

*Washington and Lee University*

# The Mudd Journal of Ethics

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Volume 1

Spring 2016



MUDD CENTER  
*for* ETHICS

Cover art drawn by Mary Corcoran.

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## **About the Roger Mudd Center for Ethics**

The Roger Mudd Center for Ethics was established in 2010 through a gift to the University from award-winning journalist Roger Mudd. When he made his gift, Mudd said that “given the state of ethics in our current culture, this seems a fitting time to endow a center for the study of ethics, and my university is its fitting home.”

Today, the Mudd Center furthers that study of ethics by organizing rigorous, interdisciplinary programming. In addition to welcoming distinguished lecturers throughout the year to speak on ethical issues, the Mudd Center also sponsors and organizes ethics-based conferences, professional ethics institutes, and other public events that further discussion and thought about ethics among students, faculty, and staff at Washington and Lee and beyond.

## **About Roger Mudd**

Roger Mudd graduated from Washington and Lee University with a degree in History in 1950. Mudd’s distinguished career in television journalism includes positions at CBS, NBC, PBS, and the History Channel. He has won five Emmy Awards, two George Foster Peabody Awards, and the Joan S. Barone Award for Distinguished Washington Reporting. Mudd serves on the board of the Virginia Foundation for Independent Colleges (VFIC) and helped establish the VFIC Ethics Bowl, an annual competition in which teams from Virginia’s private colleges and universities debate ethical issues. He is also a member of the advisory committee for Washington and Lee’s department of Journalism and Mass Communications, and is an honored benefactor of Washington and Lee.

## Letter from the Editor

On March 5th and 6th, 2016, eight undergraduate students arrived at Washington and Lee University to deliver papers addressing a wide variety of issues in ethics. Their topics ranged from virtuous economic practices, to interpretations of Immanuel Kant's categorical imperative, to the American criminal justice system. Each student presented his or her work with a passion and enthusiasm that generated fruitful and lively discussion about important issues in ethics.

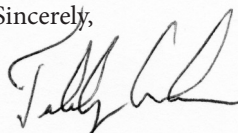
The inaugural publication of *The Mudd Journal of Ethics* is an attempt to commemorate, celebrate, and expand upon those presentations. Indeed, it is our most sincere hope that an academic journal that recognizes the fine work of those students will generate further dialogue and appreciation of the ethical concerns they address.

At its essence, this journal is a product of several outstanding individual and group contributions. First of all, we owe an enormous amount of gratitude to Roger Mudd, who had the vision to create a Center for Ethics that supports ethical inquiry and dialogue of this sort. Many thanks are also due to Dr. Daniel Wubah and Provost Marc Conner, whose advice and enthusiasm have been immensely encouraging while creating this publication. We would also like to thank Denise Watts, Cindy Lawson and the staff at the Publications Office at Washington and Lee, as they have played an essential role in helping us to realize our ideas and to create a journal that we are truly proud of. I would be remiss not to thank the fantastic Mudd Journal editors, who have been invaluable in carefully selecting papers, providing important feedback, and making final edits. Finally, if there is one person who has been most central to this journal's creation, it is undoubtedly Professor Angela Smith, the Director of The Roger Mudd Center for Ethics. From her support of the journal as director, to her well-known warmth and enthusiasm, to her careful and thoughtful feedback each step of the way, she cannot be thanked enough for helping this publication come to fruition.

This journal is truly national in scope. With nine essays in total, it features the work of undergraduates from nine colleges located in seven different states, ranging from near-by Virginia and Tennessee to far away California, Washington, and Minnesota. The papers are laid out in alphabetical order, and are followed by an additional essay that was not presented at the conference, but that was accepted for publication by the editors.

With all of that said, it is my distinct hope that you will have the chance to read through each of these essays and to get a sense of the excellent ethics-based scholarship that is being produced by undergraduates around the country. I daresay a thorough reading will engender a sense of admiration and appreciation for these nine very talented students. It certainly did for me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Teddy Corcoran', written over a light blue horizontal line.

Teddy Corcoran '16, *Founder, Editor-In-Chief*



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# A CONSEQUENTIALIST RESPONSE TO THE DEMANDINGNESS OBJECTION

*Nicholas R. Baker, Lee University*

## INTRODUCTION

We usually believe that morality has limits; that is, that there is some limit to what morality may reasonably demand of moral agents. We suppose that there are supererogatory actions that are just that, supererogatory. We often think that while morality may require some positive and negative obligations, there are at least some actions that are simply permissible.<sup>1</sup> This is what the demandingness objection to consequentialism is about; it draws upon our intuitions on these issues in order to show how counter-intuitive the implications of some versions of normative ethics can be. In this paper I will outline and defend the demandingness objection as it applies to act-consequentialism (hereafter AC), then I will argue that rule-consequentialism (hereafter RC), as conceived of by Brad Hooker, is also susceptible to this objection; finally, I will attempt to amend RC so that it may escape the demandingness objection.

## THE DEMANDS OF ACT CONSEQUENTIALISM

Shelly Kagan states in the early parts of his text, *The Limits of Morality*, that, “[T]here are [. . .] what we might think of as limits imposed on morality – for it is typically believed that there are limits to what morality can demand of us.”<sup>2</sup> He goes on to further suggest that, “[I]t is generally held that although morality does sometimes require us to make sacrifices, we are not morally required to make our greatest possible contributions to the overall good. There is a limit to moral requirement.”<sup>3</sup> While Kagan himself argues for a withholding of judgement as to whether or not these limits do exist, I will be arguing that these limits do, in fact, exist. This is because I agree with Hooker, who states that our intuitions are major factors in evaluating moral theories; indeed, on Hooker’s view, it seems that for a moral theory to be acceptable it must cohere well with our strongly held moral intuitions.<sup>4</sup> We ought to, as Rawls prescribes, engage in a sort of reflective equilibrium when considering the demands of moral theories.<sup>5</sup>

Thus, it is important that any normative theory at least be near our intuitions; perhaps it should also be able to arrange them into a cohesive system. AC is the view that an act is morally right if and only if the act maximizes value, impartially construed.<sup>6</sup> Now, to a consequentially minded individual, this principle is going to seem highly plausible; it can be difficult to see what is wrong with it. However, if we start with the (perhaps) equally plausible idea that moral theories ought to be evaluated, at least partially, according to

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<sup>1</sup> For a more in depth discussion of these sentiments, Cf. Liam B. Murphy in *Moral Demands in Nonideal Theory*. (Oxford: Oxford University Press, 2000), 5.

<sup>2</sup> Shelly Kagan, *The Limits of Morality*. (Oxford: Oxford University Press, 1989), XI.

