricting her freedom. However, in example 2, the gang does not influence Zelda in only one instance, or at only one time. They manage to force her to adjust her way of life in response to their arbitrary dominance. Their influence negatively affects her freedom in a more general sense than in example 1.

> **Example 3:** Suppose that the knuckle-scrapers focus on obstructing Zelda in only one of her particular capacities. Perhaps she loves to dance. But whenever Zelda dances, the knuckle-scrapers start jumping up and down so that the ground shakes and disturbs her rhythm, while making loud noises so that she cannot hear the music.

This is not a severe infringement of Zelda's powers, but merely an annoying one that makes her sad and irritated. Yet, it seems to be a restriction of her freedom to enjoy dancing without interference and arbitrary dominance. It is a deliberate and directed influence that negatively affects Zelda's freedom in one instance that might appear unimportant to observers but is in the interest of Zelda. Thus, even under a conception of the self-ownership right in which the right can be violated noninvasively, self-ownership does not suffice to protect freedom.

Completing the argument

The self-ownership proviso could be strengthened to account for the three thought examples above by, for instance, dropping the clause that infringements must be "severe." Thereby, *all* actions that affect a person's world-interactive powers would count as noninvasive violations of that person's self-ownership right. However, this strategy to defend the self-ownership thesis has significant implications.

First, it would be nearly impossible to live in this world. The self-ownership right would grant everyone a "safe space" so extensive that many ordinary actions would violate someone's rights; whistling a cheery tune while in a crowd would nullify everyone else's capacity to affect their sound environment in accord with their purposes, not showering for a week would nullify others' capacity to affect their scent environment, having a weird haircut would nullify other attention-seeking people's capacity to affect their visual environment, and so on. Dropping the clause of severity from the proviso to meet the freedom challenge, as it is expressed in the three examples, would render the world practically uninhabitable.

Second, the self-ownership right would lose its appeal to libertarians. The stronger proviso, the weaker self-ownership. Many libertarians are drawn to the self-ownership right *because* it is strong. If it is weakened to meet the freedom challenge, they would seek support for their politics in other principles instead; libertarians are likely to believe that a world which disallows all actions that affect other people's world-interactive powers is not a world they want to live in.

The arguments have so far targeted Mack's proviso, but there can be alternative strategies to meet the freedom challenge. For instance, Peter Vallentyne, Hillel Steiner, and Michael Otsuka have suggested that infringement of self-ownership are sometimes *permissible*. They propose that a rights-infringing act is permissible under the conditions that (Vallentyne et al. 2005, pp. 206–7)

> (1) there is only a very small probability that it will result in an incursion against oneself; (2) if there is an incursion, the harm to oneself will be trivial; (3) the harm was not reasonably foreseeable; and (4) the benefits to others of performing the action are enormous (e.g., avoidance of social catastrophe).

These conditions can be adjusted to account for the knuckle-scrapers' imprisonment of Zelda. For example:

> A non-rights-violating act is nonetheless impermissible if it (1) targets another agent's interests; the negative effect is (2) major and (3) deliberately caused; and (4) the benefits to others of prohibiting the action are enormous (e.g., avoidance of social catastrophe).

Under these conditions, the self-ownership right does not include the right to encircle people arbitrarily, at least not systematically or on a large scale. But, again, a self-ownership right that is restricted accordingly would not be appealing to libertarians. Among other things, it would entail that it is impermissible to boycott people one does not like, if the boycott targets other agents' interests (condition 1), has a major negative effect (condition 2), is deliberate (condition 3), and if the benefits of not boycotting would be enormous (condition 4). In effect, people would be forced to non-boycott, or, in other words, be forced to socialize with others.

The upshot is that weakening the self-ownership right does not solve the fundamental problem. Regardless of *how* the self-ownership right is weakened to meet the freedom challenge, if that is even possible, it follows that the self-ownership thesis loses its appeal to libertarians. Bornschein makes this point clear (Bornschein 2018, p. 351):

> The problem is that this would put [the libertarian who accepts some proviso] in a rather awkward position. Whereas before she had always been able to reject competing political values (for example, equality, community, and aggregate happiness) simply on the grounds that they conflict with self-ownership, now she would no longer be able to do so.

To summarize, a strong self-ownership right does not suffice to protect freedom. If the right is weakened through a proviso, a theory of permissible rights violations, or some similar strategy, the self-ownership right loses its appeal to libertarians. Therefore, believers in the self-ownership thesis must choose between adopting (1) a strong self-ownership right that does not suffice to protect freedom, and (2) a weak self-ownership right that loses its appeal to libertarians.

What is more, perhaps no strategy to weaken the self-ownership right can save it from the freedom challenge. The self-ownership right is a basic normative proposition whereas freedom is a factual (but often valuable) state-of-affairs that sometimes obtains, and other times do not. It is possible that there is no way to construct the self-ownership right so that it always renders desirable states-of-affairs. The relation between self-ownership and freedom is like the relation between self-ownership and equality; they do not always go together.

Concluding remarks

The question can be raised whether it is a problem to libertarians that self-ownership does not protect freedom. Libertarianism, it can be argued, is not a comprehensive moral doctrine. It is a theory explaining what is *permissible*. Therefore, libertarianism does not claim to explain what is *valuable* or *desirable*. Self-ownership libertarianism, the argument goes, allows individuals or groups of individuals to use their rights to limit others' freedom. Doing so may not be valuable or desirable, but it is permissible.

True. Self-ownership libertarianism does not protect freedom, because it is not *intended* to do so. If libertarianism is understood accordingly, the argument in this article is not a problem to libertarianism. But if so, the view that libertarianism is a theory of what is permissible is then not a problem to the arguments in this article either; everyone agrees that self-ownership does not protect freedom. It is not a problem, but a fact.

However, that seems to be a fact that some libertarians need to be reminded of. In 1955, the political ideologue Dean Russell wrote: "Let those of us who love liberty trade-

mark and reserve for our own use the good and honorable word 'libertarian'" (Russell 1955). Libertarians have thought of themselves as the real defenders of freedom at least since then, and—as shown above—many of them see a close relation between self-ownership and freedom. In this article, that relation has been questioned on a level of detail that, to the best of my knowledge, has not been done before. The article explains why self-ownership *cannot* protect freedom.

It can also be argued that freedom requires external property, and that arguments constructed in a pre-property society (such as the arguments in this article) therefore fail. Two things need to be said about this. First, this view accords with the upshot of the article; self-ownership alone does not suffice for the protection of freedom. Or; freedom cannot be defended solely with reference to self-ownership.

Second, property does not *solve* the problem, but *enforces* it. Consider the Nazi and Coca-Cola examples above. Both follow the same logic as that in Mack's example with Zelda and the knuckle-scrapers. The Nazis ("knuckle-scrapers") utilize their property rights to encircle the Jews ("Zelda"). Coca-Cola ("knuckle-scrapers") utilizes their property rights to subject the island's inhabitants ("Zelda") to the company's wishes. Property rights do not contribute to protect freedom, if individuals or groups of individuals use their property in ways that constrain others or subject them to arbitrary dominance. If freedom is to be protected in a property society, self-ownership needs to be completed with something else, such as a theory of just holdings or normative principles about valuable or desirable behavior. Self-ownership alone, extended to cover external resources, does not suffice.

To conclude, I have argued that the self-ownership right does not suffice for the protection of freedom. The arguments in this article show that some libertarians may face some difficult choices. Because there is no relation between self-ownership and freedom, libertarians who commit to the self-ownership thesis should either offer a defense of freedom that is independent from their defense of self-ownership, make it explicit that they hold freedom as second to self-ownership (and defend that position), or reconsider the basis of their political views.[1]

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[1] I am grateful to the editor and two anonymous reviewers of an earlier version of this paper.

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The Problem with Using a Maxim Permissibility Test to Derive Obligations

Samuel Kahn

The purpose of this paper is to show that, if Kant's universalization formulations of the Categorical Imperative are our only standards for judging right from wrong and permissible from impermissible, then we have no obligations. I shall do this by examining five different views of how obligations can be derived from the universalization formulations and arguing that each one fails. I shall argue that the first view rests on a misunderstanding of the universalization formulations; the second on a misunderstanding of the concept of an obligation; the third on a misunderstanding of the concept of a maxim; the fourth on a misunderstanding of the limits of action description; and the fifth on a misunderstanding of the universalization formulations again.

Introduction

Kant introduces his famous universalization formulations of the Categorical Imperative in the *Groundwork to the Metaphysics of Morals*:

> Act only according to that maxim through which you can at the same time will that it become a universal law.
>
> So act as if the maxim of your action were to become by your will a universal law of nature.[1]

The purpose of this paper is to show that, if the universalization formulations are our only standards for judging right from wrong and permissible from impermissible, then we have no obligations. I shall do this by examining five different views of how obligations can be derived from the universalization formulations and arguing that each one fails. I shall argue that the first view rests on a misunderstanding of the universalization formulations; the second on a misunderstanding of the concept of an obligation; the third on a misunderstanding of the concept of a maxim; the fourth on a misunderstanding of the limits of action description; and the fifth on a misunderstanding of the universalization formulations again.

Two points of clarification. First, it might be thought that, if I am merely taking on different views of how obligations can be derived from the universalization formulations

[1] GMS, AA 04: 421, emphases omitted. All citations to Kant are in accordance with the Prussian Academy pagination that runs in the margins of most translations. All translations are taken from the Cambridge Edition of the Works of Immanuel Kant.

piecemeal, then, even if my criticisms of these views withstand critical scrutiny, my thesis will remain unproven, for there always could be another view out there, just of out reach of the ones I have considered. But this thought is mistaken, and I shall explain why when discussing view 4.

