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Applying the Categorical Imperative in Kant's Rechtslehre

Nelson Potter

During the last forty years there has been considerable discussion of the application of the categorical imperative to derive conclusions concerning particular moral duties and rights in Kant's moral philosophy. Much attention was focused on the four examples of such applications that occur in Chapter Two of the *Groundwork*, especially the first presentation of those examples, in relation to the "universal law" formulation of the categorical imperative, as opposed to their second run-through in the same chapter, in relation to the second formulation of the categorical imperative, on respect for persons. In more recent years the often fuller discussions of such applications that are found in the second half of Kant's late work *Metaphysics of Morals*, the part called *Doctrine of Virtue (Tugendlehre)*, have provided a useful supplement to those earlier discussions. For example, I think Kant is more successful in arguing that the act of suicide is contrary to morality in the *Tugendlehre* than in the *Groundwork*. As one might expect, a considerable variety of views have been presented: Some writers tried to defend Kant's applications, and others emphasized critique, and what were said to be systematic inadequacies.

In this ongoing discussion there is one sort of application of the categorical imperative that has still been neglected. That is the application of the version of the categorical imperative that is found in the *first* part of the *Metaphysics of Morals*, called the *Rechtslehre*, the *Doctrine of Right*. My aim in this essay is to give an introduction to the issues of applying the categorical imperative to derive conclusions concerning *Recht*.

The main applications in the *Rechtslehre* that can be discussed as examples of the application of the categorical imperative are (1) Kant's development of the idea of property rights, (2) his discussion of the idea of hereditary nobility, and (3) his discussion of punishment. These are the most explicit and detailed examples of such applications in the *Rechtslehre* (there are briefer mentions of such topics as slavery and the proclamation of church doctrine as infallible). In this paper, the focus will be on Kant's argument against a hereditary aristocracy, which argument will be examined in some detail to show how such applications are to go and to make it clear that the categorical imperative is to be applied in this area of external right as well as to internal ethical examples. The sample application concerning hereditary nobility, in addition to being discussed in the *Rechtslehre* is also discussed in an earlier

essay usually referred to as *Theory and Practice*. I will compare the formulations of the categorical imperative found in the *Groundwork* and those found in the *Rechtslehre*, as well as comparing applications in the two works.

Kant introduces in two different works his argument against a hereditary aristocracy, in both instances as a singular, free-standing argument, against the idea of a hereditary nobility. I quote at length:

Now the question is whether the sovereign is entitled to establish a nobility, insofar as it is an estate intermediate between himself and the rest of the citizens that *can be inherited*. What this question comes down to is not whether it would be prudent for a sovereign to do this, with a view to his own or the people's advantage, but only whether it would be in accord with the rights of the people for it to have an estate of persons above it who, while themselves subjects, are still *born rulers* (or at least privileged) with respect to the people. The answer to this question comes from the same principle as the reply to the preceding one: "What a people (the entire mass of the subjects) cannot decide with regard to itself and its fellows, the sovereign can also not decide with regard to it." Now an *hereditary nobility* is a rank that precedes merit and also provides no basis to hope for merit, and is thus a thought-entity without any reality. . . [Merit is not inherited.] . . . Since we cannot admit that any human being would throw away his freedom, it is impossible for the general will of the people to assent to such a groundless prerogative, and therefore for the sovereign to validate it.¹

In *Theory and Practice* Kant writes:

It is instead *only an ideal of reason*, which, however, has its undoubted practical reality, namely to bind every legislator to give his laws in such a way that they *could* have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will. For this is the touchstone of any public law's conformity with right. In other words, if a public law is so constituted that a whole people *could not possibly* give its consent to it (as, e.g., that a certain class of *subjects* should have the hereditary privilege of *ruling rank*), it is unjust; but if it is *only possible* that a people could agree to it, it is a duty to consider the law just, even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse its consent.²

Kant then in a footnote gives the case of a war tax, which the people might judge to be unnecessary. But there is no necessity or certainty that this would be their judgment; since it is "*possible* that the war is unavoidable and the tax indispensable, the tax must hold in a subject's judgment as in conformity with right." But if

¹ MS, VI, 329. References to Kant's works will use an abbreviated form. First will come an abbreviation for the name of the work: MS is *Metaphysics of Morals* (1797). G is *Groundwork of the Metaphysics of Morals* (1785). TP is "On the common saying: That may be correct in theory, but it is of no use in practice." (1793), also referred to more briefly as *Theory and Practice*. References are to the volume and page of the passage in the Berlin Academy Edition. These numbers are included in the margins of most translations. The translations used are from Immanuel Kant, *Practical Philosophy*, translated and edited by Mary J. Gregor, Cambridge: Cambridge University Press, 1996.