<sup>3</sup> Kagan, *The Limits of Morality*, XII.

<sup>4</sup> Brad Hooker, *Ideal Code, Real World*. (Oxford: Oxford University Press, 2000), 4.

<sup>5</sup> Hooker, *Ideal Code, Real World*, 9.

<sup>6</sup> *Ibid.* 142.

how well they capture our intuitions about specific cases, then we will quickly see how AC fails to accurately capture our intuitions about many cases, especially in cases of our positive obligations.

The demandingness objection is perhaps the best way to construe this failure of AC to cohere well with our intuitions. Consider this objection in the form of a *reductio ad absurdum* argument:

1. Assume that AC is correct.
2. Then it follows that an action is right if and only if that action maximizes value impartially.
3. The value gained by a suffering agent receiving aid from charity is more than the value gained by an agent going to the movies.
4. Thus, if a moral agent goes to the movies instead of donating that money to a good charity, then that agent has acted wrongly.
5. But the agent in (4) has not acted wrongly.
6. Thus, either (1), (3), or (5) is false.

Since (2) follows from the definition of (1), the only premises that we may reasonably challenge if we accept (1) are either (3) or (5) since (4) follows from (1), (2), and (3) taken together. However, (3) seems obviously true. In fact, I see no plausible way to challenge its truth; so, a defender of AC has, it seems, only one option. She may either revise the definition of AC so that it does not imply (2)--and hence (4)--or hold her ground and assert that (5) is false.

It seems implausible to reject (5). Moral theories ought to be able to explain our intuitions, not force us to abandon them. Now, of course, this is open to a suspicious criticism. It is perfectly fair to question the motives of such a move; indeed, I will admit that it does seem a selfish move to make. However, if we can conceive of a morality that is still founded upon plausible principles yet can explain our intuitions about the limits of morality, then it seems obvious that we have found a better normative theory.

In this respect, I simply echo many others, such as Liam Murphy, who states, "The objection to extreme demands is based on the simple belief that there is a limit to how much morality can demand of people. The *prima facie* plausibility of this belief is very high: it stands in no obvious need of a deeper rationale."<sup>7</sup> Richard Brandt makes a similar claim stating, "Act utilitarianism [in this case, his quarrel with act utilitarianism is applicable to our discussion of AC] makes extreme and oppressive demands on the individual, so much so that it can hardly be taken seriously."<sup>8</sup> If the reader rejects this axiom, it is understandable, but, for the purposes of this paper, I ask the reader to accept that morality has limits, and that AC cannot, as demonstrated by the demandingness objection, represent these limits. Now, we turn to a system of morality that many believe can explain our intuitions about cases and provide plausible first principles better than any other version of consequentialism, namely RC.<sup>9</sup>

<sup>7</sup> Murphy, *Moral Demands in Nonideal Theory*, 15.

<sup>8</sup> Richard B. Brandt, *A Theory of the Good and the Right*. (Oxford: Clarendon Press, 1979), 276.

<sup>9</sup> Perhaps some will think that RC is a way of following the first course of action I mentioned which was available to the defender of AC in light of the demandingness objection, namely a revised AC.

## RULE CONSEQUENTIALISM

Hooker formulates RC in the following manner:

An act is wrong if it is forbidden by the code of rules whose internalization by the overwhelming majority of everyone everywhere in each new generation has maximum expected value in terms of well-being (with some priority for the worst off). The calculation of a code's expected value includes all costs of getting the code internalized. If in terms of expected value two or more codes are better than the rest but equal to one another, the one closest to conventional morality determines what acts are wrong.<sup>10</sup>

RC, like AC, places value at the center of ethical decisions. The primary difference is that actions are two steps removed from value in RC, rather than only one in AC. RC ties together not only our intuitions regarding particular cases and general moral rules but also intuitive abstract moral ideals. In particular, RC represents a marrying of two compelling ideals: the idea that morality is about the promotion of value (as AC states) and the notion of universalizability. But, we are concerned with the demandingness objection; namely, we are concerned with whether or not RC can fare any better than AC in terms of cohering with our intuitions about moral duties.

Before addressing this, however, we must first realize that, as Hooker states, “[O]ne rule an ideal code would contain is a rule telling people to prevent disaster, even if they have to break other rules to do it.”<sup>11</sup> Why is this the case? Since the rules in RC are directly connected to value, namely well-being in Hooker's formulation, and since the amount of value brought about (or rather retained) by having moral agents internalize such a rule is potentially infinite, there must exist such a rule in any code.<sup>12</sup> This rule, however, may prove to be a difficult hurdle to overcome for RC if it is to fare any better than AC against the demandingness objection.

## THE DEMANDS OF RULE-CONSEQUENTIALISM

Tim Mulgan, in what is perhaps the first work on the subject of intergenerational ethics—*Future People*—states, “Our actions have little impact on those who are dead, considerable impact on those currently alive, and potentially enormous impact on those who will live in the future. Perhaps the most significant impact is that our decisions affect who those future people will be, and even if there will be any future people at all.”<sup>13</sup> Environmental issues will take on a new sense of urgency if we agree with Mulgan's sentiments, which, of course, seem to have intuitive weight.

Consider climate change, for example. There is a wealth of empirical evidence to suggest the following two claims:

1. Previous consumption of fossil fuels, predominantly by people in the developed

<sup>10</sup> Hooker, *Ideal Code, Real World*, 32.

<sup>11</sup> *Ibid.* 86.

<sup>12</sup> Whether or not it would take on such a form as Hooker's is debatable.

<sup>13</sup> Tim Mulgan, *Future People*. (Oxford: Clarendon Press, 2006), 1.

world, is changing the global climate in ways that have detrimental effects on future people, especially those in developing countries.

2. Current patterns of consumption of fossil fuels will cause additional climate change, with additional detrimental impact.<sup>14</sup>

Although Hooker's notion of a disaster is intentionally vague, we can rightly say that if climate change continues, it will constitute a disaster. The rule, which, as we discussed earlier, must be contained in any code puts an obligation on people to prevent disasters, even at the expense of other rules. But what is the limit of this obligation to prevent disaster? Would it not be the case that, if the imperative is to prevent disaster, moral agents should dedicate their entire lives to preventing climate change? Shouldn't, according to RC, people give up their jobs and campaign vigorously or perhaps even give up families if it means better helping to prevent this disaster?

But this seems as implausible as AC did earlier. Let us formulate the demandingness objection to RC thusly:

1. Assume RC is correct.
2. RC must contain a disaster prevention rule.
3. Thus, if a disaster looms, moral agents are obligated to prevent it at any cost.
4. Climate change is a looming disaster.
5. Thus, moral agents are obligated to prevent climate change at any cost.