Second, it might be thought that, if my thesis is correct, then, although we never shall be able to figure out, using only the universalization formulations, what our obligations are, the universalizability tests can, in principle, demarcate them. The idea here might be that there is a difference between proof and truth, and my arguments impugn only the former. Perhaps infinitely many maxims would have to be tested in order to *prove* that one is obligatory and we, with our finite capacities, are not up to the task, or perhaps there would have to be a fixed enumeration of maxims in order to *derive* an obligation and there is no such enumeration. But, the thought continues, the universalizability tests demarcate our obligations all the same--the moral landscape might be mapped even if the map lies out of our reach.

However, this second thought is also mistaken. My thesis is not about proofs, deductions, or derivations *per se*. My thesis is about the actual moral landscape that we face, with or without a map, if the universalization formulations are our only tools. If we want to carve moral nature at the joints, and if any such project requires that there be a nonempty set of obligatory maxims, then the universalization formulations had better not be our only carver. Or so I aim to show, anyway.

Section 1: If a Maxim is Universalizable, then it is Obligatory

There is a reading of Kant's *Religion within the Boundaries of Mere Reason*, one that goes back at least to Fichte, according to which everything we do is either impermissible or obligatory. This is sometimes referred to as rigorism, and the crux of the reading that is relevant for present purposes is this:

VIEW1 If a maxim is universalizable, then it is obligatory.

According to VIEW1, the universalization formulations do demarcate obligatory maxims from non-obligatory maxims. A maxim that fails the universalization formulations, like a maxim to commit suicide from self-love, or a maxim to make a lying promise in order to get some ready money, is impermissible. But a maxim that passes the universalization formulations, like a maxim to promote my natural talents, or a maxim to promote the happiness of all, is obligatory.

I find rigorism counterintuitive and, indeed, although Fichte seems to have found it attractive, those who ascribe it to Kant generally seem to do so as a preface to dismissing his ethics as absurdly misguided. And for precisely this reason, it will not do to reply to VIEW1 that, although, in principle, it undermines my thesis, it does so at the cost of the plausibility of the universalization formulations. Those who favor this reading of Kant only would double down in the face of such a response: "that," they might say, "is the point." Moreover, despite the fact that I think that any view that eliminates the merely permissible is dismissible, my thesis is not: either the universalization formulations cannot demarcate obligations or they should be discarded. My thesis is that the universalization formulations cannot demarcate obligations full stop. So, if my reply to rigorism were merely that it saddles Kant in general and the universalization formulations in particular with an

unsustainable ethical outlook, that would not rebut VIEW1 among those with whom it is popular, nor would it help to prove my thesis.

Similarly, it will not do to point out that Kant clearly thinks that some things are morally indifferent and, thus, that Kant rejects rigorism. Kant clearly does think this, as may be seen from the following passage from the *Metaphysics of Morals*:

> ...the human being can be called fantastically virtuous who allows nothing to be morally indifferent...and strews all his steps with duties, as with mantraps; it is not indifferent to him whether I eat meat or fish, drink beer or wine, supposing that both agree with me. Fantastic virtue is a concern with petty details which, were it admitted into the doctrine of virtue, would turn the government of virtue into tyranny.[2]

But this does not help because Kant might have misunderstood the universalization formulations. Kant was fallible, after all, and so the fact that he thought that there are merely permissible actions, conjoined with the fact that he formulated and subscribed to the universalization formulations, does not entail (although it perhaps does suggest) that VIEW1 is mistaken.

But VIEW1 *is* mistaken, and fortunately it is easy to see why. Not only does VIEW1 not comport with Kant's general remarks about ethics (or, for that matter, his general remarks about the universalization formulations), it seems to rest on an obvious misreading of the universalization formulations. The universalization formulations tell us to act *only* on maxims that are universalizable, or to act *as if* our maxims were universalizable. They do *not* tell us to act on *all* maxims that are universalizable, and only the latter can get us to VIEW1. Thus, VIEW1 rests on a misunderstanding of the universalization formulations.

Section 2: If a Maxim of the Form 'I will Q' is Universalizable, then it is Obligatory to Q

From the previous section of this paper it may be seen that the universalization formulations seem to give the following biconditional:

> A maxim M is permissible if but only if it is universalizable.

VIEW1 is consistent with this biconditional, for it also might be the case, depending on how we understand moral dilemmas, that if X is obligatory, then X is permissible. The problem with VIEW1 is that it misunderstands the universalization formulations in such a way as to eliminate the merely permissible. But from this it may be seen that, if the universalization formulations are going to demarcate the obligatory, this cannot be solely on the basis of universalizability; it must be on the basis of universalizability+Y, where Y is some other mark.

Patricia Kitcher suggests a strategy for getting around this using universalizability+the form of a maxim. According to Kitcher, maxims can conform to either of the following schemata:

1. I will P, if I like.

[2] MS, AA 06: 409, emphases omitted.

2. I will Q.

For example, I might adopt the maxim to help my daughter with her homework if I like (schema 1), or I might adopt the maxim to keep my promises (schema 2). The point Kitcher wants to make is that, if an agent adopts a maxim conforming to schema 1, she might not P, whereas if an agent adopts a maxim conforming to schema 2, then she definitely will Q (*ceteris paribus*). This suggests that if a maxim that conforms to schema 1 is universalizable, then there is a permissive law--an agent may P or not depending on whether she likes--whereas if a maxim that conforms to schema 2 is universalizable, then there is an obligation--an agent ought to Q regardless of whether she likes. For present purposes, the important part of this may be summed up as a conditional:

VIEW2 If a maxim of the form 'I will Q' is permissible, then Q is obligatory.[3]

To see the problem with this, suppose that the maxim 'I will Q' is universalizable and, thus (from the biconditional at the beginning of this section), permissible. Then (from VIEW2) it follows that Q is obligatory. But the maxim might be merely permissible, whence it would follow that there are other permissible maxims that the agent may adopt. Suppose that R is such a maxim. But if the agent adopts R, then the agent might not Q and, crucially, her omission of Q would be permissible. Thus, whereas VIEW2 entails that Q is obligatory, an agent nonetheless permissibly can omit Q, and that is no obligation at all. To put this another way, Q is going to be genuinely obligatory only if 'I will Q' is obligatory, and the latter is precisely what needs to be shown; even if all obligations are permissible, not all permissions are obligatory--a merely permissible obligation is an oxymoron. So, VIEW2 seems to rest on a confusion about the concept of an obligation.[4]

Section 3: If it is Impermissible to Adopt Maxim M, then it is Obligatory to Adopt Maxim not-M.

In the previous section I argued against using permissibility to demarcate obligations. But our toolbox is not so sparse. The biconditional from the previous section (M is permissible

[3] Here is how Kitcher puts it: When considering laws of obligation, the 'willing 'side of the argument for FUL is developed by considering the motive force of imperatives. An agent can derive the maxim, 'I to do ACP 'only if he adopts (however temporarily) the law, 'Everyone ought to do ACP'... Parallel considerations enable us to continue the laws of permission side of the argument, although the case is more controversial. An agent can derive his maxim, 'I to do ACP, if I like 'from a law of permission, 'Everyone to do ACP, if he likes 'only if he adopts that law of permission. (Kitcher, 2004, 576)

[4] Suppose that Kitcher changes her view (or, more charitably, that I have misunderstood her). Suppose Kitcher drops the action/maxim distinction and stipulates that, if a maxim of the form 'I will Q' is universalizable, then that maxim is obligatory. Call this VIEW2*. VIEW2* gets around the objection in the paragraph to which this note is appended. But it still does not work. Quite apart from the usual problems associated with stipulation, VIEW2* will fall prey either to the problems associated with VIEW3 or those associated with VIEW4, depending on how we further specify the details. We also might question whether, in introducing such a stipulation, VIEW2* is really working with the universalization formulations anymore or whether it has moved onto something inspired by the universalization formulations.

if but only if it is universalizable) also gives us impermissibility. Moreover, the following biconditional seems relatively unobjectionable:

> Maxim M is impermissible if but only if it is obligatory not to adopt M.

This suggests something like De Morgen's law for maxims, where we drive the negation in from the deontic operator to the action in a maxim. That is, we can start with the fact that it is impermissible to adopt some maxim M, where M has the form 'I will Q,' and we can conclude from this that it is obligatory to adopt the maxim 'I will not-Q.' If Q is 'never to help anyone,' then, because this maxim is not universalizable and, thus, impermissible, we can drive the negation in to get an obligation to adopt the maxim 'sometimes help someone,' and thereby we get an obligation to help others. This seems to be what John Harrison has in mind when explaining how the universalization formulations generate obligations:

> Kant holds (a) that a maxim is not morally acceptable and must not be adopted...if it cannot be universalized; (b) that it may be adopted...if it can be universalized. He may also have thought (c) that a maxim must be adopted (ought to be adopted) if what I shall loosely call its 'contradictory 'is not universifiable...(c) would follow from (a) together with the additional premise, which I see no reason to cavil about, that if it is our duty not to do A, then it is our duty to do non-A.[5]

It also seems to be what Barbara Herman has in mind when she explains why the maxim 'to help some others sometimes' is obligatory on the universalization formulations:

> [I]f the CI procedure shows that it is impermissible to adopt the maxim, 'to never help anyone, 'it follows that we must adopt its contradictory, 'to help some others sometimes.[6]'

We can summarize the core of this view in another conditional:

> VIEW3 If it is impermissible to adopt maxim M, then it is obligatory to adopt maxim not-M.

The details of VIEW3 then can be filled in with the maxim schemata from the previous section of this paper. If a maxim of the form 'I will P, if I like' (schema 1) is impermissible, as is the maxim 'I will break my promises if it suits my purposes,' then its contradictory is obligatory. Using our De Morgan's law for maxims, we may conclude that 'I will keep my promises' is obligatory. Alternatively, if a maxim of the form 'I will Q' (schema 2) is impermissible, as is the maxim 'I will never help anyone,' then, as above, we may use our De Morgan's law for maxims to conclude, with Herman, that 'I will help some others sometimes' is obligatory.