² TP, VIII, 297.

the tax were distributed so that certain landowners were burdened and others exempted, "... it is easily seen that a whole people could not agree to a law of this kind, and it is authorized at least to make representations against it, since it cannot take this unequal distribution of burdens to be just."³

Kant's discussion continues in the next paragraph, distinguishing between the rights of the people (for equality) and the desire of the people for happiness, which is not relevant to moral issues. The basic rights are those of liberty. He sums up, "For provided it is not self-contradictory that an entire people should agree to such a law, however bitter they might find it, the law is in conformity with right."⁴ Finally, he goes on to argue against the right of revolution, concluding with a distinction: "... the people too has its inalienable rights against the head of state, although these cannot be coercive rights."⁵ And sums things up with this phrase: "*What a people cannot decree for itself, a legislator also cannot decree for a people.*"⁶ The distinction here, which we will discuss further below, is one between a choice which would be a priori impossible, and a choice which merely reflects an (empirical) preference.

Let us discuss some of the characteristics of this application of the categorical imperative in the realm of *Recht*. The character of an hereditary nobility is that it is an infringement on the equal freedom of those who are not members of this class prior to any action by anyone, which would be a source of merit or demerit. So the thought is that for example a citizen who is a commoner must have agreed in advance (as it were, from a Rawlsian original position) to have less freedom than certain others, where this distinction has no basis in merit, and is prior to any action on anyone's part. There could be no reason at such a point for anyone to accept anything less than equal freedom, or for anyone else to give me more freedom than she has. This rule would presumably apply to all preexisting privileges. But property rights are acquired rights, and as such would follow rather than precede acts of the agent (with the possible exception of inherited wealth). So inequalities of property can be perfectly acceptable since they may reflect the wise and unwise choices of the agents, and this includes inheritance.

One theme in this discussion is the distinction between prudence and right. Matters of prudence are matters relating to happiness and welfare, and prosperity or its lack. Matters of right are those relating to the quite different factors of morality and the rights of persons. Kant in the discussion of hereditary aristocracy is concerned with the latter.

There is a seemingly related distinction⁷ between matters which the people "could not possibly" give their consent to, and those matters which they might not

³ TP, VIII, 297n.

⁴ TP, VIII, 299.

⁵ TP, VIII, 303.

⁶ TP, VIII, 304.

⁷ See Kant's footnote, TP, VIII, 297n.

choose to consent to, but which it would be possible for them to consent to. Now the word "possibly" suggests modality, and hence the *a priori*. What the people would actually consent to or not would be a merely empirical issue, and hence a question not relevant to the present *moral* question. Kant's example is a war tax, which the people might feel would weigh too heavily on citizens and which they would choose to oppose, on the ground that the war was not needed. Here there is, one suspects, no question of justice in Kant's view but merely a question of preference. A question of justice would be raised by a law which taxed some citizens of a similar status differently from others of the same status. The nature of the distinction is not given in Kant's example, and one would wish to know what would be a good example here: taxing redheads differently from blondes, residents of Danzig differently from residents of Riga?

Now Kant is of course writing prior to the nineteenth century development of the notions of diminishing marginal utility, and the Marxian conceptions the injustice of class distinctions, and hence treating the bourgeoisie differently from the working class. So it becomes difficult and seemingly unhistorical to ask questions about Kantian justice in relation to such ideas. The graduated income tax is based, it seems, on the idea that those who are wealthier can afford to pay taxes at a higher rate on the dollar than those of lower income. The idea of diminishing marginal utility might be invoked here to urge that the sacrifice required by deprivation through taxation would be just only if it recognized the principle of diminishing marginal utility. One possibly Kantian alternative would be a flat tax, with all of one's income taxed at the same flat rate, rather than at a rate that increases with higher income. And a third alternative, a denial of the idea of an income tax, would be the idea that a Kantian would have to opt for equality of taxes of the sort found in the head tax: everyone paying the same amount regardless of income. Can there be any traction found for preferring one basis for allocating tax burdens to another based on Kantian principles of justice?

Kant's discussion does not answer this question. It rather seems that he is thinking of the citizens weighing the benefits of a war against the burdens of the taxation it would require, and thinking that that comparative weighing of burdens is merely an empirical procedure or matter of preference, rather than a moral issue of injustice. And perhaps more broadly, we could say that for Kant heavy taxes, if not unfairly distributed, could not be unjust, or violative of anyone's rights, or even raise moral questions.