This argument does not yet have any teeth though; that is, a rule-consequentialist may very well accept this argument. It does not lend itself to a rejection of RC as too demanding. The teeth come when we realize the implications of (5).

Because it is the case that most moral agents are often not acting upon their moral duties, and because it is the case that the disaster still looms no matter what other moral agents do (which is to say that the fact that other moral agents are failing to do their duty does not excuse other agents under RC), then, it would seem, moral agents must pick up the slack, so to speak, in preventing disaster. This is where the counter-intuitive implications arise. This is why I stated earlier that people may be required to give up many things (perhaps everything) which make their lives good in order to prevent climate change. So, let us complete the argument so as to give it teeth.

6. (5) is only plausible if most people do their duty with respect to disaster prevention.
7. Most people do not do their duty with respect to disaster prevention.
8. Thus, (5) is implausible.

So RC, as it stands, still leads to very counter-intuitive demands.<sup>15</sup> There are a few options open here to the rule-consequentialist. First, the rule-consequentialist may try to make (7) a non-issue; that is, the rule-consequentialist may attempt to get a majority of

<sup>14</sup> Mulgan, *Future People*, 278.

<sup>15</sup> Although, it still seems to fare better than AC.

individuals to fulfill their obligations with respect to disaster prevention. While this is an admirable approach, it, in the current world, is practically impossible.<sup>16</sup> This is, of course, not to say that such efforts are meaningless. In fact, these efforts are much needed, very helpful, and ought to be strongly encouraged. The point is that they simply are impractical for use in this philosophical puzzle. Another, more promising option is to change the disaster prevention rule such that it will not lead to such implausible obligations, and it is to this response that we now turn.

## AMENDING THE DISASTER PREVENTION RULE

The amended rule that I suggest is the following:

(RDR): Prevent disaster in such a way that the universalization of this method is not itself a disaster.

First, let us consider whether or not the moral code would contain this rule instead of its competitor, the original disaster prevention rule. The internalization costs of (RDR) initially seem to be greater than the costs of the original disaster prevention rule; any jump in the complexity of a rule seems to indicate a jump in internalization costs. However, it is less demanding of moral agents. This means that we could expect individuals to more readily internalize such a rule. The fact that so few individuals in the actual world follow the original disaster prevention rule to its conclusion suggests that the internalization costs of this rule are high; indeed, I would suggest that it would be much more difficult to get the vast majority of everyone everywhere to internalize such a rule than it would be to have them internalize (RDR).

Consider also the expected value of the vast internalization of both rules. The internalization of the original disaster prevention rule would lead to an easy decision making process; that is, moral agents would not have any inclination to ‘calculate’ before jumping into the ocean to rescue a drowning child. But, we should not suppose that (RDR) is meant to be a decision procedure in cases of split second timing; perhaps it is a good decision procedure in cases of deciding what our obligations are with respect to climate change, but it need not always be the decision procedure in cases of disaster prevention.<sup>17</sup>

It is not immediately apparent that the vast internalization of everyone everywhere in each new generation will lead to a clear winner amongst either rule. In the case of the original rule, most individuals will act so as to prevent disasters whatever the costs. In the case of (RDR), the same will be true; the only difference will be that the agents adhering to (RDR) will prevent disaster in a more optimistic way. Consider what the response may be if (RDR) is followed with respect to climate change.

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<sup>16</sup> It also seems that such a course of action, campaigning to get others to do their fair share in preventing climate change, in theory (since no one person’s campaigning will be enough to prevent climate change), will be as demanding as we saw AC to be.

<sup>17</sup> Cf. Hooker’s discussion on AC as a decision procedure in Hooker, *Ideal Code, Real World*, 142. Also, the reader may want to consider an alternative reading of disasters to the one which I have presented. It is conceivable that there are two types of disasters, each type requiring its own rule; on such a reading, (RDR) need not be a competitor with the standard prevent disaster rule. This may provide the reader with an interesting way to solve the issue of demandingness. However, I am not convinced of this alternative reading of disasters presently and will not allot any further discussion to this solution.

Individuals need not give up homes and families to combat the looming disaster of climate change because, if everyone did this, it would itself be a disaster in terms of well-being. However, individuals are required to do as much as they possibly can without the universalization of their actions being disastrous. This may look like e-mailing congress(wo)men, making all appliances and vehicles safe for the environment, and spreading the sense of duty amongst others, but this is the more balanced response that accords with our intuitions; this response does not seem implausibly demanding.

## CONCLUSION

So, even if we make the concession that neither rule clearly has a higher expected value than the other, (RDR) is the better rule because, according to Hooker, we ought to follow the set of rules, in cases of ties, that is closest to ordinary morality, and (RDR) captures our sense of moral obligations much more closely.<sup>18</sup> So, we see that (3), of the demandingness argument against RC, is false and thus the argument fails, if we amend the argument to include (RDR) in place of (2).

Make no mistake, RC is still very demanding even when formulated with (RDR). We are still obligated to act in cases of disaster, often in very demanding ways. However, these obligations are palatable; that is, they are not far from our intuitions. Thus we see that RC has many attractive features: it captures the consequentialist's insistence on placing the optimization of value at the center of moral theory, the deontologist's insistence on universalizability, and it accords strongly with our intuitions about the limits of morality. RC is the happy medium between a moral system that does not require much of us (which is counter-intuitive as well) and one that is too demanding.

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<sup>18</sup> Hooker, *Ideal Code, Real World*, 32.

## REDISTRIBUTION, FREEDOM, AND INDEPENDENCE

*Maura Carey, The University of Virginia*

### I. INTRODUCTION

I argue that Immanuel Kant's theory of public right, as it is presented in "Doctrine of Right," requires the redistribution of wealth through taxation. I aim to show that the Kantian state exists to maximize individual freedom and that it must implement redistributive policies in order to maintain its existence. This analysis will go against the grain of traditional objections to the redistribution of wealth, including objections associated with Kantian ethical principles. To illustrate this claim, I will consider an argument put forward by Robert Nozick in *Anarchy, State, and Utopia*. In contrasting Nozick and Kant's conceptions of the state, I will show that the Kantian ideas at work in Nozick's world do not render redistribution impermissible in Kant's world. In this essay, I plan to achieve two related goals: first, to demonstrate that it is possible to conceive of the state in a way that makes redistribution a pre-requisite to the maximization of individual freedom, and second, to contradict the notion that Kantian ideas can be used to object to the redistribution of wealth.