To begin to understand where VIEW3 goes wrong, note that it has false positives. This is not because the universalization formulations misclassify maxims. It will be noted that, despite the large literature on how to interpret the universalization formulations and, more relevantly for present purposes, whether any such interpretation can get around the

[5] (Harrison, 1957, 52).
[6] (Herman, 1993, 63).

myriad false positives and false negatives with which they have been charged, I have not said anything about this, nor do I intend to do so now. I do not need to. The reason VIEW3 has false positives has nothing to do with the universalization formulations *per se* and everything to do with how we are proposing to derive obligations from them. For example, the maxim 'to drive into pedestrians' is impermissible, and from VIEW3 it follows that it is obligatory to adopt some maxim about not driving into pedestrians. That might seem all well and good until we realize that, for all that has been said, this obligation holds for any agent, anywhere, at any time. This exposes VIEW3 to *reductio*: cars are a relatively recent invention, and it would be absurd to assert that our neanderthal forebears were obligated to adopt any maxim whatever about them.

The most immediate problem with VIEW3 is that obligations are agent-sensitive in a way that impermits are not. To use the example in the previous paragraph to illustrate, it is impermissible for any agent at any time and anywhere to adopt the maxim 'to drive into pedestrians,' but (as just noted) there is no corresponding obligation. The deeper problem with VIEW3, the one that illuminates this immediate problem, has to do with the way that VIEW3 understands maxims. In the conditional above, I used the term 'not-M' to echo Harrison, but we just as easily could have used Herman's 'maxim contradictory.' Herman's term is revelatory because it invokes the idea of propositional contradictories, where propositions P1 and P2 are contradictories if and only if (P1 is true if and only if P2 is false). Herman's thought might be that an agent adopts 'to help some others sometimes' if and only if she does not adopt 'never to help anyone,' and, thus, the impermissibility of the latter entails the obligatoriness of the former. The corresponding metaphysical view can be filled in using Leibnizean (not Kantian) possible worlds semantics. That is, if there are maximally consistent sets of sentences corresponding to each possible world, then presumably there are maximally consistent sets of sentences corresponding to each possible agent, much like Leibnizean completely determined concepts. Then, for any given agent and action, there is a fact of the matter, even if it is beyond our ken, whether and under what conditions the agent would perform that action, and from this it follows that there is a fact of the matter, again perhaps beyond our ken, for any agent and any maxim, including but not limited to neanderthals and driving-maxims, whether an agent has adopted it--and if an agent has not adopted the maxim M, then she will have adopted its contradictory.[7]

But maxims do not work like this. Agents need not consciously adopt, deliberate about, or even be aware of their maxims. But maxims are not completely external descriptions of an agent either. It might be true that none of us ever floats up off the floor like a soap bubble. But it is probably also true that none of us has a maxim to refrain from doing so. That is not because it would be impossible to adopt such a maxim. Recall O'Brien's assertion in *1984* that, if he wished, he could float in just this way. I do not want to debate the finer points of O'Brien's idealism--I merely want to note that it would be possible, although not advisable, to work your way into a mindset in which you end up

[7] There is some oversimplification here. For example, the move from maximally consistent sets of sentences corresponding to possible worlds to maximally consistent sets of sentences corresponding to possible individuals in those worlds does not work on account of the fact that many (indeed, perhaps all) of these individuals will inhabit multiple possible worlds. This raises rather deep metaphysical problems for Leibniz's monadology, but none that needs to be discussed right now.

adopting such a maxim. So, there are maxims such that we adopt neither them nor their negations. This is why obligations can be agent-sensitive in a way that impermits are not, and it is why VIEW3 does not work. From the fact that a given maxim is impermissible, exactly nothing follows about the obligatoriness of any other maxim because an agent can fulfill an impermit by doing exactly nothing. The truth of an external description about an agent (e.g., she is not stealing while she is sleeping) does not entail that the agent has adopted any corresponding maxim unless we misunderstand the concept of a maxim.[8]

Section 4: If Maxim M is Impermissible and Agent A is Deliberating About M, then it is Obligatory for A to Adopt Maxim Not-M

Although Herman's appeal to maxim contradictories seems to rest on a misunderstanding of the concept of a maxim (i.e., maxims, unlike propositions, do not have contradictories), there is a premise lurking in the shadows of VIEW3 that might be salvaged:

> If all but one of an agent's options are impermissible, then the one permissible option is obligatory.

But now, if an agent is deliberating about some course of action, then, it might be thought, this conditional can be used to derive an obligation without running afoul of concerns about the concept of a maxim. This seems to be what Korsgaard has in mind in the following passage:

> Kant does derive obligatory ends from the Formula of Universal Law, but he does it by a curiously roundabout procedure in which someone is imagined formulating a maxim of rejecting them and then finding it to be impermissible. This argument does not show that there would be a moral failing if the agent merely unthinkingly neglected rather than rejected these ends. The point about the pervasiveness of these ends in the moral life is a more complicated one, one that follows from their adoption by this route...[9]

We can summarize the core of this, building off VIEW3 from the previous section, in the following conditional:

> VIEW4 If maxim M is impermissible and agent A is deliberating about M, then it is obligatory for A to adopt maxim not-M.

The problem now is that, for any given course of action about which an agent is deliberating, there will be infinitely many different options, many of which will involve more specific or more general descriptions of the action in question, and many of which will involve alternative actions altogether. Further, if there is one permissible option, then there always will be a plurality permissible options, and so there never will be an obligatory one. To see why, suppose that action A is permissible under description B. Then

[8] Indeed, not only might an agent adopt neither a maxim nor its putative contradictory, but, more, whether an agent would adopt a given maxim or its putative contradictory might be entirely indeterminate. This ties into the issues gestured at in note 7 above.
[9] (Korsgaard, 1996, 152-153).

there must be some more specific description of A that is also permissible, whence it follows that there is more than one permissible option.

An example will bring this closer to intuition. Suppose that an agent is deliberating about whether to help at a soup kitchen. Here is a small sample of maxims she might adopt:

1. Never to help at soup kitchens.
2. Never to help at soup kitchens which serve meat.
3. Never to help at soup kitchens which are run inefficiently.
4. Never to help at soup kitchens where they make volunteers clean dishes.
5. Never to help at soup kitchens where they serve unhealthy food.
6. Sometimes to help at some soup kitchens.
7. Sometimes to help at local soup kitchens.
8. To help at local soup kitchens when their staffing is low.
9. To help at local soup kitchens on the weekends.
10. To help at local soup kitchens when at least one friend is able to volunteer with you.

I guess that quite a few of these (at least 6-10, and probably 2, 3, and 5) are permissible. But then it follows immediately that none of them is obligatory. And these 10 do not exhaust the options; obviously there are more.

This might push some people back to VIEW3. The advantage of VIEW3 is that this plurality of maxims is irrelevant. Either an agent will A or not (she will do non-A), and so if one of these (A or non-A) is permissible and the other is not, then the permissible one is obligatory. If we try to inject further details into the action description, that does not undermine the VIEW3 line of reasoning; in fact, we can duplicate it: either an agent will <A+details> or not (she will do non-<A+details>), and so if one of these (<A+details> or non-<A+details>) is permissible and the other is not, then the permissible one is obligatory. The problem with this line of reasoning is not, as we saw, the fact that more than one of these action descriptions always will be permissible; rather, it is that these action-descriptions are purely external, not maxims. We can, to be sure, assess them for permissibility using the universalization formulations as if they were maxims. But precisely because they are not maxims or, rather, precisely because when we treat them as maxims, an agent need not adopt either one of them, and so no facts about obligations follow from such assessments, VIEW3 is a wash. So, of course, retreating from VIEW4 to VIEW3 does not help.

And now I can make good on a promissory note from the introduction to this paper. Thus far, I have been explaining why different attempts to derive obligations from the universalization formulations fail. But in the introduction, I said that I would explain more: why all attempts are foredoomed to fail--why there can be no obligations if the universalization formulations are our only standards for judging right from wrong and permissible from impermissible. It is because, for any given permissible maxim, there is always another permissible one lurking around the corner, whence it follows that there are no obligatory maxims--and so any attempt to derive obligatory maxims will be unsuccessful.

Section 5: If Agent A Adopts End E, Then A Ought to Universalize E

Some might object at this point (indeed, some have objected at this point when I discuss these arguments with them) that ends, like the happiness of others or one's own perfection, are not like actions, like helping at a soup kitchen or keeping a promise, and there is a straightforward way to derive obligatory ends using the universalization formulations. Indeed, the derivation is inspired by Kant's derivation of the duty of beneficence in the *Metaphysics of Morals*, and (the objection continues) Kant does not think that actions or maxims are obligatory anyway--only ends are. So I want to discuss one last view before I wrap up this paper.

The argument that my interlocutors have in mind is something like this: suppose you adopt end E. For E to be permissible, you must universalize it. So, if you adopt end E, then you are obligated to universalize E. More concretely, if you have your own happiness as an end, then you are obligated to adopt the happiness of all as an end. As in the previous sections, we can summarize the core of this view as a conditional:

VIEW5 If agent A adopts end E, then A ought to universalize E.