We might think there is an analogous distinction involved in allowing laws to be valid that do not violate a written constitution (as in the United States). Perhaps the people's elected representatives may enact foolish or misguided measures, or they may fail to respond adequately to difficult conditions. But then they would be voted out of office at the next election, as was Herbert Hoover in 1932. On the other hand, if a law violates the constitution, then it can be struck down (under the U. S. Constitution, by the judiciary) as going beyond the proper power of government to act.

Now Kant never says anything about elections, and certainly Frederick the Great was not elected to office. In this context Kant's claim that the people must accept a war tax that most would wish to reject, because they might be mistaken in their judgment, and that the only kind of law or institution that would violate rights would be one that was an a priori violation of the sort found in an institution of hereditary aristocracy, might seem to allow very little power to the people even to define their rights, or to have any basis for deciding questions of policy. Furthermore, Kant insists that the people do have rights against the sovereign, but that these rights are non-coercive rights.⁸ But we cannot pursue this complicated issue here. If the citizens have no right to object to heavy taxes levied to carry out a war, then what kind of rights could they present as a basis for participating in state policy decisions? Their rights might seem to be extremely limited, and an authoritarian government like that in Prussia during Kant's life might be, so it would seem, completely unobjectionable on grounds of Kantian political philosophy. And then Kant would be much less the Rousseauian radical republican and defender of equality that he has seemed to be.

Alternatively, Kant's distinction between the a priori issues of justice and the empirical considerations of preference, might be considered to be analogous to the distinction Ronald Dworkin makes in his philosophy of law between issues of rights (or principles) and policy.⁹ Judges are primarily concerned with matters of rights and injustice, and not nearly so much with mere questions of which policy of government action is to be preferred. The latter are political questions, which admit of bargaining and compromise, and may revolve around empirical questions such as (to give a current example, quite foreign to Kant) how best to use tax policy to stimulate economic development. In this vein, cigarettes and liquor may be taxed heavily as socially undesirable vices, while food may remain without sales tax because it is a necessity of life, or imported products may be more heavily taxed than the same products produced domestically in order to stimulate the domestic economy. Such decisions would be merely policy decisions, not involving matters of justice or injustice. Kant says (MS, VI, 318), "By the well-being of a state is understood, instead, that condition which reason, *by a categorical imperative*, makes it obligatory to strive after."¹⁰

Another feature of the votes of the will of the people in this case is that they would be required to be unanimous. What is the significance of this requirement? First, notice that it involves once again an echo of the idea of the a priori, for the marks of the a priori, as Kant tells us in the first *Critique*, are necessity (already mentioned), and universality. Empirically we can have at best an accidental uni-

⁸ TP, VIII, 303.

⁹ Ronald Dworkin, *Taking Rights Seriously*, Cambridge: Harvard University Press, 1977. See pp. 22–28.

¹⁰ MS, VI, 318. This quotation is also an example of Kant talking about the "categorical imperative" in the context of *Recht*. See below.

versality, as would occur if all the coins in my pocket happened to be quarters. Secondly, notice that Rawls also expects that votes in the original position will be unanimous¹¹. This is a mark of the fact that those voting in the original position are behind the veil of ignorance, or, to put the same point in a different way, that such votes are made in abstraction from most of the features of voters in virtue of which they would be able to vote their self-interest, e.g., in voting concerning proposals that would benefit women rather than men, old rather than young, rich rather than poor, athletically or intellectually gifted rather than those lacking such gifts, the religious versus the nonreligious, city as opposed to rural residents, and on and on and on. So in both Rawls and Kant we may say that such votes abstract from a considerable range of empirical characteristics of the voters, and it is this abstraction that leads to unanimity. And in the case of both philosophers also, this abstraction marks the distinction between considerations of justice and rights, which require an at least relatively a priori (abstracted) point of view, and considerations of policy, concerning how best to achieve certain benefits for certain groups. (E.g., lower the capital gains tax? Provide an income tax deduction for mortgage interest?).

