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## Kant on Obligation and Motivation in Law and Ethics

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## Kant on Obligation and Motivation in Law and Ethics

Nelson Potter

### I.

There is a passage in Immanuel Kant's general introduction to both parts of *Die Metaphysik der Sitten* that deserves more attention than it has received. I plan to build the present paper around the implications of this passage:

In all lawgiving (*Gesetzgebung*) (whether it prescribes for internal or external actions, and whether it prescribes them a priori by reason alone or by the choice of another) there are two elements: first, a law, which represents an action that is to be done as objectively necessary, that is, which makes the action a duty; and second, an incentive, which connects a ground for determining choice to this action subjectively with the representation of the law. Hence, the second element is this: that the law makes duty the incentive. By the first the action is represented as a duty, and this is a merely theoretical cognition of a possible determination of choice, that is, of practical rules. By the second the obligation so to act is connected in the subject with a ground for determining choice generally.<sup>1</sup>

We have tended to concentrate our attention in writing about Kant's ethical theory on the first of these elements alone, and acted as if the second element did not exist. Kant calls elements of the first type, when considered in isolation from the second, *precepts* (*Vorschriften*).

It is quite clear that a positive *law* must have some motivation connected with it, as specified in a penalty, at least a criminal law must, as opposed to a law appropriating funds or a law authorizing persons to make use of certain legal possibilities, such as a will, a limited liability corporation, or marriage. Some ten years ago Nebraska's state legislature passed a law requiring the wearing of a motorcycle helmet while riding a motorcycle on the state's roads, and the Governor signed it into law. Only some time after this process had been completed was the defect of the law discovered: the law as passed omitted to include any

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<sup>1</sup> Kant, *Metaphysics of Morals*, VI, 218. References to Kant's works are to the volume and page of the passages referred to in the Prussian Academy edition of his works (Kants gesammelte Schriften, herausgegeben von der Deutschen (formerly Koeniglichen Preussischen) Akademie der Wissenschaften, 29 volumes, Berlin, Walter de Gruyter (and predecessors), 1902. Most English translations of works referred to include these page numbers marginally.

provisions for penalties for violating the law. In the interval before the law was corrected by a new legislative session, did my state have a motorcycle helmet law? It was contrary to law not to wear such a helmet, . . . etc., but no individual could be penalized for violating this law. I would say that during this interval Nebraska had no law against not wearing a motorcycle helmet.<sup>2</sup> If this is right, then I am in agreement with Kant with respect to at least the area of the criminal law and related areas of the law: every piece of legislation (*Gesetzgebung*) requires *two* elements: a precept and an incentive.

When we turn to ethics the necessity that there be an incentive along with a precept is perhaps somewhat less clear. There are certainly ethical theorists who regard ethics as based on certain precepts, with the question of motivation to act as the precepts require being a distinct question, that could not affect the validity, content, or scope of precepts. The utilitarian who recommends a maximization of value for human beings in general, is stating an abstract precept without reference to any incentive, and in fact we tend to find among human beings differential levels of interest in (and therefore incentives toward) value maximization for different subjects: We may have the fondest regard for our own value, for example, with a level of regard for family members that may decrease with the distance of relation, and may decrease still more for other tribes and races. Or, to take another sort of ethical theory, W. D. Ross may state it as a moral requirement that the agent perform acts of gratitude for benefits received, entirely apart from any question of whether the agent has any wish or drive so to act, and H. A. Prichard separates the question of what our moral obligation is from the motivation to perform it provided by, he urges, a (distinct and contingent) desire to do our duty.<sup>3</sup> Regardless of what the best account is about the connection between obligation and incentive in ethics, I think it is clear that *Kant* regarded an incentive as essentially and analytically connected with the fact of obligation, and as therefore entailed by statements of obligation (i. e., precepts). For Kant the law provides an external incentive, a specified punishment, as a motivational source. But in the case of ethics, the incentive must be internal, not external to the agent, as it is in the case of law. And this internal ethical incentive will turn out to be internal and intrinsic in another important sense: the source of the inner ethical incentive will be the motive of duty itself. That is, the reasons that justify the conclusion that a certain action is a positive duty, or contrary to duty, and hence will justify the mere precept that "Promises must be kept," or "Lying is

<sup>2</sup> As it stands this is a report of a linguistic intuition, which perhaps has some weight of reliability, perhaps not. Nothing in the argument that follows depends upon the correctness of this report. That is, even if one might wish to say that Nebraska had what might be called an "admonitory law" or even a valid law without qualification, Kant's view seems to be different.

<sup>3</sup> See H. A. Prichard, *Duty and Interest*, Oxford, Clarendon Press, 1928. For a critique of Prichard's view see John Ladd, "The Desire to Do One's Duty for its Own Sake," pp. 301-349 in Hector-Neri Castaneda / George Nakhnikian, eds. *Morality and the Language of Conduct*, Detroit, Wayne State University Press, 1965.

wrong,” become motivating reasons in the agent who acts from the motive of duty. Such an agent does what is morally required, for the reasons that the actions in question are morally required, and for no other. Kant’s view then is that ethical motivation is “internal” to obligation in a double sense: (1) the motivation is required for without it there would be no obligation; obligation entails motivation. And (2), the motivating reasons are the same as the justifying reasons. This is the character of the appropriate inner moral motivation, which Kant calls action from duty: the motivating reasons reproduce the justifying reasons.