Now, strictly speaking, there is no duty to adopt the universalized E on VIEW5. An agent could (permissibly) just give up the non-universalized end E. But if the agent is unable (or simply unwilling) to give up E, then the obligation follows. Kant thinks that agents are unable to give up the end of their own happiness, and he seems to think that happiness is the only end of this kind, which gives the duty of beneficence a special status in his system. It is for this reason (i.e., because happiness is the only end that agents cannot give up) that Allen Wood maintains that the duty of beneficence is the only obligation that can be derived from the universalization formulations.[10]

But VIEW5 does not work any more than the previous ones. The first indication that something has gone wrong with VIEW5 is that the reasoning is not generalizable. For example, suppose that I have the end of becoming a professor. It does not (or, at any rate, should not) follow from this that I ought to have the end of everyone becoming a professor (or give up the end myself). The second indication that something has gone wrong is that there are lots of other permissible ends that I might adopt *instead* of the end of the happiness of all, like the end of the happiness of my friends and family. This latter (i.e., the happiness of my friends and family) *must* be a permissible end, for I could adopt it as a permissible *subordinate* end, subordinate to the end of the happiness of all. So I could just adopt this end *without* the superordinate end of the happiness of all.[11]

[10] (Wood, 1999, chapter 3 section 7.2).

[11] There are two things that are notable about this point: (1) if we try to argue that this end (the happiness of friends and family) is permissible only if subordinate to the happiness of all, then we must be appealing to something other than the universalizability tests--we are no longer assessing the end (maxim of ends) by the universalizability tests, we are assessing the end by its context. Barbara Herman does this in some of her publications (i.e., she says that what makes a maxim impermissible is the maxim it is subordinate to), but, again, this is no longer appealing (solely) to the universalization tests (see Herman, 1993, 65, discussed briefly in Kahn, 2021, section 4). (2) Once we start thinking about this--that is, about the difference between the happiness of all and the happiness of friends and family--I think it becomes implausible to maintain that many (if any) actually have adopted the end of the happiness of all (rather than some more restricted end).

But this only indicates that something has gone wrong with VIEW5. We still have to figure out what it is that has gone wrong. And I think it is in the step that says: if you have an end, then you must universalize that end. I do not think that this follows from the universalization formulations. I think that, if you have an end, you have to determine whether it is unversalizable--and if it is not, then you ought to divest yourself of that end. But that is not the same as saying you must in some way universalize it--i.e., give it universal scope in the way that the above derivation does for the end of happiness. To be sure, adopting the happiness of all as an end might be one way of permissibly promoting my own happiness. But so is adopting the happiness of my friends and family as an end, and so is adopting the happiness of those within my sphere of influence--and so on. The universalization formulations are applied to maxims of ends in the same way that they are applied to maxims of actions, and the same considerations that were relevant in assessing VIEW4 are, thus, relevant in assessing VIEW5.

Conclusion

In this paper, I have argued that if the universalization formulations are our only moral standards, then we have no obligations. I did so by assessing five different views of how obligations can be derived from the universalization formulations. I argued that the first rests on a misunderstanding of the universalization formulations; the second on a misunderstanding of the concept of an obligation; the third on a misunderstanding of the concept of a maxim; the fourth on a misunderstanding of the limits of action description; and the fifth on a misunderstanding of the universalization formulations again. Along the way, I tried to explain why it is not only these views that fail--I tried to explain that, once we understand the reasons for the reasons why these views fail, we can see that there are no obligations at all, at least if the universalization formulations are our only moral standards. However, it should be borne in mind that nothing I have said here has in any way undermined whether the universalization formulations can demarcate the permissible and the impermissible. And that might be all that we need them to do anyway.

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From Ethical Analysis to Legal Reform: Methodological Reflections on Ethical Transplants in Pluralist Contexts

Wibren van der Burg

Ethical analysis may result in recommendations for legal reform. This article discusses the problem of how academic researchers can go from ethical normative judgments to recommendations for law reform. It develops a methodological framework for what may be called 'ethical transplants': transplanting ethical normative judgments into legislation. It is an inventory of the issues that need to be addressed, but not a substantive normative theory. It may be especially helpful for Ph.D. students and beginning researchers working in interdisciplinary projects combining ethical and legal analysis.
I distinguish three stages in the process from ethics to law: translation, transformation, and incorporation. The latter stage can be divided into three clusters of issues, these being legal, empirical, and normative ones. Most of the philosophical literature on the legal enforcement of morals focuses on the normative issues. My aim is to broaden the perspective in two ways. First, I show that this is only one relevant issue and that we should address legal and empirical issues and the processes of translation and transformation as well. Second, I argue that we should pay more attention to pluralism and variation.

1. Introduction

Applied ethics usually takes place in a legal context. Our society is strongly structured by law. For example, discussions in animal ethics about animal biotechnology can only be understood against the background of a legal framework that does not consider animals as legal subjects, but primarily as entities that can be owned. Our moral ideas about justice, rights, and personhood have been strongly influenced by the law – and vice versa. Law and ethics are at least partly intertwined and partly autonomous.[1]

Applied ethics often discusses legal themes explicitly. Ethical analysis may result in recommendations for legal reform. Should our tax system or the law on euthanasia be changed? Should we introduce a basic income? Most topics discussed in applied ethics

[1] Wibren van der Burg, 'Bioethics and Law. A Developmental Perspective', *Bioethics*, 11(1997)2: 91-115.

have a legal dimension, and ethicists are frequently members – or even chairs – of advisory committees on law reform.[2]

Though law and ethics look similar in many respects, they are also different. Therefore, the results of ethical analysis cannot simply be transplanted into a legal context. For example, let us assume that ethicists conclude that voluntary euthanasia at the request of a fully competent patient enduring unbearable suffering can be morally justified.[3] This is a normative judgment in a first-person perspective for a clearly defined category of particular cases. However, law enforcement officials can only take a more general third-person perspective, and this entails many complicated issues. There are major problems such as definition, proof, unwanted side-effects, and fittingness in the criminal law system. How, for example, can a prosecutor really ascertain the intention of patients, the severity of their suffering, and their competence? How can we prevent undue influence by patients' children? How can we prevent a murder being successfully disguised as an act of euthanasia? Because of these problems, we cannot simply transplant this moral norm into the criminal code.

There has been little methodological reflection on how ethical insights can be incorporated into law. Of course, there have been studies on whether and how moral norms should be incorporated into criminal law; examples are the continuing discussions inspired by the Hart-Devlin debate.[4] Similarly, there have been various sociological studies about the effects and side-effects of legally enforcing morality.[5] However, each of these provide only part of the story. Moreover, most of these approaches discuss morality – rather than ethical analysis – as their starting point, and criminal law as the subfield of law, rather than all subfields of law.

In this article, I will provide a systematic methodological framework involving how to go from ethical normative judgments to recommendations for law reform. I focus on ethical normative judgments; that is, judgments that certain types of acts are morally justified, permitted, or reprehensible. Of course, ethical analysis may also result in other output than normative judgments. Ethicists can contribute to legal discussions in various ways: for example, through value judgments, conceptual clarification, or argumentation analysis. The problems and possibilities of integration into law for these categories may be partly the same and partly different from those with regard to normative judgments. But

[2] Famous UK examples are the Warnock Committee on human embryology in 1978, and the Williams Committee on obscenity and film censorship in 1979. Mary Warnock, 'Moral Thinking and Government Policy: The Warnock Committee on Human Embryology', *The Milbank Memorial Fund Quarterly: Health and Society*, 63(1985)3: 504-522, provides interesting reflections on the process, and mentions many of the themes discussed in this article; for the latter report, see Bernard Williams (ed.), *Obscenity and film censorship: An abridgement of the Williams report*, Cambridge: Cambridge University Press 2015.

[3] In this article, I will abstain from taking substantive ethical positions myself: I just use familiar examples to illustrate my points. If readers do not agree with a particular example, they may simply reformulate the case: e.g. by adding the word 'not'.

[4] H.L.A. Hart, *Law, Liberty and Morality*, Oxford: Oxford University Press, 1963; Patrick Devlin, *The Enforcement of Morals*, Oxford: Oxford University Press, 1965. As an illustration of the influence of this debate, both reports mentioned in note 2 above were framed partly in terms of the two positions in this debate.

[5] For an overview, see Roger Cotterrell, *The Sociology of Law. An Introduction*, London: Butterworths 1992, Chapter 2.

for presentation purposes, I focus on normative judgments here. Of course, these judgments can only be understood against the background of the ethical theories in which they are embedded, the concepts used and the arguments supporting them, so I will refer to these too but they are not the focus. Moreover, I focus on a specific type of normative judgments, namely those that may provide a *prima facie* reason for law reform, because it seems to conflict with the current law. For example, the judgment that abortion is morally permissible under specific conditions is a reason for law reform if the current law completely prohibits abortion.

This article is an inventory of the issues that need to be addressed, but not a substantive normative theory. As such, it may be especially helpful for Ph.D. students and beginning researchers working in interdisciplinary projects in which ethical and legal analysis are combined. In comparative law, Alan Watson has discussed 'legal transplants': transplanting a legal construct from one legal order to another.[6] That does not always work out well, like with medical transplants where the receiving body may reject the transplanted organ. This article can be seen as discussing the problems and possibilities of *ethical transplants*: transplanting ethical normative judgments into legislation.[7]

An ethical transplant requires three steps or processes: translation, transformation, and incorporation. How the dialect of ethics can be translated into the legal dialect is discussed in Section 2. Transformation is the process in which ethical judgments, theories and categories are transformed into judgments, theories and categories that are relevant and useful in a legal context. The most complex step is that of incorporation: the ethical judgment has to be integrated into the legal order. We may divide the issues of incorporation into three clusters. The first cluster consists of legal issues to do with the distinct characteristics of a legal order or a specific legal subfield (Section 4). The second cluster concerns empirical issues that deal with concerns like side-effects, costs, and popular support (Section 5). The third cluster consists of normative issues, such as the limits of government power, the balancing of rights, and liberal democracy (Section 6).