Notice that this example of hereditary nobility, which was certainly a live question of political philosophy in the time and place where Kant wrote, is hardly so in the United States or Europe of the late 20th century. In this connection, Kant explicitly assumes the acceptability of inherited wealth, even though such inheritance or its lack in the lives of different individuals might be equally independent of personal merit, just as is hereditary nobility. Perhaps this is an inconsistency on Kant's part. Also notice that Rawls has generalized this Kantian idea of inheritance that is unrelated to personal merit and accomplishment by his discussion of the "natural lottery" and the advantages and disadvantages that it distributes or withholds: health, intelligence, beauty, athletic ability, artistic talent, etc.

The reason why Kant tells us an hereditary nobility would not be universally agreed to is because anyone excluded from it could never be supposed willing to "throw away his freedom". It is therefore a "groundless prerogative" (but so is innate intelligence, health, physical beauty, perhaps inherited wealth). Hence such an idea "could [not] have arisen from the united will of a whole people," and "a whole people *could not possibly* give its consent to it."¹² Those denied such a special privilege could have no reason to vote for it, for the reason that they would thereby deny themselves privileges which they would have no opportunity to achieve themselves, and there is (could be) no reason for them to do such a thing. And Kant insists that such a result is a matter of necessity, not a merely empirical result, since merely empirical results would pertain merely to the happiness of the subjects, rather than to their rights. Compare the voters in Rawls' original position, where individuals behind a veil of ignorance (which is itself at least a major partial exclu-

¹¹ *John Rawls*, *A Theory of Justice*, Cambridge: Harvard University Press, 1972.

¹² TP, VIII, 297.

sion of the empirical) would vote (always, according to Rawls, unanimously, because there would be no basis in personal knowledge for one voter to choose differently from another), and would not vote for matters that would adversely affect their own interest. Now the interest, arguably, in Kant, is freedom, which commoners in the case of a hereditary aristocracy, would have less of.

Now let us compare this *Recht*-based discussion of hereditary nobility with Kant's famous argument in the second example in the *Groundwork* against making a lying promise. In order to obtain money one needs. To determine whether such an action is right,

I therefore turn the demand of self-love into a universal law and put the question as follows: how would it be if my maxim became a universal law? I then see at once that it could never hold as a universal law of nature and be consistent with itself, but must necessarily contradict itself. For, the universality of a law that everyone, when he believes himself to be in need, could promise whatever he pleases with the intention of not keeping it would make the promise and the end one might have in it itself impossible, since no one would believe what was promised him but would laugh at all such expressions as vain pretenses.¹³

The main difference between these two cases, I think, revolves around the Kantian concept of the "lawgiver" (*Gesetzgeber*).¹⁴ "One who commands (*imperans*) through a law is the lawgiver (*legislator*)."¹⁵ Lawgiving, Kant tells us in the *Metaphysics of Morals* has two elements: first, the law itself, which presents a certain kind of action as objectively necessary, and secondly an incentive, which in the case of *Recht* would be the desire to avoid punishment by the state for wrongdoing, and in the case of Ethics would be an incentive of inner commitment to morality. In the example of hereditary nobility, a case from *Recht*, the lawgiver is the sovereign, and the sovereign is identified with those voting to establish the general will, somewhat like the members of the kingdom of ends in the *Groundwork*. These are persons abstractly conceived, and the "touchstone"¹⁶ for testing the moral acceptability of existing or proposed laws is how such persons would vote. Now clearly the kingdom of ends is not to be identified with any actual legislature; it is an abstract, ideal entity, „only an ideal of reason“¹⁷ These voting persons are imagined to be voting their basic self-interest (in some broad sense), for the hereditary nobility proposal fails to attain a unanimous vote because it would involve the voting commoners "throwing away [their] freedom"¹⁸ And we can see this just from abstractly considering the proposal, rather than from any empirical weighing of benefits against burdens (the sort of considerations involved in policy decisions). It seems in these discussions that Kant considers the value of freedom as a priori, in

¹³ G, V, 422.

¹⁴ See MS, VI, 218 f.

¹⁵ MS, VI, 227.

¹⁶ TP, VIII, 297.

¹⁷ Ibid.

¹⁸ MS, VI, 329.

contrast to the values having to do with welfare and happiness that are parts of considerations of prudence. But we can still, at least in some broad sense, say that these voting persons are voting their self-interest. The elements of self-interest that are more central here are those involving political rights and freedom – e.g., the right to vote, to attain office, to have one’s property rights and rights to be free from personal harm protected – rather than welfare rights (there is an analogous distinction in Rawls). My point in speaking of voting self-interest here is to say that these votes are not themselves the results of moral decisions; rather such votes collectively are constitutive of right and justice.