### II. THE KANTIAN STATE EXISTS TO MAXIMIZE INDIVIDUAL FREEDOM

My first claim is that the Kantian state exists so that each citizen may enjoy the maximum level of freedom. Establishing this claim will allow me to highlight the relationship between the redistribution of wealth and individual freedom in the Kantian state. A brief introduction to the "Doctrine of Right"—Kant's account of the legitimate reasons individuals may have to coerce one another—is necessary here. The starting point of the Doctrine of Right is the "universal principle of right," which states, "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>1</sup> Put more simply, all actions are right insofar as they coexist with the freedom of all others.

The universal principle of right is the foundation of Kant's doctrine because it secures humanity's sole innate right: the right to freedom. An innate right, he says, is a title (or a good reason) to coerce others that we have in virtue of our humanity. The innate right to freedom entails simply that all humans are entitled to be their own masters. We have access to a further set of rights: acquired rights, or titles to coerce that are *possible* in virtue of our humanity. We are not born with these rights, but we acquire them under appropriate conditions.

Kant divides the category of acquired rights into two classes: private and public right. Private right refers to the set of rights we can have in external objects, while public right

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<sup>1</sup> Immanuel Kant and Mary J. Gregor, *Practical Philosophy* (Cambridge: Cambridge UP, 1996), 387.

refers to the set of laws that make private rights enforceable. The two sets of rights are causally connected; the possibility of the former generates the need for the latter. The possibility that humans can hold and enforce property rights, considered in tandem with the universal principle of right, leads us out of the state of nature and into civil society, where private rights can be enforced.

But one might ask why we must possess objects at all. We might avoid the difficulty inherent in enforcing private rights and choose to remain in the state of nature. However, such a choice is inconsistent with the universal principle of right. Under appropriate conditions, property ownership is entirely consistent with the freedom of all others. The universal principle of right tells us that whatever is not wrong is right, so it would be wrong to remain in a condition that is inimical to private possession. The possibility of private right gives rise to a “duty of right to act towards others so that what is external (usable) could also become someone’s [property].”<sup>2</sup>

Kant explains that we can fulfill that duty in one very specific way. In Kant’s view, it is not enough for individuals to merely declare their ownership of some piece of property. The only way to possess an object legitimately is to obtain the consent of everyone bound to respect that possession. Humans express their consent in the form of public law. Therefore, Kant thinks humans are compelled to leave the state of nature and enter a civil society governed by public law. All those who choose to remain in a state of nature are “wrong in the highest degree”<sup>3</sup> because they trap themselves and others in a vicious cycle of retribution where no possessions are safe and individual freedom is restricted.

The duty to enter a civil condition gives rise to the “postulate of public right,” or the possibility that individuals could unite in a society governed by a set of external laws. We are now in a position to understand why it is correct to say that the Kantian state exists to maximize individual freedom: property is impossible outside a civil condition, yet individuals have the *right* to own property. Therefore, membership in a civil society is the pre-requisite to a certain set of rights. The state exists to facilitate access to those rights; it alone can guarantee the maximum level of individual freedom.

### III. THE IDEA OF THE ORIGINAL CONTRACT REQUIRES THE REDISTRIBUTION OF WEALTH

The “idea of the original contract” is Kant’s term for the *idea* of a community’s decision to form a society. This is not a moment in history, but a conceptual tool with which we understand civic relationships. The idea of the original contract also serves as the link between the redistribution of wealth and the universal principle of right, or the principle that constrains our actions in accordance with the freedom of all. The idea of the original contract entails that the commonwealth is as identical to its constituents. The state and the people, in Kant’s view, are one and the same. Viewing civic society through the lens of the idea of the original contract, we imagine that the state’s citizens have abandoned their innate freedom and united as a whole to govern themselves and enjoy a secure, robust set of rights.

Because the Kantian state is made up of its citizens, it is bound by the universal principle of right. The state is a united body of individuals who cannot violate this principle;

<sup>2</sup> Kant and Gregor, *Practical Philosophy*, 406.

<sup>3</sup> *Ibid*, 452.



therefore, the state's legislators cannot violate this principle. This restriction stems purely from the fact that its citizens are its legislators; they cannot authorize any action that they could not, themselves, perform.

It is important to note, however, that the idea of the original contract limits legislation to laws that are *a priori* possible. It forbids only those laws that violate individual freedom. It has nothing to say regarding laws that fail to reflect actual preferences. For example, citizens could not possibly consent to a law that creates hereditary nobility. Such a law would hinder the freedom of everyone outside the noble caste. But the idea of the original contract is consistent with majority rule. Citizens in the minority might not prefer the majority's policies, but if they could, in principle, consent to them, the majority's policies may become law. Kant's concern is not with the facts on the ground—whether citizens consent—but whether a state's laws are consistent with innate freedom and the universal principle of right.

There is one exception to this limitation on the rights of the state. Kant writes, “To the supreme commander there belongs indirectly, that is, insofar as he has taken over the duty of the people, the right to impose taxes on the people for its own preservation, such as taxes to support organizations providing for the poor, founding homes, and church organizations, usually called charitable or pious institutions.”<sup>4</sup> Kant is explicit that the idea of the original contract guarantees that the state may take measures to protect its citizens. They are, after all, its constituent parts; in preserving its citizens, the state preserves itself. Kant is also clear in saying that this can be done through redistributive taxation. He writes, “The general will of the people has united itself into a society which is to maintain itself perpetually...for reasons of state the government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs.”<sup>5</sup> The burden of redistribution can be placed on the rich because the preservation of their property requires the preservation of the state.

It is now possible to understand why the redistribution of wealth is a pre-requisite to the maximization of individual freedom: in Kant's view of the state, as expressed by the idea of the original contract, the state's right to redistribute is a consequence of the existence of property itself. There can be no property without the state, and no state without its citizens. Therefore, property may (nay, *must*) be taxed to preserve the state and the citizens who comprise it.

#### IV. KANTIAN IDEAS CANNOT CHALLENGED REDISTRIBUTION IN THE KANTIAN STATE

Although Kant is clear that redistributive taxation may occur in a condition of public right, Kantian ideas are often associated with libertarian theories purporting to justify the minimal state and nothing more. Libertarian philosophers Friedrich Hayek, Wilhelm Von Humboldt, and Wolfgang Kersting have drawn on Kantian language to argue against the expansion of government. Moreover, words like “freedom” and “liberty” are often at the center of arguments against state power in contemporary political discourse. One would be forgiven for thinking that a state grounded in the innate right to freedom does not share anything in common with the modern welfare state.

<sup>4</sup> Kant and Gregor, *Practical Philosophy*, 452.

<sup>5</sup> *Ibid*, 468.