The distinction between these three processes is somewhat artificial. Actual research projects are iterative, integrated processes in which we switch between these steps throughout. The distinction is not a proscription of three steps that have to be taken in a consecutive order, but an identification of elements and issues to be taken into account during the full research process. The three steps are merely a simplification necessary for structuring the presentation. A similar simplification is the assumption that we start from an ethical judgment and only then embark on the three processes. Of course, in ethical research practice, the process leading to the ethical judgment already takes into account the various contextual aspects including the legal ones. Moreover, the ethical problem is embedded in a legal background, so even at the start ethics is not isolated from law. Usually the reason to start an ethical analysis is that there are certain practical problems

[6] Alan Watson, *Legal Transplants. An Approach to Comparative Law*, Athens and London: University of Georgia Press 1993[1974]). We may transplant full codes (like the Napoleonic Codes introduced in many European countries) but also individual statutes or clauses (e.g. legislators may adopt certain statutory rules legalising euthanasia from other legal states). See also Mathias Siems, *Comparative Law*, Cambridge: Cambridge University Press 2014, Chapter 8.

[7] For simplicity reasons, I focus here on legislation, but most of my analysis can be relevant, *mutatis mutandis*, for, e.g. self-regulation, treaties, contracts, and adjudication.

that are broadly discussed in society. For example, ethical discussions of end-of-life decisions do not take place in a legal void; the ethical and broader societal debates have often even been triggered by actual legal cases. So the notion that we first start with a 'pure' ethical analysis and only then move to law, is a simplifying model. However, this model helps to clearly distinguish and identify the various processes and factors; it is up to the researchers at what stage they actual want to address them – as long as they address them somewhere during the process.

A recurrent theme in this essay is that we need to have an eye for variation and pluralism. Ethical theories often have universalist aims, and they abstract from concrete contexts. Examples are Rawls' original position and his theory for a nearly just society.[8] However, law is highly contextual and variable. For example, the meaning of property in the Common Law tradition differs from that in the Civil Law tradition. Even within one legal order there is variation: in criminal law, responsibility means something different than in tort law, and the burden of proof is also different in both fields. One cannot simply argue that because Rawls' theory would imply a normative judgment that a high minimum wage is warranted, we must introduce this into the legal order of the United States, let alone of Brazil. There is too much variation in context here, and therefore we need to analyse carefully the various steps that have to be taken. Variation and pluralism are not restricted to law; both moral pluralism in society and the ethical pluralism of competing ethical theories pose additional challenges for ethical transplants.

2. Translation

Law and morality are similar in many respects. They influence each other and partly overlap. The same holds for the corresponding academic disciplines: legal scholarship and ethics.[9] I will not go into similarities and differences here, let alone in the relations between law and morality or between legal scholarship and ethics.[10] According to some authors, law and morality are distinct and strongly differentiated; others suggest they are strongly connected; some even regard law as more or less a subcategory of morality.[11] I have defended an intermediate position: namely, that law and morality are neither strongly intertwined nor completely separate; there is overlap and mutual influence.[12] We could, of course, define law as conceptually distinct from morality, but then the distinction would merely be the result of our stipulative definition.[13] Even so, it is inconsequential whether anyone would defend a stronger differentiation, because it would merely magnify the differences between both, and therefore only amplify the problems that I discuss regarding translation, transformation, and incorporation.

[8] John Rawls, *A Theory of Justice*, Oxford: Oxford University Press 1999[1971]).
[9] Wibren van der Burg, 'Law and Ethics: The Twin Disciplines' in: Bart van Klink and Sanne Taekema (eds.), *Law and Method. Interdisciplinary Research into Law* (Tübingen: Mohr Siebeck, 2011), 175-194.
[10] For an overview, see Roger A. Shiner, 'Law and Morality' in: Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Oxford: Blackwell 1996, 436-449.
[11] Ronald Dworkin, *Justice for Hedgehogs*, Cambridge, Mass.: Belknap Press 2011.
[12] Van der Burg 1997 op. cit. and Wibren van der Burg, *The Dynamics of Law and Morality. A Pluralist Account of Legal Interactionism* (Farnham: Ashgate, 2014).
[13] Van der Burg 2014 op. cit.

Translation from ethics into legal scholarship is problematic because of the various differences between law and morality, and between the corresponding academic disciplines of legal scholarship and ethics.[14] One of these differences is that moral language and legal language, although sharing a common etymological background, have partly diverged. We may regard law and morality as different dialects. Both have much in common, and the differences are mostly variations within a broader common social context. However, although law and morality often use the same words and concepts,[15] it is in general a good methodological starting point to presume they are 'semantic false friends'. The linguistic notion of semantic false friends refers to two words in different languages that look similar but differ in meaning, and that have a common etymological origin.[16] Legal and moral discourse share general concepts like rights, responsibility, fairness, and discrimination as well as more specific concepts such as rape or theft. Some statutes also know open norms with terms that are shared with morality, such as equity, fairness, or the care of a good employer. These norms may provide a bridge between law and morality, but even in those cases, there are minor or even substantive differences between the legal and the moral meaning.

Concepts are embedded in a web of meaning. The full meaning of a word cannot simply be found in a dictionary. The meaning, especially of value-laden words, is often associated with the meaning of other words. For example, the meaning of the term 'democracy' can only be fully understood when we understand the meaning of terms such as 'people', 'rule of law', 'human rights', and 'representation'. Normative concepts like these refer to a host of other norms and values. A word in the context of morality may evoke associations other than the same word in a legal context. For example, in moral discourse we may speak of animal rights, whereas most legal orders do not recognise animal rights, with the result that the word 'rights' in legal discourse is only associated with humans. Moreover, as Wittgenstein has said, meaning is in its use.[17] Legal orders connect legal obligations to words like 'promise' or 'declare'. Law has had to develop precise definitions in what counts as a promise or declaration; such specific definitions are usually lacking in moral discourse. As a result of this legal-technical elaboration, the legal dialect shields itself from developments in the general social discourse, and the divergence between the legal and moral dialects increases over time. Use of legal language is embedded in the practice of law, and this practice is oriented towards the ideal of integrity: namely, that law should be constructed as a coherent doctrine, a system.[18] This

[14] There is much more to be said about the linguistic character of law and the obstacles and possibilities for successful translation than I can offer here; for a more elaborate discussion, see Jeanne Gaakeer, 'Iudex Translator: the reign of finitude', in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law*, Cheltenham UK: Edward Elgar 2012, 252-269.

[15] I use 'words' and 'concepts' here mostly interchangeably, as the difference in meaning between both is not always relevant in this context.

[16] Pedro J. Chamizo Domínguez, Brigitte Nerlich, 'False friends: their origin and semantics in some selected languages,' *Journal of Pragmatics*, 34(2002)12: 1833-1849, distinguish semantic false friends from chance ones, where it is just a coincidence that the same word exists in two languages and there is no common origin. Examples of semantic false friends are the German *Flanell* and the English flannel; examples of chances ones are the Spanish *burro* (ass, donkey) and the Italian *burro* (butter).

[17] Ludwig Wittgenstein, *Philosophical Investigations* (transl. G.E.M. Anscombe) Malden, Mass.: Blackwell 2001, §43.

[18] Ronald Dworkin, *Law's Empire*, London: Fontana 1986.

systematicity of law restricts the translation as well as the transformation and incorporation of isolated ethical judgments into law.

So far, I have focused on translation problems with regard to morality and law, but there are also specific difficulties associated with the respective academic disciplines of ethics and legal scholarship. Both disciplines do more than merely reflect language use in their objects of study. They provide their own conceptual analyses and suggest fine distinctions and new concepts and definitions, thereby contributing to further differentiation. Ethicists often use words or definitions that are uncommon in daily usage and law: think of 'supererogation' and 'capabilities'. For example, intersectional discrimination is a relatively novel concept frequently used by legal and philosophical scholars, but it is still mostly absent in national statutes or regulations.[19] If it were to be transplanted into legal texts, its meaning might gradually shift because it would become embedded in a different web of meaning and be used in specific institutional contexts.

A special challenge for translation is constituted by ethical pluralism. Different ethical theories often have their own conceptual frameworks and terminology. Core concepts like autonomy or justice in utilitarian ethics have a different meaning in Kantian ethics – and neither of these has the same meaning as the corresponding concepts in law or legal scholarship.[20]

3. Transformation

Transformation is the process in which the output of ethical analysis is transformed in order to make it directly relevant to the law. Ethical theories are often only indirectly relevant. For example, the claim that persons in a Rawlsian original position would choose an almost equal distribution of income is not a direct argument for the radical reform of current labour law. This example illustrates two issues that we should take into account in transformation: ethical pluralism and the focus on ideal theory. If ethicists want to go from normative judgments made in a Rawlsian original position to recommendations for legal reform, they should transform ideal theory to non-ideal theory in the context of our concrete society, and they should address the fact that competing ethical theories may lead to different judgments.

Ethical analysis is often based on some form of ideal theory. Examples are the nearly just society, the original position, the Kantian theory of autonomy, and the ideal observer. Ethicists also often abstract from concrete societies in order to provide general or even universal theories. Legal orders, however, are strongly contextual and contingent, so we need to transform theories and statements based on idealisation or abstraction into recommendations fitting the context of specific legal orders. This transformation is not a one-directional process from ideal or abstract theory to a concrete legal order; understanding the legal order may also lead to revisions of the ethical theory. For example, philosophical theories of free speech developed by American scholars are usually influenced by the US tradition, which interprets free speech very broadly. In Europe, many

[19] Sandra Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law* Luxembourg: Publications Office of the European Union 2016, 51.