Now, if one were, let us suppose, a king or an elected member of congress (a law making body), then one should according to Kant use this ideal of reason, of how these votes should go, to guide one’s votes or decisions to establish laws. For example, one should not vote to establish a hereditary aristocracy, and one should vote to establish (retributively) appropriate punishments for crimes, and should not vote for unjust systems of taxation (though as we have seen above, just how we determine such are difficult to make out from what Kant tells us). Of course, these votes are morally informed; they presuppose moral judgments about certain social arrangements violating and others upholding people’s rights. But those moral judgments themselves presuppose nonmoral judgments about how certain social arrangements would protect or fail to protect the freedom (self-interest, in a certain sense) of people falling under such laws. Analogously, Rawls insists that votes taken in the original position do not presuppose any moral principles, and are rather based on calculations of self-interest; the results of such votes (which votes can be deduced from general facts about human society, and agents) are constitutive of the basic principles of right or justice.

In contrast to such deliberations concerning *Recht*, in ethical issues, as the above quotation from Kant’s famous lying promise discussion shows, the deliberation is taking place within the mind of a single person. The deliberation involves a thought experiment: What would happen if everyone made lying promises to get what he wants? The conclusion is that in such a (contrary to fact) situation no one would be able to achieve his end of receiving needed funds through the means of making a promise to repay it. This would be because if making lying promises were a universal practice, people would soon learn not to trust or rely on them. This then, further, entails that if I, as an individual moral agent, making such a lying promise, am taking unto myself an advantage I cannot possibly give to every-one else, i.e., an unjustified, because morally arbitrary and unfair advantage, then the action in question is wrong.¹⁹ Making such a lying promise would thus be contrary to morality, and the discussion is a specifically ethical discussion because the conclusion is that the agent who has gone through this process of deliberation has an (inner) duty to constrain himself from performing any such wrongful action.

¹⁹ For more detailed discussion of this example, see my “How to Apply the Categorical Imperative,” *Philosophia* 5 (1975), pp. 395–416.

The issues in the case of a proposed hereditary aristocracy and making a lying promise are the same: each involves unjustified, arbitrary, special privileges for some at the expense of others. This is the essence of Kantian morality, whether it deals with Law or Ethics, outer or inner duty, the incentive of avoiding punishment or the incentive of inner self-constraint that is essential to the ethical. The deliberators in the *Recht* case are considering proposed laws and arrangements of society – for taxation, for punishment of antisocial actions, for arranging distributions of status and power, etc. And the deliberators in the lying promise case and other such cases are thinking through a personal moral decision. But after these differences are taken account of, the similarities of the arguments are also quite great. And the moral principle at work in both sorts of cases is quite similar: a principle prohibiting arbitrary special privilege, taking unto oneself advantages that cannot be equally shared, etc. The deliberators in each case are lawgivers, as I've said, and in each case the lawgiver consults his own reason. The law that is given in the lying promise case is an inner ethical law that would require the agent to constrain his actions through inner motives and making of choices so as not to act contrary to it. The law that is the product of deliberation in the hereditary aristocracy case would guide legislators (whether a single monarch or a representative member of a legislature, or a member of a democratic assembly) so that they did not establish an inherited aristocracy, and would advise them to move away from and reform such already existing arrangements. Thus the thought-product of a priori moral reasoning provides norms that would be useful for guiding changes and reforms in existing social structures. The final product of lawgiving in this instance would be legal structures (hence social structures, external to the individual agent) that conformed with moral requirements. Since the lawgiving is external, the lawgiver is the legislator, who determines the subject's choice "by the will of another."²⁰ The laws actually enacted into law by the sovereign constitute positive law, and the ideal or correct laws, that are in accord with moral law, are natural laws.²¹

Now let us turn our attention to the somewhat different formulations of the categorical imperative in the *Groundwork* and in the *Rechtslehre*. Kant states the "universal principle of right" in the *Rechtslehre*²² as follows:

"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."²³

In contrast when first stated as the sole single categorical imperative, in the *Groundwork*, the principle reads as follows: "act only in accordance with that maxim through which you can at the same time will that it should become a universal law."²⁴

²⁰ MS, VI, 218.

²¹ MS, VI, 224.

²² MS, VI 230.

²³ *Ibid*, Quotation marks in the original.