I have urged at length in another paper that what Kant is trying to do when he claims that the categorical imperative is a synthetic a priori proposition, and then seeks to justify it, is to show that we are free in the sense that we have the (free causal) power to act from purely moral motives; it would only be if we had such a capability that we could have a moral obligation so to act.<sup>4</sup> Again this interpretation points towards Kant’s motivational internalism. I have detailed how this causal / motivational determination works within the complex internal structure of Kantian maxims in another paper, which seeks to give the internalism of obligation and motivation in Kant some specificity and concreteness, and I have cited the opening quote as evidence that Kant is a motivational internalist in his *ethics*.<sup>5</sup> (Ethics for Kant is that part of practical philosophy having to do with inner freedom.<sup>6</sup>) But I am not going to here develop much further the ethical side of this issue in this paper. Instead, I am here going to explore some of the parallels and connections between the two systems of motivation, ethics and law, and consider how the motivational side of precepts of the law affect, limit, and influence the development of Kant’s juridical philosophy. Briefly, Kant’s belief is that we have two parallel areas and systems of human freedom: (1) outer, phenomenal, and juridical, and (2) inner, noumenally-based, and ethical. We can learn about each by seeing how it parallels the other.

## II.

In the discussion that comes after the quotation above Kant spells out the contrast, or at least some elements of the contrast between law and ethics, with the emphasis on the differences in appropriate motivation. In fact there is a certain emphasis given to the fact that the character of an item of legislation or law-giving (*Gesetzgebung*) may be identical in the content of the precept, but distinguished by the character of the incentive. Thus “Do not steal” is a precept of both ethics and law, and when the precepts are thus identical, the two parts of lawgiving are distinguished only by their incentive:

<sup>4</sup> “The Synthetic A Priori Proposition of Kant’s Moral Philosophy,” unpublished.

<sup>5</sup> “Kant on Maxims,” forthcoming in *Philosophia*.

<sup>6</sup> *Kant*, *Metaphysics of Morals*, VI, 219-220.

That lawgiving which makes an action a duty and also makes this duty the incentive is *ethical*. But that lawgiving which does not include the incentive of duty in the law and so admits an incentive other than the Idea of duty itself is juridical. It is clear that in the latter case this incentive that is something other than the Idea of duty must be drawn from *sensibly dependent* determining grounds of choice, inclinations and aversions, and among these, from aversions; for it is a lawgiving which constrains, not an allurements, which invites.<sup>7</sup>

This contrast of incentives and kinds of lawgiving gets elaborated as a contrast between inner and outer or external, and, it is finally at least suggested, noumenal vs phenomenal. We are told that "all duties, just because they are duties, belong to ethics; but it does not follow that the *lawgiving* for them is always contained in ethics: For many of them it is outside of ethics."<sup>8</sup> But although there are distinctions between the two realms in terms of the scope of possible duties of each kind, the more basic distinction between them is in terms of the kinds of incentives, as we are told in at least two different ways:

The doctrine of Right and the doctrine of virtue are therefore distinguished not so much by their different duties as by the difference in their lawgiving, which connects one incentive or the other with the law.<sup>9</sup>

For what is distinctive of ethical lawgiving is that one is to perform actions just because they are duties and to make the principle of duty itself, wherever the duty comes from, the sufficient incentive for choice. So while there are many *directly ethical* duties, internal lawgiving makes the rest of them, one and all, indirectly ethical.<sup>10</sup>

Kant apparently believes that inner freedom and imputability are necessary conditions for outer freedom and imputability, though I do not know of any direct statement by Kant on this point. The point of such a claim would be that only moral agents (i. e., those capable of inner moral freedom) are or can be legally responsible for their actions. Here are some indirect indications of such a connection:

(1) Kant says that the basis for security against violence is living under a civil constitution where individual rights are determined by law. (The same statement is made with respect to individual peoples and nations, but that does not concern us now.)<sup>11</sup> That is to say, individuals, "... ought above all else to enter into a civil condition."<sup>12</sup> It at least appears that such an obligation presupposes an ethical nature; the obligation cannot be merely legal, since the commonwealth is supposed not yet to exist. In the absence of an inner ethical nature, there could be no practical requirement to enter a commonwealth.

<sup>7</sup> Ibid., VI, 219.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid., VI, 220

<sup>10</sup> Ibid., VI, 220-221.

<sup>11</sup> Ibid., VI, 312.

<sup>12</sup> Ibid.

(2) Punishment presupposes imputability for crime, and the criterion of punishment must be appropriately respectful of the moral personality of the individual being punished, in Kant's view. Both legal imputability and the required respect in punishing individuals entail that such individuals be moral persons capable of inner freedom.

(3) All individuals within a state are citizens (though, infamously, some are merely "passive citizens"), and therefore all (even the passive ones) are potential active participants in determining legislatively their own destiny, and the bearers of the rights of citizens, both of which again presuppose personhood and a moral nature.