In order to debunk the view that Kantian ideas are inimical to the state's redistributive powers, I will consider a famous argument against the redistribution of wealth that draws on a Kantian idea. My aim is to show that even though this view incorporates one of Kant's ethical principles, the view in general is incompatible with the Kantian architectonic. The argument against the redistribution of wealth that I have in mind was put forward by Robert Nozick in *Anarchy, State, and Utopia*. In demonstrating that Nozick's use of the categorical imperative against redistribution does not threaten redistribution in the Kantian state, I hope to undermine the suggestion that redistribution is impossible in a state that exists to maximize individual freedom.

Nozick believes, in contrast to Kant, that the only legitimate function of a state is to create a monopoly on force in a geographic area. In a chapter entitled "Moral Constraints and the State," Nozick argues against redistribution on the basis that the state's actions are subject to "side constraints." He explains that idea of side constraints is derived from "the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent."<sup>6</sup> Nozick, here, is referring to a concept Kant introduced in *The Groundwork for the Metaphysics of Morals* known as "the categorical imperative."

The categorical imperative is the fundamental principle of moral duty that binds us in virtue of our rationality. This means that we must only adopt maxims for action that take the form of the categorical imperative. Nozick cites what Kant calls the "humanity formulation" of the categorical imperative. This formulation states, "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, and never merely as a means."<sup>7</sup>

Nozick interprets the second formulation of the categorical imperative to mean that individuals are inviolable. Individuals, he says, cannot be used against their wishes as material objects can be used, even if they are being used for the greater good of society. Redistribution, then, is immoral because it requires the use of some individuals as mere means. This leads Nozick to the controversial claim that "taxation is on par with forced labor." He continues that, "Some persons find this claim obviously true: taking the earnings of  $n$  hours of labor is like taking  $n$  hours from the person; it is like forcing the person to work  $n$  hours for another's purpose."<sup>8</sup> This conclusion is supposed to arise, in part, from the claim that the state must act in accordance with "side constraints" derived from Kant's categorical imperative. If such side constraints truly do follow from the categorical imperative, then it seems that Kant's argument for the redistribution of wealth in a condition of public right is contradictory.

However, this is not the case. When we understand the state in Kant's terms, we can easily show that Nozick's side constraints do not restrict the state's legislative powers. Nozick assumes that a government that redistributes wealth uses its wealthy citizens as means. But to say that this is true of a Kantian government reflects a misunderstanding of the idea of the original contract. Because all legislative power emanates from the united will of the people, and because legislative power is constrained by the universal principle of right, the Kantian state can never do injustice to the people who determine its laws.

<sup>6</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York, Basic, 1974), 32.

<sup>7</sup> Kant and Gregor, *Practical Philosophy*, 80.

<sup>8</sup> Nozick, *Anarchy, State, and Utopia*, 169.

The categorical imperative would perhaps be violated if Kant thought of the state as an individual actor. If the Kantian state were thought to act like Robin Hood, a character who takes from the rich and gives to the poor, Nozick's arguments would apply. Certain breeds of consequentialists might say that he is morally correct, but Kant would never say that Robin Hood acts in accordance with the categorical imperative. Robin Hood is, in fact, using the wealthy as a means to improving the status of the poor. For both Nozick and Kant, the fact that Robin Hood generates positive utility by taking wealth from those who do not need it and giving it to those who do is irrelevant.

However, Kant does not conceive of the state as an individual apart from its constituents. The idea of the original contract guarantees that the state is identical to the people who comprise it. The Robin Hood example is therefore not analogous to the Kantian state. A better analogy to redistributive taxation is the choice to sacrifice some hours of leisure in order to work for a living. Like an individual who chooses to work to support herself, redistributive policies are measures the Kantian state takes to support itself. Redistributive tax policies are not the product of a unilateral will, as in the Robin Hood case, but the result of a legislative body's decision to provide for its continued existence.

We, therefore, have no reason to believe that the categorical imperative imposes "side constraints" on the Kantian state. This is because Nozick presupposes a view of rights in the state of nature that is incompatible with Kant's beliefs. Nozick's first line in *Anarchy, State, and Utopia* is "individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state?"<sup>9</sup>

Property rights are innate rights, for Nozick; they are as secure insofar as property holders can deter others from stealing. Individuals exit the state of nature only to avoid certain inconveniences. Individuals, in Kant's view, leave the state of nature not in order to avoid inconveniences, but in accordance with obligations generated by the universal principle of right. Nozick and Kant present internally consistent yet mutually exclusive accounts of the relationship between a state and its citizens; they start from different premises and arrive at different conclusions. Therefore, Nozick's forced labor argument cannot defeat any policy implemented in the Kantian state. I have endeavored to show, over the course of this discussion, that Nozick's vision of the state does not, and cannot, bleed into Kant's. Nozick may share Kant's concern for individual freedom, but his account of the state is not definitive. Kant shows us that there is another way to understand the structure of civil society—and that it leads us to perfectly opposite results.

## V. CONCLUSION

Kant's political philosophy, like his critical work, is an effective tool for uprooting our assumptions. Analysis of the Doctrine of Right reveals what some have thought to be a chimera: a political entity grounded in personal liberty that resembles the modern welfare state. The foregoing interpretation of Kant's work demonstrates that it is possible to conceive of the redistribution of wealth as a pre-requisite to the right to own property and, moreover, that the possession of property is tantamount to a commitment to preserve

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<sup>9</sup> Nozick, *Anarchy, State, and Utopia*, xix.

the lives of one's fellow citizens. Nozick's account of the state is merely one perspective from which the relationship between a body of laws and its citizens can be approached, but we can say confidently that it is not the only perspective from which to approach this relationship. In this paper, I have presented two competing pictures of the state and its relationship to human freedom; I will leave it to the reader to evaluate the relative merits of each philosopher's sketch. But in an age of ubiquitous and intensifying political rhetoric, the value of a return to Kant's political philosophy is abundantly clear. Filtered through contemporary paradigms, the Doctrine of Right shows us that freedom and liberty do not have any political slant; they do not sit on a particular side of the aisle. From the bare fact that humans are innately free, we can show that all people are entitled to a certain minimum standard of living. We can show that others are obligated to provide the resources to maintain the lives of their fellow citizens. Kant's work invites us to revise our assumptions in the hopes that, through discourse and inquiry, we may one day subscribe to the ideals he introduced to the world.