The reference here to “maxim” has been much discussed. The significance of its mention is as follows: Maxims are inner statements of policies of action (together with the end to be gained by such actions, and the motives moving us to perform such actions from such ends (see my article on maxims) that the agent has adopted (or is considering adopting). Thus the kind of constraint on action that is under discussion here is inner self-constraint, rather than constraints imposed externally by threats of punishment, for example. The principle of the *Rechtslehre* therefore should not mention maxims, and yet it does. However, Kant immediately explains that such a principle of *Recht* cannot require that we act upon a particular maxim. The content of one’s maxims is the subject of the inner side of morality, ethics.²⁵

Kant adds that this principle of right is limited to external actions only. But he adds, the idea of *Recht* does not expect that we should follow such rules for their own sake: “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.”²⁶ When we are setting forth what is merely right, “one need not and should not represent that law of right as itself the incentive of action.” Thus in spite of the mention of “maxims” in its statement, the present statement of *Recht* is clearly distinguished from the more familiar categorical imperative as found in the *Groundwork*. In fact Kant immediately goes on to connect this principle of right with an authorization to use coercion, i.e., external force.

Both formulations under discussion here mention the same key phrase “universal law.” This marks them as different versions of the same principle, the moral law or categorical imperative. Now since the principle of right is limited to those cases where the use of external force may be undertaken, this limits the scope of this principle, and thereby marks off a separate subject matter for the doctrine of virtue, which precisely deals with such inner motivations and demands of morality. Thus the principle of *Recht* would cover required payment of taxes, and abstaining from murder, assault, and theft, but it would not cover the duty of giving to charity or the duty to abstain from being servile.

There is a considerable literature on the connections between the different formulations of the categorical imperative in the *Groundwork*, and in particular on Kant’s claim that the formulations are equivalent. Within this literature there are some major scholars who claim that Kant does better with what is called the second formulation, having to do with respect for persons, and persons as ends in themselves (Thomas Hill, Allen Wood), and this is a position I have considerable sympathy for. However, at this point in the *Rechtslehre*, Kant gives us only a version of the “universal law” formulation, usually called the first formulation (it has two versions in the *Groundwork*, “universal law” and “universal law of nature.”). This may suggest a kind of primacy for the first formulation, or it at least tempts

²⁴ G, IV, 421, italics in the original.

²⁵ See MS, VI, 231.

²⁶ *Ibid.*

us to inquire why no other formulations are mentioned. This is a major question that cannot be answered within the scope of the present paper, but here are a few suggestions: (1) The second formulation mentions ends, which are internal rather than external. And perhaps the concept of respect in "respect for persons" should also be taken as inner. Hence such conceptions would have no role in the *Rechtslehre*. On the other hand, it seems obvious that respect for persons could be given a partial but significant spelling out in terms of respecting the *rights* of others. (2) It might be said that in the criterion of universal acceptability that we saw being presented in the discussion of hereditary aristocracy, there is an implicit reference to something like a kingdom of ends, and to the idea that each and every one of these individuals whose "votes" must be counted is thus an individual whose rights are to be respected. When the kingdom of ends formulation is introduced in the *Groundwork*, it is said to *combine* the two previous formulations, those mentioning universal law and persons as ends in themselves. So if the kingdom of ends formulation is implicit in the discussion of hereditary aristocracy, so is the persons as ends in themselves formulation.

This completes our discussion of the application of the categorical imperative to rule out the arrangement of an hereditary aristocracy. We have examined this application to attempt to discern in some detail how it works, and how it compares to (at least one of) the application arguments of the *Groundwork*. One point which might be made now, and has not been previously mentioned is the following; it might have been thought that the *Rechtslehre* contained *no* applications of the categorical imperative, and that there was therefore a sort of disconnect between the *Rechtslehre* and the *Groundwork*, and perhaps also between it and the *Tugendlehre*. But I would claim that this example that has been under discussion shows pretty clearly that there is a unity to Kant's moral philosophy, a unity that is provided by the concept of the categorical imperative, and that extends to the *Rechtslehre*. I will bolster this claim with a few introductory comments on other applications of the categorical imperative from the *Rechtslehre* below.