(4) Kant may be intending to make this very point (that legal rights presuppose inner moral freedom) when he writes<sup>13</sup> "Like the wooden head in Phaedrus' fable, a merely empirical doctrine of Right is a head that may be beautiful but unfortunately it has no brain." I suggest that what the proposed analogy means is just that the "brain" or essence of any doctrine of right has to be found in a presupposed inner ethical nature that is within the mind of human beings, viz., those included with the scope of any doctrine of Right. The doctrine of this inner moral nature, which is the subject, for example, of the *Critique of Practical Reason*, is not a merely empirical doctrine of Right, but an a priori doctrine of the principles of pure practical reason that must be presupposed. Attempts to find justification of such rights in a merely empirical doctrine are inevitably radically incomplete.

(5) In the same spirit, Kant a little later is developing the point that the universal law of Right makes no demands of the agent concerning appropriate moral motivation: "... instead, reason says only that freedom is limited to those conditions in conformity with the Idea of it and that it may also be actively limited by others; and it says this as a postulate incapable of further proof."<sup>14</sup> Mary Gregor in her translation puzzles over this use by Kant of the term "postulate" (*Postulat*). My suggestion is this: Kant is first emphasizing that the two motivational systems are distinct: the inner self-restraint, and the outer restraint by others. Then his point is that the phenomenal, empirical, juridical system is unprovable on its own terms, i. e., without leaving the empirical and juridical and going back to the underlying a priori inner rational principles that must be presupposed. It is because the empirical system is unprovable on its own terms that it gets called a "postulate."

For all of these reasons, let us take the fact that the juridical presupposes the ethical, outer freedom presupposes inner freedom, as demonstrated in what follows.

<sup>13</sup> Ibid., VI, 230.

<sup>14</sup> Ibid., VI, 231.

Now, this way of introducing the contrast between the ethical and the juridical, as well as how Kant goes on to develop each realm, suggests that what we are talking about here is *two separate and distinct realms of freedom*, each with its appropriate and distinct though related ethical principles. This helps us to see Kant's entire moral philosophy as a doctrine built around the basic importance of the value of *freedom*. This may seem surprising, for even as comprehensive a discussion of Kant's doctrine of freedom as Henry Allison's recent and important book, does not include any discussion of the realm of law and external freedom as part of such a total Kantian doctrine; he limits himself to discussing inner, ethical freedom, and its metaphysical character and basis. Allison has recently written "Kant's Doctrine of Obligatory Ends"<sup>15</sup> as his account of Kant's theory of freedom as it gets extended to the determination of the moral ends or goals of action. In the same vein, Allison might well consider the *Rechtslehre* doctrine that I am writing about here as *another* such basic and important extension. If I am right in what I just said in the previous paragraph, about how external freedom presupposes internal or moral freedom, then Allison is right to center his attention on the more central and more basic topics indicated that he takes up in his book, for they form a set of necessary conditions for the present discussion. And yet for the sake of completeness, he might well have extended that discussion to include the topics of the present paper. I regard myself as writing this paper in an Allisonian spirit, building on the conclusions of his important book here, and providing one more chapter in the story of Kant's practical philosophy as a philosophy of human freedom and its implications. In fact, it is a kind of companion piece to Allison's "Kant's Doctrine of Obligatory Ends," since that essay centered on a central doctrine of the *Tugendlehre*, and the present essay centers in a similar way on the *Rechtslehre*.

One aspect of these two realms of freedom that goes back to the topics of Allison's book has to do with the idea of causality. Kant speaks of "causality" in connection with the operations of pure practical reason, in a work like the *Critique of Practical Reason*. He is thinking of the inner moral motivation that is the motivation of action from duty as a sort of free noumenal cause, which, since it is modeled upon moral categorical imperatives that have a logical/motivational shape incompatible with the essentially hypothetical character of phenomenal causal relations, must be produced by, and have its origin in noumenal free causes. When we argue from the phenomena of moral consciousness, back to the source of such conscious contents, we have arrived at what Kant in the second *Critique* calls the "fact of pure reason."

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<sup>15</sup> This essay is in the 1993 volume (volume 1) of *Jahrbuch für Recht und Ethik*, pp 7-23. The book mentioned above is: *Henry E. Allison, Kant's Theory of Freedom*, Cambridge: Cambridge University Press, 1990.

The basic principle of *Recht* is an adaptation of the “universal law” formulation of the categorical imperative into a principle that is limited to external action, and that makes no assumptions about purely moral *motivation*:

“Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.”<sup>16</sup>

Now although he mentions maxims in this statement, Kant goes on to add that one can’t require another to act on such a maxim, for the only concern here is with external action, since nothing else than that could possibly impair another’s freedom. And it is further added that someone who hinders one in the free and rightful exercise of her own freedom *wrongs* her, and with considerable emphasis Kant insists that the doctrine of *Recht* can say nothing about the agent’s appropriate motives. In a point we will come back to, it is also immediately argued that the existence of this realm of external freedom entails an authorization to hinder those whose actions interfere with the freedom of others, since “Right and authorization to use coercion therefore mean one and the same thing.”<sup>17</sup>