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## VIRTUENOMICS: ARISTOTLE'S LIBERALITY AND THE CREATION OF A SUSTAINABLE ECONOMIC SYSTEM

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Aristotle's doctrine of the mean is his signature framework for developing a virtuous life. By canting one's behavior toward the mean between the extremes of excess and deficiency, the resulting attitudes, and the habits generated by repeating those behaviors, create virtue in the soul. Aristotle defines several different virtues along with their extremes and corresponding vices in the *Nicomachean Ethics*, including pride, justice, and courage. Here we will focus on his stance on liberality (generosity)<sup>1</sup>, and how we can apply his thoughts above the level of the individual to build a model for a sustainable and virtuous economic system. There may be some question as to whether systems can have virtue in and of themselves, but in this context we can answer in the affirmative. The *N.E.* are designed as a complement to Aristotle's *Politics*, his larger vision being to showcase how virtue comes into being on an individual scale before discussing how those same individuals would come together to form a virtuous State. The creation of virtuous systems is the point of the exercise.

In Book IV of the *N.E.*, liberality and its attendant extremes are defined as follows:

**Prodigality** (over-spending/giving)

**Liberality** (generous giving/proper acquisition)

**Meanness** (giving very little, and/or taking from improper sources)

In accordance with the doctrine of the mean regarding wealth, aiming for the balance of giving generously to the right people while not depleting one's own resources or taking from improper sources, creates the possibility of making one a liberal, and therefore virtuous, man. Why only the possibility? It is because Aristotle says that virtue requires not only that the proper acts be undertaken, in the proper degree, and toward the proper people; it also requires that acts be undertaken in the right way. That is, the acts must stem from a firm and abiding disposition to act in certain ways; one's acts must, in other words, be the results of and reflect one's character. Aristotle says that, "virtuous actions are noble and done for the sake of the noble. Therefore the liberal man, like other virtuous men, will give for the sake of the noble, and rightly; for he will give to the right people, the right amounts, and at the right time... Nor is he liberal who gives with pain; for he would prefer the wealth to the noble act."<sup>2</sup>

Now we see it is possible to give but not be virtuous; if the gift is given grudgingly, or the amount is too much or too little, or the person on the receiving end is unworthy, the act is not that of a liberal man. The liberal man uses his wealth as a means to achieve virtue; regardless of the size of his gifts, if they are in proportion to his own resources, and

<sup>1</sup> Richard McKeon, *The Basic Works of Aristotle* (New York: The Modern Library, 2001), 984.

<sup>2</sup> McKeon, *Aristotle*, 985.

if they confer benefit on a worthy recipient or the community as a whole, that giving or exchange is done with noble intentions and is therefore virtuous.

The first extreme to the mean of liberality we will discuss is prodigality. A prodigal man is described as “one who is being ruined by his own fault,”<sup>3</sup> in this case being wanton with his giving to the point that he ruins his very substance. Aristotle writes,

For he has the characteristics of a liberal man, since he both gives and refrains from taking, though he does neither of these in the right manner or well. Therefore if he were brought to do so by habituation or in some other way, he would be liberal; for he will then give to the right people, and not take from the wrong sources. This is why he is not thought to be of bad character; it is not the mark of a wicked or ignoble man to go to excess in giving and not taking, but only of a foolish one.<sup>4</sup>

So our foolish, prodigal man is not of bad character; he is good-spirited and can learn the error of his ways. If he can learn to give nobly with proper intention, he can bring himself to the mean and become a liberal, and therefore virtuous, man. Unfortunately for the prodigal, it is rarely that simple. Overextending oneself though excessive giving tends to deplete one’s wealth rapidly. People to whom this happens “are forced to provide means from some other source. At the same time, because they care nothing for honor, they take recklessly from any source.”<sup>5</sup> When this happens, a man becomes both prodigal and mean (the opposite extreme to prodigality, not to be confused with the mean itself), resulting in behavior that is far from virtuous. .

Aristotle defines meanness in terms of two parts: “deficiency in giving, and excess in taking, and is not found complete in all men but is sometimes divided; some men go to excess in taking, others fall short in giving.”<sup>6</sup> Thus a mean man can be a miser, hoarding his wealth for fear of bad times to come, or he can be afraid to engage in taking and giving because he fears that his own resources might be taken by others.<sup>7</sup> There are also mean men who have “a sordid love of gain.”<sup>8</sup> These are con-men, robbers, and other people who gain through exploitation. These latter types fall deeply into the category of ‘excess in taking’ “because they are willing to make gain from wrong sources.”<sup>9</sup> Meanness is an evident contrary to liberality, while prodigality can turn to virtue if managed correctly.

Having defined how the three pieces of the mean of liberality fit together as they apply to the individual, let us look briefly at some of Aristotle’s view on justice, to help us gain further insight into the proper, virtuous manner in which to exchange resources. He begins Book V, Chapter 5 of the *N.E.* with an explanation of how perfect reciprocity does not fit his earlier definitions of distributive justice (in which each person receives wealth in geometric proportion to their merit) or rectificatory justice (in which a court acts to rectify any unjust distributions of wealth, thus restoring the mean) -- saying that a precise

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<sup>3</sup> Ibid., 984.

<sup>4</sup> McKeon, *Aristotle*, 987.

<sup>5</sup> Ibid., 987.

<sup>6</sup> Ibid., 987.

<sup>7</sup> Ibid., 987-988.

<sup>8</sup> Ibid., 988.

<sup>9</sup> Ibid., 988.

eye-for-an-eye, one-for-one exchange is not always the result of a virtuous action. Instead, he says that "in association of exchange this sort of justice does hold men together-- reciprocity in accordance with proportion and not on the basis of precisely equal return. For it is by proportional requital that the city holds together."<sup>10</sup> Proportion is key here; exchanges that do not take into account the merit or virtue of the parties involved cannot yield a virtuous result. To Aristotle, it is proportionality that keeps a society together-- it is right and just that good people get more, and bad people get less.

In order to effect that kind of proportional distribution of resources, there must be a medium of exchange. Aristotle explains why in the following passage:

For it is not two doctors that associate for exchange, but a doctor and a farmer, or in general people who are different and unequal; but these must be equated. This is why all things that are exchanged must be somehow comparable. It is for this end that money is introduced, and it becomes in a sense an intermediate; for it measures all things, and therefore the excess and the defect- how many shoes are equal to a house or to a given amount of food.<sup>11</sup>

What the creation of money does is, in effect, manufacture a symbol for the demand and usefulness of a product, and therefore set a standard for all sides of an exchange to receive proportionate return for their efforts or products. Aristotle is quick to point out that currency is only a symbol, and should always be treated as such. He says "money has become by convention a sort of representation of demand; and this is why it has the name 'money' (*nomisma*)- because it exists not by nature but by law (*nomos*) and it is in our power to change it and make it useless."<sup>12</sup> His point here is that just exchange is the goal, and that money exists for that purpose alone. We can look at the current economic climate and see the value in that notion. Our culture values the acquisition of money for its own sake. No matter how much property we accumulate or how ostentatious our lifestyles become, the fact remains that all those material possessions have been derived from treating money not as a symbol of value with which to conduct proper exchange, but as an end unto itself. That dissonance between intended symbolism and actual use has contributed to the large imbalances in the socio-economic sphere today. Instead of making it powerless, we have rendered money all-powerful. It is no longer a tool to ensure proportional exchange; it is simply something to pursue with our appetites, rather than a symbol of a society's dedication to just distribution and virtuous interaction. These ideas of justice plainly reinforce the same ideas of liberty, just on a more macro scale-- there must not be too much or too little taking or giving. There needs to be a means of exchange if people are to live together and build a common life, but that means must always be thought of as just that: a means toward a virtuous, just exchange of resources. If the focus shifts from that goal toward one centered around thinking of means as an end unto themselves, virtuous behavior is an impossibility.