[20] A problem that may become even more complicated by additional losses and distortions as a result of linguistic translations: e.g. when Immanuel Kant's German terminology is translated into English.

countries have banned Nazi symbols and Holocaust denial, which can be understood and, in my view, justified in light of their history. In order to allow for these bans, I suggest that when confronted with these examples, and with their justifications, we should reconsider and revise the broad theories of free speech. Of course, most applied ethicists nowadays work mainly in non-ideal theory, so the transformation from ideal theory to non-ideal theory is not required for them, or was already included in the construction of their own preferred non-ideal theory.[21] Even so, even for non-ideal theorists, it is important to critically assess whether an indirect reliance on ideal theory or a use of abstract principles and concepts may lead to distortions in their ethical analysis that need to be addressed.

A second issue that has to be addressed is ethical pluralism. Most ethicists work within a certain tradition, such as Kantianism, utilitarianism, or some form of religious ethics. Legal orders, however, are usually based on an overlapping majority consensus or a compromise between different ideological positions. Even in those cases where a legal order was originally predominantly influenced by only one ideological position, say Communism or Catholicism, we cannot assume that this position should still provide the normative standards for legal reform. After all, recommendations may focus precisely on removing the remnants of ideological positions that are no longer widely accepted. Ethicists often present their view as one that every reasonable person should accept. This is only natural; if they did not believe that their view was the best, they would not publish it. From a broader perspective, however, we cannot ignore ethical pluralism. A philosopher-queen might simply rely on what she thinks is the best theory, but in a democracy, we need to accept the fact of reasonable pluralism. Every ethical judgment seems to have an implicit qualifier, such as 'according to my Kantian (or utilitarian, Catholic, etc.) theory'. There is nothing wrong with that. It still might lead to partial, *prima facie* arguments for legal reform. For example, an argument could be that obligatory vaccination would be justified if we made a utilitarian calculus. However, in order for an ethical analysis to be fully incorporated into a legal order, it must be presented without a qualifier such as 'according to philosophical tradition X'.

This may require a process of *ethical triangulation*. This implies that a certain topic is analysed from the perspective of various traditions.[22] If a certain bill were to be justified in a utilitarian, a Kantian, and a Christian perspective, that might provide a presumption that it is ethically justified. This presumption is based on an overlapping consensus

[21] Whether, and if so how, applied ethicists should rely on ideal theory at all, is a different debate. See for example Ingrid Robeyns, 'Ideal Theory in Theory and Practice', *Social Theory and Practice*, 34(2008)3, 341–362. http://www.jstor.org/stable/23558712. I have suggested that the transformation process from ideal to non-ideal theory involves so many problems that an appeal to ideal theory is rarely valid; see my 'Ideals and Ideal Theory: The Problem of Methodological Conservatism', in Wibren van der Burg and Theo van Willigenburg (eds.), *Reflective Equilibrium. Essays in Honour of Robert Heeger*, Dordrecht: Kluwer Academic Publishers 1998, 89-99.

[22] In social sciences, triangulation is the use of different methods to study one topic. David A. Fennell and David C. Malloy, 'Ethics and Ecotourism: A Comprehensive Ethical Model', *Journal of Applied Recreation Research*, 20(1995)3: 163-183, suggest ethical triangulation as a practical method in the context of governance. Deane-Peter Baker, 'Making Good Better: A Proposal for Teaching Ethics at the Service Academies', *Journal of Military Ethics* 11(2012)3: 208-222, suggests ethical triangulation as a pedagogical method.

between the major ethical traditions. Even so, it will usually not be possible to include all traditions.

Often, triangulation will not lead to an overlapping consensus. A more modest result could be that it narrows down the choice by excluding some alternatives that are deemed unacceptable by the major traditions. Triangulation may also demonstrate that there is an unbridgeable diversity; even then, it may clarify each of the defensible positions, or present an overview of all relevant arguments pro and con. Sometimes, clarification is all we can get, but even that may help. After all, legislation is not based merely on reasonable argument and compromise; it is sometimes simply a political decision.[23] Narrowing down the range of alternatives, clarifying each of them, and listing their pros and cons may help to make a reasonable decision, without uniquely determining one best solution.

Of course, triangulation is a familiar process in applied ethics. The influential 'Georgetown mantra' of four principles of biomedical ethics was developed on the basis of an overlapping consensus between the authors.[24] Ethics committees and governmental advisory commissions usually include members with different theoretical backgrounds. The deliberation in such commissions can be seen as a form of triangulation, aiming at an overlapping consensus or, as a second-best option, at a reasonable compromise.

A final observation is that not all ethical theories and categories can be easily transformed into legal ones. For instance, the category of virtues is mostly absent in law, and therefore virtue ethics cannot be easily transplanted. The same holds for ethical judgments about supererogatory actions: these can rarely be directly incorporated into legal orders. In most cases, however, ethical categories reasonably match legal ones. For example, ethical categories such as duties, rights, rules and principles have equivalents in legal discourse.[25]

4. Incorporation: Characteristics of Legal Orders

The third and most difficult step from ethical analysis to legal reform is that of incorporation. After translation and transformation, the ethical judgment has to be integrated into the legal order. In order to fully justify recommendations, we need to factor in at least three clusters of issues. The first concerns the general and contingent characteristics of law; the second concerns the social effects of law and its embedding in society; and the third is a cluster of straightforward normative issues. I will deal with these in this and the next two sections.

Many legal philosophers have tried to find the essential or universal characteristics of law. According to some, it is the core task of jurisprudence,[26] while to others, including

[23] See the discussion in Section 4 below on law as fiat and reason.
[24] Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, New York: Oxford University Press 1979; one author was a utilitarian, the other a deontologist.
[25] In Van der Burg 1997 op. cit., I have discussed how, for some time, bioethics and health law used the same conceptual categories and the same liberal normative theory, which enabled an intensive cooperation and convergence.
[26] Julie Dickson, *Evaluation and Legal Theory*, Oxford: Hart Publishing 2001, 17.

the author, this search project is fundamentally mistaken.[27] For this article, the debate is inconsequential. We are not interested in the incorporation of ethical analysis into law as such, but into specific legal orders. The suggestions for distinctively legal characteristics may not be universally valid, but they have resulted in valuable insights involving general characteristics that legal orders often – though not always – have. When these characteristics apply to our legal order, we should take note of them. Therefore, I will discuss the most important suggestions.

First, according to Lon L. Fuller, law may be regarded as based on both fiat and reason.[28] On the one hand, legal orders are oriented towards the ideal that they are coherent and reasonably justified.[29] On the other hand, many norms are the result of political decision-making, and may be arbitrary or even unreasonable. Or, although once accepted, they are now seen as unreasonable because of developments in our moral views; think of various forms of gender discrimination. Every legal order is a mixture of both dimensions, but there is significant variation in the mix. Some countries are more open than others to including ethical analysis in legislative debates or in the implementation of legislation. This characteristic is especially important for ethicists. The ideal of reasonable justification makes ethical analysis relevant, whereas the decisionist dimension not only limits the role of ethical input but also makes it possible to set norms when normative analysis is inconclusive – as it often is. There are frequently no conclusive grounds for a controversial decision, yet a decision must be made.[30] Philosophers should beware of ignoring any of these dimensions. If they focus too much on reasonable or even rational argumentation, they may set unrealistic demands, as we should accept that law cannot always be fully justified.[31] If they focus too much on law as power, they risk the opposite bias by ignoring that legal norms are not always the result of arbitrary decision-making by those in power, thereby denying the relevance of ethical contributions for legal reform.

Second, law is often associated with sanctions.[32] This is certainly not true for all law, as demonstrated by private law norms regulating contracts and wills.[33] Nevertheless, in many cases, legal norms are indeed associated with sanctions, and the negative consequences of sanctions – and the variation in possible sanctions – should be included in the balance of whether and how we should legally enforce moral norms. Moreover, to prevent abuse and arbitrariness, the application of sanctions requires procedural safeguards, and therefore implies additional costs.

[27] See Van der Burg 2014 op. cit., 78ff, for further references.
[28] Lon L. Fuller, 'Reason and Fiat in Case Law', *Harvard Law Review* 59(1946): 376-395; Robert Alexy, 'The Dual Nature of Law', *Ratio Juris* 23(2010): 167-182; cf. Roger Cotterrell, *Law's Community. Legal Theory in Sociological Perspective*, Oxford: Clarendon 1995, 319.
[29] Dworkin 1986 op. cit.
[30] Cf. Ruth Mampuys, *The deadlock in European GM Crop Authorisations as a Wicked Problem by Design. A Need for Repoliticisation of the Decision-Making Process* (diss. Erasmus University Rotterdam 2021).
[31] Such an approach may be associated with a natural law position, but also with a liberal conception of political legitimacy, which is sometimes taken to imply that not only political authority in general but also concrete legal norms must be justifiable to everyone.
[32] This position is usually associated with John Austin's command theory of law, which in a simple form states that laws are general commands by the sovereign enforced with sanctions; see John Austin, *Lectures on Jurisprudence*, (ed. R. Campbell) London: John Murray 1885[1863]. For a critical analysis, see H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon 1994[1961]), Chapter II.
[33] Hart 1994 op cit., 27.

Third, according to the influential theory of H.L.A. Hart, law may be seen as the union of primary and secondary rules.[34] Even though this need not be true of all law – customary law is an example – most legal orders do have secondary norms that regulate the recognition, application, and change of primary norms. Whereas ethical normative judgments usually focus on primary rules (e.g. should euthanasia be permitted?), the presence of procedural rules that recognise, interpret, and apply them has important implications. For instance, in ethics we often simply construct the case at hand by specifying that someone has requested euthanasia, but judges need proof – based on testimonies or written declarations – that it was a voluntary request.