I said in the last paragraph that the statement of the basic principle of *Recht* is derived from the general statement of the categorical imperative, e. g., one of the “universal law” formulations in the *Grundlegung*. Such a derivation is suggested by the fact that the *Grundlegung* is an earlier work, and the statement of the categorical imperative there seems broader and more general. But yet the derivation may in fact go in the other direction. The universal law principle of ethics makes the most sense in the realm of external action that affects others; it is only there that it is a moral principle with a real cutting edge, i. e., a principle that enables us to conclude that certain actions are wrong. It appears impossible to derive most characteristically *ethical* duties, especially duties to oneself, from this principle alone. Any action, insofar as it is only self-regarding, could “be willed as a universal law,” and hence the universal law criterion seems to exclude *no* such actions as forbidden. Kant perhaps partially concealed this fact from himself in 1785 by invoking extraneous teleological considerations in the arguments for the first and third examples of the *Grundlegung*.<sup>18</sup> When we look at things this way, we might conclude that the universal law principle of morality was in the first instance a social principle of moral and political equality and that the “derived” version of the principle is the broader, more general one we are more familiar with from the *Grundlegung*. There is another reason for thinking that in a sense the external political aspect of morality comes first, at least in

<sup>16</sup> Kant, *Metaphysics of Morals*, VI, 230. The quotation marks are Kant’s.

<sup>17</sup> Ibid., VI, 232.

<sup>18</sup> See Kant, *Groundwork of the Metaphysics of Morals*, IV, 421-4. For more on problems with using the universal law formulation in this passage to derive duties to oneself, see my “What Is Wrong with Kant’s Four Examples,” *Journal of Philosophical Research*, Volume XVIII (1993), pp. 213-229.



the order of knowledge. Kant writes that the first principle of law is analytic, that of ethics synthetic.<sup>19</sup> When we move from considering outer to inner freedom, he says, then “the concept of duty is extended beyond outer freedom.”<sup>20</sup> The extension takes place by ends that are also duties being laid down. However, the considerations mentioned may not be conclusive, and so for present purposes I leave it an open question which version of the principle came first in Kant’s thinking, and in the general order of human knowledge, and I also leave unresolved the issues just raised about the effective scope of a universal law principle, e. g., whether it can successfully encompass duties to oneself.

So we have not one but two realms of freedom that are of concern for Kant, and his moral theory has two distinct parts to relate to two distinct realms of human action, the inner and the outer, the noumenal and the phenomenal. Because these two realms are conceived in a number of ways as parallel to each other, we can learn about each by comparing it with the other. I will follow this technique in the remainder of this paper, but with the emphasis on the realm of external freedom, since less has been said about Kant’s philosophy of law as a development of this part of his theory.

This understanding of what Kant is up to is supported by his discussion of external freedom later in the *Rechtslehre*,<sup>21</sup> where he writes that “There is Only One Innate Right,” adding, “Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.” This freedom involves innate equality we are told.<sup>22</sup>

The thing that might seem surprising about what I have just said, at least surprising to the reader of the more familiar Kantian works such as the *Grundlegung* and the second *Critique* is that Kant’s moral philosophy in those works seems to be nothing more than a doctrine of inner freedom; now we learn of a surprising extension of the doctrine, one we could hardly have anticipated. Suppose that the Kantian doctrine were *not* extended in this way. What would have been lost or omitted? Well, most obviously, the whole of Kant’s political philosophy. But why not say: The provision of mere external guarantees, for such things as property and personal rights, goes well beyond ethics, and is therefore not relevant. Kant’s response seems to be: It cannot be irrelevant, for it is a part of human freedom. And in fact underlying positive law by way of support or critique is the natural law, and there are questions about legal wrongs to others because underlying them are serious moral wrongs.

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<sup>19</sup> Kant, *Metaphysics of Morals*, VI, 396-7.

<sup>20</sup> *Ibid.*, VI, 396.

<sup>21</sup> *Ibid.*, VI, 237.

<sup>22</sup> *Ibid.*

The idea that the juridical and the ethical are conceived by Kant as parallel realms of freedom is supported by the fact that there are significant parallels between Kant's arguments in the *Tugendlehre* for the claim that there must be ends that are at the same time duties, and the argument for the indispensability of recognizing property rights in the *Rechtslehre*. Here is the argument from the *Rechtslehre* that there must be property and property rights:

It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would *in itself* (objectively) have to *belong to no one* (*res nullius*) is contrary to rights.

For an object of my choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my rightful power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting usable objects beyond any possibility of being used; in other words, it would annihilate them in a practical respect and make them into *res nullius*, even though in the use of things choice was formally consistent with everyone's outer freedom in accordance with universal laws. But since pure practical reason lays down only formal laws as the basis for using choice and thus abstracts from its matter, that is, from other properties of the object provided only that it is an object of choice, it can contain no absolute prohibition against using such an object, since this would be a contradiction of outer freedom with itself.<sup>23</sup>

And here is one of the arguments from the *Tugendlehre* for there being at least one end which is at the same time a duty:

What, in the relation of man to himself and others *can* be an end *is* an end for pure practical reason; for pure practical reason is a capacity for ends generally, and for it to be indifferent to ends, that is, to take no interest in them, would therefore be a contradiction, since then it would not determine maxims of actions either (because every maxim of action contains an end) and so would not be practical reason. But pure reason can prescribe no ends a priori without setting them forth as duties, and such duties are then called duties of virtue.<sup>24</sup>

This argument aims to show that if we have pure practical reason, that is, if we have moral capacities, and if there are hence categorical imperatives, then these moral rules must prescribe ends; such rules prescribing ends set them forth as duties, and such duties are called duties of virtue. There is an analogous earlier argument also in the *Tugendlehre*,<sup>25</sup> which similarly presupposes the existence of categorical imperatives. It then goes on to show that unless there are some ends that are at the same time duties there could be no categorical imperatives,

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<sup>23</sup> Ibid., VI, 246.