For the present, let me just note one terminological qualification in the way I've been speaking of the categorical imperative throughout this paper: perhaps when we talk about the unity of Kant's moral philosophy as built around a single moral principle, we should not talk about the "categorical imperative" but use some broader term such as "the moral law" because both words in "categorical imperative" have reference to the inner motivational aspects of morality that are at the center of Kant's attention in the *Groundwork*. An imperative is said to be "an objective principle, insofar as it is necessitating for a will" and necessitation is said to express a relation between such an objective principle and a will such that the will may fail to act in accord with it.²⁷ And moral imperatives are categorical because they lack the provision of a sensuous incentive that is central to the idea of a hypothetical imperative; they are thus unconditional, for they cite no extrinsic moti-

²⁷ G. IV, 413.

vation that moves the agent to act. This sets Kant on his search for the unconditional internalist or intrinsic motivation that is characteristic of action from duty. And none of this is directly relevant to discussions in the *Rechtslehre*, where the assumption is that motivation to obey the relevant laws will be provided by external coercion, and often specifically fear of punishment. I say “directly” because it seems reasonable to think that those subject to punishment must be presupposed to be capable of free action, so that Kant’s metaphysical theory of human moral freedom is arguably in the background of even the *Rechtslehre*.

Now there are various other application-topics that are discussed in the *Rechtslehre*, and that should be discussed before we had completed a discussion of the application of the Kantian moral law in that work: slavery, and even his critique of a decree that would say that certain forms of faith and forms of external religion, once adopted, are to remain forever.²⁸ But the two applications I will discuss in a brief and sketchy way below are punishment and property rights.

(1) Kant says in what is perhaps an unguarded and unusually explicit moment that “The law of punishment is a categorical imperative. . .”²⁹, which seems to be saying that the Kantian theory of punishment that then follows is an application of the categorical imperative. Kant’s theory, as is well known, is a retributive theory, a version of the *lex talionis*, which requires the equality of crime and punishment, and, additionally, at least where possible, a qualitative similarity of crime and punishment, most notably and famously in the infliction of capital punishment upon murderers. There are various rationales suggested for this proposed standard. One is that it is the only standard that gives a fixed, non-arbitrary result. Another is that the justice of punishments determined by this standard is transparent to the wrongdoer, who thus should understand the appropriateness of this punitive response. There is a certain focus in Kant’s discussion of punishment³⁰ on convincing the person who is punished of the appropriateness of this response. Kant actually undertakes to discuss this point in his response to Beccaria³¹, in opposition to whom Kant insists that the person punished cannot possibly consent to be punished. The basic principle of punishment, Kant also tells us, is one of “equality”³²; the idea seems to be that the punishment restores equality from a situation of inequality and hence injustice that was introduced by the criminal act itself. Here as elsewhere there is a strong contrast drawn between the a priori character of Kant’s retributivism compared with the empirical character of “eudaimonism”³³ (MS, VI, 331) and the Beccaria view of punishment. It is almost, here and elsewhere, as if the

²⁸ TP, VIII, 305. We should add *Theory and Practice* to the *Rechtslehre*, for it contains this interesting example, as well as a discussion of hereditary aristocracy.

²⁹ MS, VI, 331.

³⁰ MS, VI, 331 ff.

³¹ MS, VI, 335.

³² MS, VI, 332.

³³ MS, VI, 331.

distinction between deontology and teleology itself exactly corresponds in Kant's mind with the distinction between the a priori and the empirical.³⁴

(2) The goal of the system of laws in the state is to protect the rights of citizens, and in particular their property rights. The discussion of the Kantian rationale for property is an entire large and complicated topic in itself, which will not be undertaken here. Let us just say that the point of Kant's rationale for the right of noumenal (legal or moral) possession is that it be such that all could agree to it. The will of the people are united. There is no unilateralism allowed. That was the basic problem with Locke's theory of property, which Locke, in an imperfect way, attempted to deal with with his "proviso," presented as a limit upon unilateral original acquisition of property. Hence for Kant property rights remain provisional in the state of nature, and the very idea of the state is the idea of a universal agreement and acceptance of a given division of property as appropriate. Little is said either by way of justification or critique of actual (empirical?) inequalities of wealth and property. But justice in the distribution of property, possessed in the legal sense of a moral/legal right, presupposes the possibility of universal agreement of all citizens in that system.

Now in this case of the Kantian general will (there are obvious echoes of Rousseau here), we are, as Kant himself insists, thinking of the general will as an ideal of reason rather than as an historical occurrence, and stripped of most empirical specificity. So votes will not be influenced by jealousies, loves, hates, private tastes, or other private individual preferences, or by people joining in coalitions, or making compromises after the fashion familiar from collective bargaining. And, for example, tax or welfare schemes will not be accepted or rejected (within this standpoint of a concern for justice) because of their efficiency or inefficiency. Kant's rejection of hereditary nobility might be thought to be in embryo the Rawlsian insistence, as part of his principles of justice, that offices are open to all, through some fair selection process. Again, in contrast, particular policies – going to war with Iraq, eliminating the tax on dividends – are within the proper power of the state, and must be accepted if legally enacted. The difference is that the Kantian "constitution" is an idea of reason that does not make specific (empirical) requirements, for example, as the U. S. Constitution does (the president must be at least 35 years old, members of congress are elected for two year terms, there will be a census every ten years, members of the federal judiciary shall be appointed for life terms by the president and confirmed by the Senate).