Understanding these concepts of justice and how they deal with economic relationships on both an individual and societal level will make it easier to apply the ideas of

<sup>10</sup> McKeon, *Aristotle*, 1010.

<sup>11</sup> *Ibid.*, 1010-1011.

<sup>12</sup> *Ibid.*, 1011.

liberality to large organizations that have a direct, sustained, and powerful impact on the economy. Let's begin with prodigality. Prodigal individuals are most likely self-indulgent; "for they spend lightly and waste money on their indulgences, and incline toward pleasures because they do not live with a view toward what is noble."<sup>13</sup> That profligate attitude is hard to tie to a nation-state or corporation as a whole, so in this context we will define prodigality as over-spending. The outcome of this vice, in this situation, is easy to see. No organization can spend more than it brings in without incurring debt, perhaps to a critical level. This applies to more than just monetary wealth; it is just as easy to squander personnel, infrastructure, and technology. At any rate, a company or State that commits itself beyond its means has three options: one, to dissolve; two, to receive funding from outside sources and pivot its business practices toward more sustainable spending; or three, to begin acquiring wealth from the wrong sources, thereby becoming mean as well as prodigal, falling into the same trap that an individual behaving in this way would. In this macro sense, acquiring from the wrong sources can take many forms, such as cutting worker pay, making a cheaper but inferior product, ignoring safety and environmental regulations to lessen cost, levying unfair taxes, not paying the proper amount of tax, even engaging in industrial or interstate espionage-- any form of gathering resources that promotes a disproportionate level of exchange.

A mean organization is in no less trouble than a prodigal one. Hoarding its resources would lead to fewer goods or services provided, while excessively taking will engender a bad reputation or even legal troubles. Any exploitive practices in regard to business practices, labor relations, environmental overuse, etc., is inherently ignoble, as it serves only to increase gain, with no thought to the good.

Here we arrive at the crux of the economic issue. In a strict capitalist sense: the most surplus equates to the most good. The problem with that profit-and-loss paradigm, when seen through the lens of Aristotle's concept of virtue, is that all the spending, giving, taking, and making is directed toward profit, rather than toward a larger purpose. Remember, liberal actions pave the way for virtuous behavior, and liberal actions are undertaken for the sake of the noble. If an organization focuses entirely on its bottom line, it will make decisions that tend toward one extreme or the other (e.g. spending a fortune on an ad campaign for a product known to be inferior, or outsourcing jobs with no regard for the local community).

How can we build organizations that will trend toward the mean, that will use their resources wisely and with virtuous intent? If profit is the only motivation, there seems little hope. Creating policy that encourages economic virtue is an impossible task unless the laws put into effect would enforce macro concepts in tune with the more particular ideas of individual virtue; namely, the previously mentioned concepts of distributive and rectificatory justice. If the laws in place are more about the rules of the game than bringing about a virtuous end, the State that enforces such laws ceases to be a good actor in this milieu. Such a State would be at the mercy of the doctrine of the mean itself and thus responsible for any extremes its legislation caused. Any organizations within the State (e.g. a business, charity, social club, school, etc., that functioned under the umbrella of *nomos* imposed by the State) could be punished or shut out of mainstream life if they chose to pursue their noble goals rather than following the lines of behavior drawn by the State.

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<sup>13</sup> McKeon, *Aristotle*, 987.



We can see that in action within our society today- within a ruleset designed to encourage consumerism and the free market, organizations that wish to pursue the good (charities, arts programs, youth enrichment, etc.) find most of their resources from private sources, not State institutions.

It is in those who work toward the good regardless of dissonance with the prevailing culture where we can find hope for creating an economic system that functions to improve society rather than divide it. The individuals charged with the distribution of resources (public or private) must themselves be virtuous, and guide the organizations under their charge toward the mean of liberality. Even in this larger context, the virtue of individuals is necessary to achieve a good and noble outcome. These virtuous individuals would be responsible for keeping the organization on course; making sure it was directed toward a noble end and correcting any deviance toward a viscous extreme.

This virtue-driven option is by no means inimical to profit or what we would call a stable economy. Remember, a virtuously liberal man does not have a problem making money; he will just view that money as a means to a noble end, rather than an end unto itself. A virtuous man in business will take pride in crafting a superior product, or being a valuable asset to his community. He will give and spend for the right reasons, at the right time, and will take from the right sources. He will treat his workers fairly, he will ask the appropriate price for his goods and services, and he will not exploit the environment or other people to replenish his resources.

The same idea can be applied to the state as well. If those in power are virtuous, the state's resources will be directed in accordance with distributive and rectificatory justice. There will be appropriate distribution between education, defense, infrastructure, health care, etc., and a focus on proper development of resources in order to provide a stable and prosperous economy for its citizens. These concepts of justice are the State's iteration of the doctrine of the mean, while individuals and organizations within the State follow the mean by habituating themselves with virtuous behavior, illustrated in these economic terms by the virtue of liberality. As Aristotle said:

...the just man is said to be a doer, by choice, of that which is just, and one who will distribute either between himself or another or between two others not so as to give more of what is desirable to himself and less to his neighbor (and conversely with what is harmful), but so as to give what is equal in accordance with proportion; and similarly in distributing between two other persons.<sup>14</sup>

One person, one hundred people, or a whole nation- the number doesn't matter, the idea is still the same. If there are virtuous individuals in power, who see the giving and taking of wealth as a means toward a noble end, both the individuals themselves and organizations they direct will increase their habituation toward the good, toward the virtuous.