<sup>24</sup> Ibid., VI, 395.

<sup>25</sup> Ibid., VI, 385.

and hence no morality. In the *Rechtslehre* argument for external property just quoted above, the supposition that there are some objects that it is not possible to take possession of contradicts the assumption of *external* freedom. So, in brief, both arguments have the form of a *reductio*, and both are *reductios* on the assumption of an appropriate and relevant kind of freedom. What we learn from the quoted *Rechtslehre* argument is that there is a realm of outer freedom, which has its own basic principles.

Now, suppose that somehow we rejected this realm of outer freedom as part of a complete practical philosophy. What would be the implications? I take it the realm of inner freedom would remain, and most of the things that are forbidden by criminal law (e. g.s, murder, assault, theft, fraud) would remain morally forbidden. But we would be without enforcement mechanisms, and without a doctrine of rights answering to perfect duties to others. We might, as a kind of anthropological fact of life, have laws and states, and enforcement authorities, but they would have no relation to morality. There would be no rights and wrongs about such external institutions; the proper doctrine of external relations would be one of anarchism, in the etymological sense of that word, i. e., the absence of any relevant (moral) principle. The total theory of morality would be the existing theory of *inner* freedom that is the center of attention in the *Grundlegung*, the second *Critique* and the *Tugendlehre*. This would amount to a doctrine of partial moral scepticism, about the scope of possible moral principles, and it is obviously a doctrine not accepted by Kant.

### III.

Now consider how this idea of a realm of external coercion to maintain external freedom works. The main way it works, at least that Kant discusses, is through the state institution of punishment. Kant, as soon as he gives the principle of right,<sup>26</sup> immediately writes about how “Right is Connected with an Authorization to Use Coercion.”<sup>27</sup> This is because those whose actions hinder the rightful use of freedom of another should be hindered in that wrongful behavior. Hindering those who hinder is defending freedom, and therefore is right: “Hence there is connected with Right by the principle of contradiction an authorization to coerce someone who infringes upon it.”<sup>28</sup> So Kant concludes, “A strict right can also be represented as the possibility of a fully reciprocal use of coercion that is consistent with everyone’s freedom in accordance with universal laws.”<sup>29</sup> The only meaning of the word “strict,” it appears, is that if A wrongs B, B is not to

<sup>26</sup> Ibid., VI, 230.

<sup>27</sup> Heading of Section D, Ibid., VI, 231.

<sup>28</sup> Ibid., VI, 231.

<sup>29</sup> Heading of Section E, with some capitals omitted, Ibid., VI, 232.

appeal to A's moral sense, but to the penalty to be paid for wrongdoing, i. e., appropriate punishment.

Now the connection between these "hindrances" and Kant's later, separate discussion of punishment is not explicit. The word "hindrance" might suggest mere interference to prevent the completion of an act of, e. g., rape or burglary, rather than after-the-fact punishment. But hindrance in that first sense would be an unusual occurrence, since most rapists and burglars take pains to assure that others are not around who would interfere with their intentions. The only sort of systematic hindrance Kant ever discusses and regards as basic or important is punishment. In fact, he says, in an Appendix to the *Rechtslehre* added to the second edition, "The mere Idea of a civil constitution among men carries with it the concept of punitive justice belonging to the supreme authority."<sup>30</sup> The importance of this institution makes sense when we consider the main purpose of the state, the one which puts us all under a moral obligation to leave the state of nature, viz., the guarantee of rights (it is property rights Kant discusses in the most detail) that are assigned in the state of nature, but can be assured only under state enforcement. Punishment is the main instrument of state enforcement.

One might ask how punishment hinders. Once a given rape or burglary has been completed, it can hardly be hindered. The answer, it seems, is that punishment of such acts hinders through *deterrence*, presumably both specific and general. The essential purpose of the state, the basis of our moral obligation to leave the state of nature, is that it guaranteed us in our rights, and the power and authority to punish, as the major way Kant thinks of to do this, is therefore, as the quote above indicated, of the *essence* of the state. Deterrence is a teleological, goal-oriented function of punishment, and so quite clearly punishment is a state institution that has essential teleological roles.

It might seem out of keeping with the spirit of Kant's moral philosophy, that rights should be guaranteed by the providing of extraneous, non-moral, pathological incentives for abstaining from wrongdoing. But "rights" themselves are aspects of external freedom, and hence would be maintained by what Kant calls external incentives such as deterrence through punishment.