As mentioned above, perhaps the very reason that Kant is a deontologist and a rejecter of consequentialism is because in his view this reflects his distinction between the empirical and the a priori. No empirical requirement could be deontological, nor could it have the modal character of all moral requirements. So then

³⁴ For a further discussion by the author on Kant's theory of Punishment, see "The Principle of Punishment Is a Categorical Imperative," pp. 169–190 in *Autonomy and Community*, edited by Jane Kneller and Sidney Axinn, Albany: State University of New York Press, 1998.

there are echoes of Kantian a priorism in Rawls, whose theory of justice is deontological, and whose state also admits of a variety of economic and practical arrangements within the framework of justice. The main difference is perhaps that it is explicit that offices are to be open to all in Rawls, and this is not explicit in Kant, as it could hardly be, given Kant's position as a government employee in an authoritarian state with a hereditary monarchy. The rights of office (the right to run for and achieve office) is another large separate topic in Kant, one to be explored another time. But if we assume some selection process for state offices involving participation by citizens in Kant, then there may not be much difference between Kant and Rawls.

In conclusion, it should be clear that the whole idea of the application of the supreme principle of morality, the categorical imperative, extends far beyond the ethical examples from the *Groundwork* that are so familiar to us, and that in particular they extend in Kant's view to the institutional structure and the system of laws of the state.

Zusammenfassung

Kant hat sein „höchstes Prinzip der Moral“, das er „kategorischer Imperativ“ nennt, mehrfach auf konkrete Fälle angewendet, um zu Schlussfolgerungen hinsichtlich spezieller moralischer Pflichten zu gelangen, z. B. in Bezug auf ein Suizidverbot, ein Verbot lügenhafter Versprechungen oder ein allgemeines Hilfeleistungsgesetz. Es gibt aber eine Reihe von Anwendungen des kategorischen Imperativs im ersten Teil von Kants *Metaphysik der Sitten* (1797), also in der *Rechtslehre*, denen bisher nur wenig Aufmerksamkeit geschenkt wurde. In der *Rechtslehre* befasst sich Kant mit staatlichen strafbewehrten Gesetzen, die der Sicherung der Rechte des Bürgers dienen sollen. Dies führt zu einem etwas anderen Anwendungsverfahren als bei seinen bekannten Beispielen in der vorangehenden *Grundlegung zur Metaphysik der Sitten* (1785), die sich mit dem internen Entscheidungsprozess und der Selbst-Bindung moralischer Motivation befassen. Der vorliegende Beitrag untersucht die Einzelheiten derjenigen Argumentation Kants (sowohl in der *Rechtslehre* als auch in der Schrift über *Theorie und Praxis*), die zeigen soll, dass eine erbliche Aristokratie unzulässig ist, und vergleicht diese Argumentation mit der gegen das lügenhafte Versprechen in der *Grundlegung*. Dabei zeigen sich deutliche Gemeinsamkeiten, aber auch Unterschiede, und es gibt bezeichnende Verbindungen zu den Thesen von John Rawls in dessen *Theorie der Gerechtigkeit* (1971). Kürzer gefasst ist die Auseinandersetzung mit Kants Argumenten in der *Rechtslehre* zum Strafrecht und zum Eigentumsrecht. Die gesamte Erörterung wird verstanden als eine Einführung in die Probleme, die sich bei der Anwendung des kategorischen Imperativs ergeben, wenn diese zu äußeren staatlichen Gesetzen führt und nicht zu internen moralisch motivierten Entscheidungen. Weiterhin geht es darum, wann Personen abstrakt gesehen im Vorhinein ihre Zustimmung zu bestimmten Gesetzen geben könnten. Bekanntlich bezieht Kant hier-

auf seine zentrale Unterscheidung zwischen (1) a priori Überlegungen, die etwas mit der Handlungsfreiheit zu tun haben und zu einer moralischen Entscheidung im Hinblick auf die Rechte des Bürgers führen, und (2) empirischen Überlegungen, die etwas mit der Glückseligkeit zu tun haben und die sich nicht zu Schlussfolgerungen im Hinblick auf Bürgerrechte eignen.