Fourth, rules are central in most legal orders, and usually they are written.[35] Although other elements such as principles, values, and ideals are also part of the law,[36] law's focus on general written rules has important consequences. Legislators must simplify and bring diverse cases under one general rule. This results in a crucial tension between ethics and law. There will always be individual cases where the application of general rules has morally unacceptable effects. Although these effects can sometimes be mitigated by references to equity or by hardship clauses, they can never be fully prevented.

Fifth, the neo-Kantian Gustav Radbruch has suggested that law concerns the external side of behaviour, whereas morality focuses on the internal side.[37] Again, this is not completely true, as law often makes differentiations based on intentions as well, and utilitarian morality looks at external consequences.[38] Even so, the problem that judges cannot always determine the intentions of actors is highly relevant for enforcement. How can a judge be sure that the euthanasia request was not made under the undue influence of greedy heirs? The internal dimension is crucial here for ethical and legal assessment, but it is not easy to design legal rules that can effectively protect patient autonomy in such situations.

Sixth, law is often seen as intrinsically connected to the sovereign state.[39] In an era of global legal pluralism, this claim cannot be accepted as universal, even though many legal norms are embedded in state legal orders.[40] Counterexamples here are, again, customary and international law as well as self-regulation. At the international level, many environmental norms have been developed in covenants between businesses, NGOs, and other non-state actors. Similarly, many norms with regard to medical experiments, biotechnology, and information technology were developed initially as internal ethics codes, and gradually acquired a stronger legal status, even without formal recognition by

[34] Hart 1994 op. cit.
[35] For this focus on rules, see, e.g. Hart 1994 op. cit. and Lon L. Fuller, *The Morality of Law*, New Haven: Yale University Press 1969[1964]).
[36] For this critique, see Ronald Dworkin, *Taking Rights Seriously*, Cambridge, Mass.: Harvard University Press 1978.
[37] Gustav Radbruch, *Rechtsphilosophie*, (hrsg. Erik Wolf und Hans-Peter Schneider) Stuttgart: K.F. Koehler 1973[1932], 127-137.
[38] Judith N. Shklar, *Legalism. Law, Morals, and Political Trials*, Cambridge, Mass.: Harvard University Press 1964, 39v.
[39] For example, by Austin 1885[1863] op. cit., 85 and 510.
[40] See Paul Schiff Berman (ed.), *Oxford Handbook on Global Legal Pluralism*, Oxford: Oxford University Press 2020.

the state. If ethicists look only at state law, they may miss important opportunities to implement the results of their analysis.

Seventh, various authors have suggested that law is oriented towards certain values or ideals.[41] Philip Selznick has argued that law is oriented towards the ideal of legality,[42] while Gustav Radbruch contends that it is oriented towards justice.[43] Although we may question whether these specific statements are universally true, most legal orders consist not merely of a set of rules but also include values or ideals. These values, and especially the ideal of legality, influence and restrict the interpretation of the rules by judges and other legal officials. At the same time, they often provide a bridge to ethical analysis, as most values are shared by law and morality – even if they may have a slightly different meaning in both contexts.

A final general characteristic of law that has frequently been suggested is that it aims to guide action. According to Lon Fuller, in order to guide actions, rules must be general, public, non-retroactive, clear, consistent, and relatively constant; they should also not demand the impossible, and there should be congruence between the rules and their implementation.[44] If rules fail in these respects, they cannot be relied upon to guide actions. These eight principles apply only to legislation; as regards contract law, for example, there may be other principles.[45] However, Fuller's work suggests an important broader insight. Making law is an enterprise with its own internal norms that must be taken into account in the attempt to legislate morality.

Apart from these general but not universal characteristics, there are also many characteristics that are specific for a legal order, or even for a specific subfield within a legal order. Therefore, we must also understand those specific characteristics. Two important sources of variation should be mentioned in particular. First, every country has its own legal tradition, whereas much of the philosophical literature aims at universal analysis – but usually implicitly presupposes the country of the author. One important divide between legal traditions is that between Common Law – basically the English-speaking countries – and Civil Law – most continental European countries.[46] In the Civil Law tradition, the focus is on codes and statutes as the primary source of law. In Common Law, most law is not made by legislation but develops organically through evolving case law, based partly on customary law and, indirectly, on social morality. Although the distinction between these traditions is certainly not strict – and they are converging, partly as a result of European integration and globalisation – the basic attitude of lawyers, and especially of judges, in both traditions is still different. When discussing the legal enforcement of morality, many legal philosophers in the Common Law world still focus more on the judge than their counterparts in the Civil Law world do.

[41] See Sanne Taekema, *The Concept of Ideals in Legal Theory*, The Hague: Kluwer Law International 2003; Dworkin 1986 op. cit.
[42] Philip Selznick, 'Sociology and Natural Law', *Natural Law Forum*, 6(1961): 84-108.
[43] Radbruch 1973 op. cit.
[44] Fuller 1969 op. cit. See also Joseph Raz, 'The Rule of Law and its Virtue', in *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press 1979, 210-229.
[45] Lon L. Fuller, *The Principles of Social Order. Selected Essays of Lon L. Fuller*, (ed. Kenneth I. Winston) Oxford: Hart Publishing 2001[1981].
[46] For the distinction between Civil and Common Law, and a critical discussion of the notion of legal traditions in general, see Siems 2014 op. cit.

A second source of considerable variation is that within a legal order.[47] Here a general divide is whether the subfield is one in which individual citizens confront the state, as in criminal, administrative, and constitutional law, or one in which two citizens confront each other, as in tort and contract law. Traditionally, this distinction is labelled as public law versus private law. In public law, there is a fundamental inequality between the parties, whereas private law presupposes equality – and often compensates for inequalities, as in labour and tenancy law. This difference has many implications. For example, the burden of proof is different in criminal law, where the powerful state can severely sanction citizens, than in tort law, where the question is which of the two parties has to bear certain costs. In criminal law, the standard of proof is that of beyond a reasonable doubt, whereas in tort law the standard is basically that of the most plausible narrative. Some fields have a mixed character. For instance, health law combines the legal culture of criminal law with those of professional disciplinary law – a form of self-regulation – and contract law. Most of the philosophical literature focuses on criminal and constitutional law, and private law is neglected.[48] This is regrettable, because ethicists therefore tend to overlook major areas where they could provide relevant recommendations. For example, we could combat alcohol abuse in many ways other than outright or partial prohibition in criminal law. Actions could include using tax law to increase the price; administrative law for a permission system for sales with conditions such as prohibiting open display and advertisements; traffic law to institute stricter alcohol limits and more frequent and effective controls; and labour law to allow tests in the workplace. Another illustration is medical malpractice, which is hardly ever litigated in criminal law. More frequently it is dealt with by medical disciplinary law, internal regulations of hospitals, and tort and insurance law. The sanctions can sometimes be more severe than those of criminal law. For most doctors, the withdrawal of their license to practice is more consequential than a fine.

5. Incorporation: Empirical Issues

The second cluster of issues with regard to incorporation concerns the relations between law and society. For these issues, ethicists may need some basic understanding of legal sociology and related empirical disciplines such as law and economics, legal psychology, and political sciences.

One empirical issue is the degree of popular support and support of relevant stakeholders. For two reasons, researchers should try to assess social norms, popular opinion, and the views of relevant stakeholders. The first reason is one of effectiveness; if legal norms conflict with social norms, they will likely be less effective because many people will be less inclined to voluntarily comply. This is even more problematic if

[47] Apart from different subfields of law, there are also differences in types of legal processes. For example, Roger B. Dworkin distinguishes constitutional adjudication, legislation, common law, and administrative law as possible mechanisms, and discusses the limitations and possibilities of each process in dealing with the rapid developments in bioethics. Roger B. Dworkin, *Limits. The Role of Law in Bioethical Decision Making*, Bloomington and Indianapolis: Indiana University Press 1996.
[48] An exception is Peter Cane, *Responsibility in Law and Morality*, Oxford: Hart Publishing 2002.

significant stakeholders, such as the medical profession on issues of euthanasia, do not support the reform proposals. Of course, social beliefs can change, but they do not change overnight. Therefore, if a significant discrepancy exists, a broader public debate and communication strategy may be required, to explain the new legislation and convince people to comply. Or we may have to accept that the effectiveness of the legislation will be significantly compromised, and then assess whether the weaker effectiveness is still good enough. The second reason has to do with democracy; the democratic aspiration is that legislation is, as much as possible, supported by the people and their representatives. The question is broader than that of whether there is a majority; democracy should also take into account the perspectives of minorities. In the end, it is a normative issue as to how important we deem popular and stakeholder support or its lack thereof. It may sometimes be completely justified to recommend unpopular measures, simply because justice or public health requires them.

Additional empirical factors are the various costs, which should be taken into account. Is the problem really worth the costs and the scarce time of legislative advisors, legislators, and civil servants? Even more important are the costs of implementation and enforcement. Police and prosecution time is limited, and we should question whether it would be a prosecution priority. An example is the negligible number of prosecutions for recent bans on niqabs and burqas in some European countries; these bans are rarely a priority for overburdened police departments and prosecutors.

The most important issue is the effect of legislation. Passing a statute is not a guarantee for practical effect. Numerous studies have shown that, especially in moral issues, the power of the law to change behaviour is limited.[49] One reason is that people often feel strongly about their moral views, or about activities that are an important part of their lifestyle. This has been frequently demonstrated as regards sexual behaviour like prostitution and homosexuality, and the use of drugs and alcohol. A similar conclusion holds for doctors practicing euthanasia.[50] This ineffectiveness is associated with the fact that these actions usually do not know victims – so there are no complaints – and that they are often protected by privacy rights or by medical confidentiality. Therefore, detection and proof may be problematic. Especially in morally sensitive issues, enforcement without the substantive support of stakeholders is difficult, which is one reason that in many such fields we find alternative legislation strategies, such as communicative or symbolic legislation.[51]

[49] For example, Jerome H. Skolnick, 'Coercion to Virtue', *Southern California Law Review*, 41(1968)3: 588-641; Douglas N. Husak, 'Drugs: Moral and Legal Issues' in Ruth Chadwick (ed.), *Encyclopaedia of Applied Ethics, Volume 1*, San Diego: Academic Press 1998, pp. 849-858; Cotterrell 1992 op. cit.; Jennifer Barton-Crosby, 'The nature and role of morality in situational action theory,' *European Journal of Criminology*, (2020) DOI: 10.1177/1477370820977099.