Such non-moral incentives are not discussed in the *Grundlegung*, the second *Critique*, or the *Tugendlehre*, but they are present in the *Rechtslehre*. In their accounts of Kant's theory of punishment as having these aspects of deterrence both Don Scheid and Sharon Byrd are correct, and Samuel Fleischhacker, who defends the more traditional pure retributivist account, is incorrect. Not only

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<sup>30</sup> Ibid., VI, 362. This makes it clear that punishment is one essential sort of "hinderance" in Kant's view. But perhaps there are other important forms of hinderance, or coercion, such as taxation, or regulation. If this is correct, "hinderance" or "coercion" are broader terms with "punishment" a name for but one specific form of coercion. This point was made orally by Klaus Günter in the discussion of this paper at the Erlangen conference.

does Kant *write about* and give an exposition of this function of punishment, as Scheid and Byrd both clearly indicate, but such a function is a central, indeed essential function of the state, in Kant's view. So Fleischhacker's wish to understand the deterrent effects of punishment as mere by-products is incorrect. The element of punishment that is set by the retributive idea of the *lex talionis*, according to Kant, is the amount and kind of punishment that is appropriate for a given offense; in determining this, Kant tells us that teleological considerations are not to be taken into account.<sup>31</sup>

#### IV.

Now let us turn to some of the limits on the use of external coercion. I will mention five such limitations. The source of each of these limitations is the limitation not of the inherent possible scope of moral precepts, but rather a limitation on the second element of all lawgiving, the incentive. The fact that there are such limitations makes clear the systematic way in which Kant carries through in the *Rechtslehre* his idea that any "*Gesetzgebung*" requires both precept and incentive.

(1) There is no properly established system of (external) rights in a state of nature, prior to entering a civil commonwealth. It is this fact which creates the very obligation to enter a civil commonwealth. In a state of nature there are of course no effective laws with enforcement provisions that forbid antisocial and harmful actions. The system of external incentives would not and could not exist in such a circumstance. Our property rights in a state of nature Kant maintains would be provisional rights based on natural right conceptions. This limitation on the existence of external right would also be found, Kant seems to indicate, whenever an existing state dissolves, for whatever reason, so that the state has effectively gone out of existence.

(2) There is a second important limit that is indicated soon after the quotation with which this paper began, a limit to *external duty*. Kant writes,

Duties in accordance with rightful lawgiving can be only external duties, since this lawgiving does not require that the Idea of this duty, which is internal, itself be the determining ground of the agent's choice; and since it still needs an incentive suited to the law, it can connect only external incentives to it.<sup>32</sup>

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<sup>31</sup> See Don Scheid, "Kant's Retributivism", *Ethics* 93 (1983), 262-282, p. 263; B. Sharon Byrd, "Kant's Theory of Punishment: Deterrence in its Threat, Retribution in Its Execution," *Law and Philosophy*, I: 151-200, 1989; Samuel Fleischacker, "Kant's Theory of Punishment," *Kant-Studien* 1988, reprinted in Howard Lloyd Williams, editor, *Essays on Kant's Political Philosophy* (1992, Chicago: University of Chicago Press), pp. 191-212. Fleischacker, although he claims to be dealing primarily with the "American" (see note 12 on p. 208 in Williams) literature on this topic, does not mention either Scheid or Byrd, both of whom have views opposed to his.

<sup>32</sup> Kant, *Metaphysics of Morals*, VI, 219.

It is obvious that external coercion cannot be effective in forcing us to adopt certain motives or ends of action; motives and goals, as inner states of mind, are beyond the reach of such external incentives. In contrast, the realm of the ethical includes all duties, though the internal ethical incentive must not be an element in external legislation. "All that ethics teaches is that if the incentive which juridical lawmaking connects with that duty, namely external constraint, were absent, the Idea of duty by itself would be sufficient as the incentive."<sup>33</sup>

(3) Not even all external duty is covered by *Recht*. Ethical lawgiving proper is that lawgiving that cannot be external, even when the duty involves external action, as for example in the case of duties of benevolence, with again the distinctive characteristic of ethical lawgiving being the character of the *incentive*.<sup>34</sup> Any duty, even a duty to external action, is a duty of ethics and not a juridical duty so long as the only appropriate incentive which governs the duty is an internal incentive.

(4) Another factor that interestingly limits the full reach of obligation, or at least the related concept of imputation is "the magnitude of the obstacles that had to be overcome."<sup>35</sup>:

The greater the natural obstacles (of sensibility) and the less the moral obstacles (of duty), so much the more merit is to be accounted for a *good deed*, as when, for example, at considerable self-sacrifice I rescue a complete stranger from great distress . . . Hence, the state of mind of the subject, whether he committed the deed in a state of agitation or with cool deliberation, makes a difference in imputation . . .<sup>36</sup>

These passages might seem surprising because, at least with respect to external freedom, they seem to show Kant headed towards a theory of degrees of responsibility, something that the doctrine of the categorical imperative in the *Grundlegung*, might have seemed to take to be excluded. Remember, this doctrine of the degrees of freedom is true only of external duty and obligation. So when we assess action in accord with criteria of phenomenal duty, Kant is not as dour a moralist as earlier he might have appeared to be, since he appears to allow for partially excusing conditions being created by strong counter incentives to juridically required actions. Thus the directive seems to be when considering phenomenal legal imputability, to take into account all motives of the same (phenomenal) sort. Kant's view appears then to be that when we are evaluating actions phe-

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<sup>33</sup> Ibid., VI, 220.

<sup>34</sup> Ibid., VI, 220-221. It might be urged that this limitation on the scope of the reach of law arises not from facts about the character of the legal incentive, but rather from limits on the correct scope of the related precepts, so that the appropriate incentive here simply follows the precept. But this seems not correct. The precept by itself only specifies what is to be done, eg., "Give assistance to those in need." The question of whether the precept is one of law or ethics just is a question not about the precept but about what incentive is appropriate.

<sup>35</sup> Ibid., VI, 228.

<sup>36</sup> Ibid.

nomenally, with reference to imputability, we should take into account the totality of sensible motives. Such a view is at least roughly in accord with moral and legal “common sense,” which allows for extenuating circumstances that reduce the level of responsibility. Such a conclusion also sits well with Kant’s essays in philosophy of history, which look at human conduct from a descriptive point of view rather out of keeping with the core moral philosophy. It may not sit so well with Kant’s espousal of the *lex talionis*, which, as a qualitative criterion for correct punishment, might not seem to allow for quantitative diminutions based on degrees of responsibility.<sup>37</sup>

(5) There is another part of Kant’s doctrine which indicates a limit to punishability created by the inability to provide an adequate incentive against a crime. This is the second of the cases Kant discusses in an appendix to the introduction to the *Rechtslehre*, on “Equivocal Rights.” The case is one where after a shipwreck I push another from a log not big enough for both of us, leaving him to drown, and enabling me to save myself. He has done me no wrong; objectively I am guilty of murder. This is what gets called “the right of necessity.”<sup>38</sup> Kant thinks there really is not a right of necessity, though no court would assess the death penalty to such a “murder.” The maximum penalty under law is death, and that is also the result of a failure to push the other person off the log, and the legal penalty is more uncertain than the natural result. So the law fails because in such a case the incentive fails; the situation is comparable in some respects to the defective motorcycle helmet law. In writing about Kant’s ethical philosophy I have used this passage to indicate that it is Kant’s view that moral responsibility presupposes the availability of an adequate incentive. This is perhaps the clearest textual indication that Kant is willing to trim the size of an obligation to fit the more limited pattern of available adequate motives, something he never needs to do when he is working with inner moral motivation.

## V.

Kant never discusses very much the content of external duty, what we would be required and forbidden to do, according to this principle of *Recht*. There is a good reason for this, given Kant’s general theory. The reason is that our primary moral obligation under *Recht* is, if we find ourselves in a state of nature, to leave it and enter civil society, in order to assure and guarantee the provisional rights we have in the state of nature. Once we have entered civil society the main content of external duty will be provided by positive law that is enforced by the state. So we might say, all there is to do in terms of juridical obligation is to

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<sup>37</sup> Jeremy Waldron, “Lex Talionis,” *Arizona Law Review*, Volume 34 (1992), pp. 25-51.

<sup>38</sup> Kant, *Metaphysics of Morals*, VI, 235.

obey the law. When we look at legal structures in many states, there are certain similarities, together with some significant variations. Such states have laws forbidding murder, rape, robbery, burglary, assault, theft, and such states have provisions for people suing one another when one wrongs another. Still, there are within the positive law of many states unfortunate departures from justice, and it is exactly at such points that the positive law is open to criticism. Women or racial minorities may not have full access to the courts, or rights equal to those of others. There is sometimes an hereditary nobility that has special privileges, an example of injustice that Kant actually cites.

This reminds us of the fact that Kant does have a natural law sort of view of the state and its laws, even though he seems to weaken this view because of another view he has about the complete and universal moral unacceptability of violent revolution, no matter how serious the abuses are. I accept the explanation for Kant's (mistaken) views on this issue that are offered by Thomas Pogge.<sup>39</sup> According to him Kant was unduly influenced by a mistaken view, which comes from Hobbes, about the absoluteness and completeness required of sovereignty. In this connection also we should recall that there are provisional rights in the state of nature, so that these rights are not conventions that are first created by the commonwealth.

## VI.

One thing that becomes apparent from this perspective: punishment for violations of the criminal law, and perhaps other state sanctions, emerge as being very important to Kant's political philosophy, absolutely central. Punishment in the realm of external freedom is the counterpart of the motive of duty in inner freedom; each are the motivational engines that make possible complete and proper *Gesetzgebung* in their respective areas of inner and outer freedom. We also now understand better, I hope, how Kant's political philosophy is a continuation of the moral ideas of his more familiar earlier works. We should be reminded by this account, as I've just mentioned, of the fact that Kant has a natural law view of social institutions: the actual institutions are to be compared to the ideal for adequacy and correctness, though a judgment that finds the actual institutions wanting does not undermine the authority of the actual institution, or our obligation loyally to obey it, in Kant's view.

The discussion of punishment, which is so central to the whole idea of outer freedom, is illustrative of Kant's way of proceeding. Here as elsewhere in the *Rechtslehre* he is laying out an ideal system for determining punishment. Actual systems will understandably depart from this ideal, and thereby be subject to justified moral criticism, using the very guidelines Kant presents.