[50] For example, Helga Kuhse et al., 'End-of-life decisions in Australian medical practice', *Medical Journal of Australia*, 166(1997)4: 191-196, concluded that "Australian law has not prevented the practice of euthanasia or the intentional ending of life without the patient's consent." Actually, Australia, where euthanasia was illegal, had the same rate of euthanasia as the Netherlands, where euthanasia was under certain conditions legal, but a significantly higher rate of intentional ending of life without an explicit request.

[51] See Wibren van der Burg, 'The Expressive and the Communicative Functions of Law', *Law and Philosophy*, 20(2001)1: 31-59; Bart van Klink, Britta van Beers and Lonneke Poort (eds.*), Symbolic Legislation: Theory and Developments in Biolaw*, Dordrecht: Springer 2016.

Here again, we need to take variation into account and be wary of implicit bias. Being, in general, well educated, rationalist, relatively prosperous, independent, self-confident, and disproportionately white, ethicists as well as legislators may tend to project their own personal characteristics and preferences onto the population at large. Their implicit view of human psychology may be unrealistic with regard to some groups of the population, like citizens with minority ethnic backgrounds or those who live around the poverty line and perhaps may be functionally illiterate. What would seem a desirable effect for legislators and ethicists – e.g. having more freedom of choice with regard to medical insurance – might be merely an additional burden to many citizens who cannot oversee their choices and may not be able to bear the financial consequences of wrong choices.

6. Incorporation: Normative Issues

Even if ethical analysis results in the clear conclusion that a certain type of behaviour is morally unacceptable, that is not yet reason enough to make such behaviour criminal. For example, though lying and cheating are widely considered immoral, most legal orders refrain from sanctioning them, except in specific situations such as lying under oath. This is not particular to morality; there are many legitimate policy aims that are not enacted in law. We should not try to regulate all immoral behaviour; it would not only be impossible but also result in a police state.

The first normative issue is therefore whether a specific category of immoral behaviour should be prohibited. This is the central issue in the famous Hart-Devlin debate on the legal enforcement of morals.[52] Obviously, the scene has changed since the time of that debate. As a result of the increasingly diversifying character of Western societies, the traditional presupposition of authors like Devlin that there is one dominant morality has become even more problematic than in the 1960s.[53] But Hart's alternative is certainly not without problems as well. He suggested as a criterion for legal intervention the harm principle, referring to John Stuart Mill. Harm to others is certainly one criterion, but it cannot be a sufficient one – not every harm can be regulated. It is also not a necessary one. For example, paternalism or preventing offensive actions may sometimes – but certainly not always – also be a ground for prohibition.[54] Moreover, many policy issues cannot be discussed so easily in terms of the traditional harm principle: for example, nature conservation and sustainability issues.

[52] Hart 1963 op. cit.; Devlin 1965 op. cit. For an overview, see Kent Greenawalt, 'Legal Enforcement of Morality' in: Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory,* Oxford: Blackwell 1996, 475-487.

[53] Cf. Christian Joppke, 'Islam and the Legal Enforcement of Morality', *Theory and Society*, 43(2014)6: 589-615; Kate Moss and Rowland Hughes, 'Hart-Devlin revisited: law, morality and consent in parenthood', *Medicine, Science and the Law*, 51(2011)2: 68-75. Hans Boutellier, *A Criminology of Moral Order*, Bristol: Bristol University Press 2020.

[54] See Joel Feinberg, *Harm to Others. The Moral Limits of the Criminal Law. Volume One*, New York: Oxford University Press 1984; Joel Feinberg, *Offence to Others. The Moral Limits of the Criminal Law. Volume Two*, New York: Oxford University Press 1985; Joel Feinberg, *Harm to Self. The Moral Limits of the Criminal Law. Volume Three*, New York: Oxford University Press 1986; Joel Feinberg, *Harmless Wrongdoing. The Moral Limits of the Criminal Law. Volume Four*, New York: Oxford University Press 1990.

This issue therefore leads to the heart of fundamental debates in political philosophy about the limits of the liberal-democratic state and the role of law in society. When – and, if so, how – should the law legislate moral norms? When – and, if so, how – should the state use legislation to realise morally desirable purposes? What role should rights and the rule of law play as limits on state power – and on the power of private actors such as large companies? Normative political theory is at the core of the issues at stake here. Even a simple overview of the competing normative theories would warrant a separate article.[55]

An important issue is whether there are alternatives to legislation. Let us take abortion as an illustration. Most ethicists will agree with the policy aim to reduce the number of abortions. Some effective strategies do not include legislation.[56] For example, we might promote better sex education or make prophylactic preservatives more easily accessible to reduce the number of unwanted pregnancies. We could make preimplantation diagnostics more easily accessible to reduce the number of abortions on genetic grounds. We could also turn to nudges as alternative modes of influencing behaviour.[57] Nudges change the choice architecture, by making the morally preferred option more attractive or accessible than the alternative. A controversial nudge to reduce the number of abortions is allowing abortion in only a few specialised clinics so that many women would have to travel long distances to have an abortion, with the result that some would choose not do so.[58] Each of these alternative policies is obviously contentious, but not because of the morality of abortion itself – it is because other controversial values are at stake. To address these, we have to refer to general normative political theories.

A full normative analysis should include not only the directly normative issues discussed in this section but also the issues discussed in previous sections. The insights derived from the legal, empirical, and normative studies can be combined into a list of arguments pro and con.[59] Some of these reasons may be what Joseph Raz calls exclusionary: they are enough to exclude all other reasons from the balance altogether.[60] For example, if a proposed bill violated the Constitution or human right treaties, that would usually be enough to bin the proposal. Lack of effectiveness or very high enforcement costs will usually not be exclusionary in the Razian sense, but they can

[55] The most important texts on the specific issue of legislation on morality are Feinberg's four volumes *The Moral Limits of the Criminal Law*, see previous footnote. See also Robert P. George, *Making Men Moral. Civil Liberties and Public Morality*, Oxford: Oxford University Press 1993 (defending a natural law position).

[56] At least not directly. In modern societies, most policy measures, including many nudges, require some form of regulation: e.g. by providing subsidies, setting quality standards, requiring permissions, and so on.

[57] Richard H. Thaler and Cass R. Sunstein, *Nudge. Improving Decisions about Health, Wealth and Happiness*, London: Penguin 2009.

[58] Thaler and Sunstein mostly discuss examples that liberals, or libertarian paternalists, could support, but there are numerous examples of non-liberal nudges. The Dutch mandatory five-day waiting period after a request for abortion is another non-liberal example of a nudge.

[59] For an elaborate discussion of how such insights can be combined in order to justify recommendations for legal reform in general, see Wibren van der Burg, 'The Merits of Law. An Argumentative Framework for Evaluative Judgments and Normative Recommendations in Legal Research', *Archiv für Rechts- und Sozialphilosophie*, 105(2019)1: 11-43

[60] Joseph Raz, *Practical Reason and Norms*, London: Hutchinson 1975.

provide very strong arguments against a proposal. The balance between pros and cons is sometimes quite obvious: for instance, if an adequate detection and prosecution of relatively minor transgressions were to require serious infractions of fundamental rights such as privacy or the attorney-client privilege. But apart from these clear cases, the balance may not always be easy to achieve. In legislation, as in ethics, many situations do not have a uniquely right answer. Even so, an inventory of all relevant considerations may still help to restrict the range of options and elucidate what exactly is at stake.

7. Conclusion

This article has discussed the problem of how in academic research we can go from ethical normative judgments to recommendations for law reform. I have not discussed substantive theories, but have developed a methodological framework for ethical transplants. There can never be a direct appeal to ethical views, as a number of steps must be taken before ethical judgments can be integrated into law. This article has identified and elaborated the various processes and issues that have to be taken into account. I have distinguished three steps or processes:

> 1. *Translation*: the process in which the dialect of ethics is translated into the legal dialect;
>
> 2. *Transformation*: the process in which ethical judgments, theories and categories are transformed into judgments, theories and categories that are relevant and useful in a legal context;
>
> 3. *Incorporation*: the process in which the ethical judgment is integrated into the legal order. This can be further divided into three clusters of issues: A. legal, B. empirical, and C. normative.

Most literature on the legal enforcement of morals focuses on normative issues. My aim in this article has been to broaden the perspective in two ways. First, I have shown that this is only one relevant issue and that we should address legal and empirical issues as well, and moreover, that we should pay attention to the problems of translation and transformation. Second, I argue that we should pay more attention to pluralism and variation in many respects: in morality, in ethical theories, and among and within societies as well as among and within legal orders.

Some readers may think I demand too much. Taking all these factors into account is impossible for someone who has only been trained as a moral philosopher. To an extent, that may be true. However, apart from receiving elementary training in other disciplines, ethicists have two alternatives: the first is modesty, whereby they should acknowledge explicitly that their ethical analysis is only part of the story; the second is perspective, in which they view their work as part of an interdisciplinary enterprise. Of course, this is already common practice in many ethics' institutes and advisory committees, since applied ethics cannot be undertaken in the isolation of the ivory tower. In that respect, this article provides a methodological framework for those who want to have a broader perspective.

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