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<sup>39</sup> See Thomas Pogge, "Kant's Theory of Justice," *Kantstudien*, 79, pp. 407-433, 1988.



We need to note that although punishment has a deterrence function, and hence there is an important teleological element to the whole theory, the distribution of punishment, i. e., the determination of the appropriate punishment for each crime, is based on non-teleological considerations (something that Kant particularly emphasizes in the appendix passage<sup>40</sup> having to do with the respect for the personhood of the individual being punished. It is for this reason that Kant insists that “The principle of punishment is a categorical imperative . . .”<sup>41</sup>

In this presentation of the *Rechtslehre* as being influenced throughout in its shape and character by the need to provide an incentive, we should find an indirect argument for the importance of the moral incentive in Kant’s thinking in the realm of inner freedom, self-constraint, and moral goodness. Kant is a motivational internalist in his moral philosophy through and through. Now, because the inner moral motivation has an a priori source, it is not at all subject to the empirical vagaries of the external incentives, which, as we saw above, in various ways serve to limit the scope of external duty. Such empirical, external incentives may fail empirically simply because a rape or a burglary may be undertaken with no one else around, and the criminal concludes, rightly or wrongly, that he will be able to escape punishment. Such contingent deterrence failures do not limit the scope of external duty, however. Kant’s view seems to be that we can *always* count on an inner moral motivation adequate to assure our ability to do our duty, and hence adequate to insure the imputability of any moral failure; this is the transcendental presupposition of freedom that is basic to Kant’s moral philosophy. The principle that Kant famously develops to express this idea is “Ought implies can,” which Kant does not use in the contrapositive, as is so often done in 20th century discussions of the same principle. Rather Kant uses it in its original form to assert his view that we can use our inner sense of what our moral obligations are to draw positive conclusions about how far our inner freedom as agents extends.<sup>42</sup>

The aim of this essay has been to give an exposition of what turn out to be parallel systems of moral law in the *Metaphysics of Morals*: inner freedom in ethics, and outer freedom in the juridical realm. In our discussion, we have mostly not been attending to the “precept” aspect of lawgiving, but rather to the second element of lawgiving, the incentive, and its implications. We have seen some of the parallels between the ethical and the juridical, and how Kant limits the scope of external obligation to fit the in-principle limits of the external incentive. The *Rechtslehre* is more than Kant on politics; it is a continuation of his system of moral philosophy as a theory of external, phenomenal freedom, a

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<sup>40</sup> Kant, *Metaphysics of Morals*, VI, 362-3.

<sup>41</sup> Ibid., VI, 331.

<sup>42</sup> See Ibid., VI, 380, for example; the principle is introduced in *Religion within the Limits of Reason Alone*.

continuation that in a number of ways parallels his views about moral philosophy as a theory of inner freedom.

### Zusammenfassung

Der erste Teil in Kants Werk *Die Metaphysik der Sitten*, die *Rechtslehre*, wird üblicherweise als eine politische Abhandlung diskutiert. Aber es gibt Parallelen zwischen Recht (der äußeren Freiheit) und Ethik (der inneren Freiheit) bei Kant. Gesetzgebung ist in beiden Bereichen eine Kombination von Gesetz und Triebfeder. In den Arbeiten, die das eigentliche Herzstück von Kants Tugendlehre behandeln, ist die Freiheit eine innere ethische Freiheit, die auf einer rein moralischen Triebfeder basiert, deren Angemessenheit und Zulänglichkeit eine transzendente Annahme dieses Teils von Kants Moralphilosophie ist. Die innere Freiheit hat jedoch eine Parallele in Kants Darstellung der äußeren Freiheit. Hier geht es um die Sicherung unserer äußeren Rechte, einschließlich des Rechts auf Eigentum, durch den Abschreckungseffekt einer Strafe für die Verletzung der Rechte Anderer. Wenn wir die *Rechtslehre* gerade als Teil von Kants praktischer Philosophie verstehen, dann stellen wir fest: (1) Kant geht davon aus, daß gültige juristische Normen stets ausreichende Triebfedern dafür enthalten, daß unser Handeln diesen Normen entspricht. (2) Der Bereich des Rechts, und damit auch der Zurechnung unter Rechtsgesetzen, wird auf unterschiedliche Weise von der Wirksamkeit äußerer Triebfedern zur Abschreckung begrenzt. Das gilt auch für Handlungen, die auf dem sogenannten „Notrecht“ beruhen. (3) Zwischen Kants Argumenten in der *Tugendlehre* für die Erweiterung des kategorischen Imperativs als eines Prinzips für den Gebrauch unserer Freiheit durch die Annahme, daß es Zwecke gibt, die zugleich Pflicht (Tugendpflichten) sind, und dem Argument in der *Rechtslehre* für die Notwendigkeit der Anerkennung von Eigentumsrechten bestehen signifikante Parallelen. (4) Kants Theorie der Strafe ist, obwohl vergeltungstheoretisch mit Blick auf die Frage der Angemessenheit einer Strafe, jedenfalls auch teleologisch / abschreckungstheoretisch konzipiert, nämlich insoweit, als die Androhung von Strafen Triebfedern für die Befolgung der positiven Rechtsgesetze bereitstellt.