In our culture, economic success has been defined only by the amount of wealth one attains, not by how it is obtained or how it is put to use. Our laws are designed to enforce that *laissez-faire* ideal. The tax code is a mess, and serves to perpetuate the ideal that those who gain the most are the ones who work the hardest and therefore deserve to hoard it; and rarely do we see prosecutions for financial crimes unless the victims happen to be

<sup>14</sup> McKeon, *Aristotle*, 1012.

wealthy themselves. Legality offers no avenue toward the good in this current iteration. Our treatment of monetary wealth as the goal itself rather than as a symbolic means of virtuous exchange has led to a society with zero equity of resources. “In the unjust act to have too little is to be unjustly treated; to have too much is to act unjustly.”<sup>15</sup> Proportion can be violated in either direction. In our society today, those who have too much are the ones with easier access to more, and for those that have too little the disparity is too great to overcome given the lack of opportunity. This system is not sustainable, practically or ethically. The way forward is to be able to rely on virtuous individuals to take responsibility for the acquisition and distribution of resources, and so develop a fair and equitable economic culture that strives toward the mean of liberality; this will help habituate individuals and organizations at all levels of society toward practices that spend the right amount, at the right time, and replenish themselves in the right way; creating the foundation for an economic system that is virtuous, profitable, and sustainable.

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<sup>15</sup> McKeon, *Aristotle*, 1012.

## RESTORATION OVER RETRIBUTIVISM: A HOLISTIC APPROACH TO RECONCILING HARM

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In this paper, I focus on which justice method, either retributive or restorative, is the most effective in reconciling the harm done by a crime. Retributivism focuses on the punishment a wrongdoer deserves as a result of breaking a legal standard. Restorative justice instead focuses on the fact that the harm of the victim is the true matter to be reconciled. I advocate for a restorative model because it more comprehensively addresses and rehabilitates the wrongs committed, as it puts the primary focus on persons rather than laws. I show the benefits of a restorative model by first outlining the aims of retributive justice, drawing largely from H.J. McCloskey, to show that retributivism's aim is to punish offenders because of the violation of some legal standard. In outlining what and how retributivism punishes, I show that retributivism is inherently flawed in its approach, failing to address who has actually been wronged and inadequately considering each case. I then use Lode Walgrave to show that retributivism is highly limited and morally dubious. After considering possible responses from a retributivist, I end by offering a restorative approach to justice as a method for more adequately addressing the harm of a victim and the rehabilitation of the perpetrator, while still incorporating the mechanism of a third-party justice system to act as a mediator. This allows for an overall more inclusive and holistic system aimed at the service of justice for all persons involved.

To begin, offense in the retributive model is committed principally against laws and the ideals woven in the fabric of the justice system. The main differences between retributivism and restorative justice are what a wrongdoer has offended and how she is treated as a result. These aspects highlight the main failings of retributivism. I begin with the problem that, generally, retributivism requires punishment because of some offense against a legal standard. I use McCloskey for a positive articulation of retributivism, as his arguments underscore that wrong should be considered when committed against laws. The focus of retributivism is not what effects are produced by punishment, including the rehabilitation of the offender or the reconciliation of harm for the victim, but what wrong was committed in principle and what compensation the state demands as retribution from the wrongdoer. For McCloskey, "...punishment must be of an offender who is guilty of an offence in the morally relevant sense of 'offence.'"<sup>1</sup> McCloskey goes on to give instances of harm done, always offering examples in terms of offender against some preset standard.<sup>2</sup> This goes to show that, in the way that McCloskey talks about guilt in terms of offenses in given instances, wrong is committed against principles mainly; persons, as far as they are victims, are just the beings that bear the brunt of the offence.

Additionally, many support the retributive model as it uses the broadly applicable standard of proportional punishment that many believe is a necessary feature of justice.

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<sup>1</sup> H. J. McCloskey, "A Non-Utilitarian Approach to Punishment," *Inquiry* 8, no. 1-4 (1965): 250. doi: 10.1080/00201746508601433.

<sup>2</sup> *Ibid.*, 250-251

For McCloskey, a wrongdoer<sup>3</sup> must singularly and intentionally commit an infraction against an actively practiced and visible law.<sup>4</sup> Retributivism dictates that, in terms of treatment for these perpetrators, "...equals should be treated equally and unequals unequally."<sup>5</sup> In this way, persons who deal fairly with the law are dealt with fairly in return. Those who infringe upon the law and upon others' entitlement to protection are dealt with unfairly. This "...unequal treatment amounts to deliberate infliction of evils—suffering or death."<sup>6</sup> McCloskey's point here is to illustrate that, in many ways, retributive justice does call for "an eye for an eye" in the context of wrongs of justice. However, this is not to be understood in the purely literal sense. To punish a rapist, we do not rape him. Instead, McCloskey introduces the idea that the punishment for an infraction must be "commensurate with the offense."<sup>7</sup> In this way, retributivism levels a punishment on the wrongdoer that is proportional to her infraction. She deserves this as a result of breaking the law and causing harm to the system.

Though this system may make for a more easily applicable standard on a larger scale, I think that retributivism is troubling in its means and aims. While I do see the merits of incorporating such concrete and broadly applicable standards that retributivism upholds, I think McCloskey's account of retributivism fails to characterize for whom justice should work. If a wrong is committed, we generally do think of to whom the wrong is done, not what. If I scrape a woman's car in a parking garage, I feel remorse for harming her property and causing her inconvenience, not for violating a legal standard. I may fear that she may sue me, but I still recognize that wrong has been done to her. I owe her, not the law. In this way, retributivism misses who has truly been wronged. Furthermore, while proportional punishment for a particular crime may be a more universally easy standard to apply, it fails to dole out justice to perpetrators by considering them in a reductively similar way. When I hit the woman's car and she sues me for damaging her property, I want the law to consider my circumstances and subjectivities as well. In this way, I feel that retributivism fails because it will not judge individually and differently from cases that may nearly match it.

In addition to these objections, I draw on Lode Walgrave to show retributivism to be actually limited and morally dubious in its approach. Under Walgrave's characterization, retributivism looks at means, using punishment for the specific purpose of urging complicity with the laws.<sup>8</sup> Punishment is a way of upholding a structure and reinforcing the rightness of law. It is a "primary yardstick" in compelling justice, intentionally causing suffering to teach a lesson.<sup>9</sup> As it seeks to *force* compliance with the law, retributivism

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<sup>3</sup> McCloskey does provide limits to this, saying that someone who does not have the mental state to register the offense committed, those punished disproportionately, retroactively, with secret laws, those punished as scapegoats, and persons subjected to collective punishment cannot be considered to be deserving of punishment in the morally relevant sense (250-251). Furthermore, a person in a retributive model could not be truly innocent *and* be punished; if a person has not actually committed an offense, she is not morally culpable (250).

<sup>4</sup> McCloskey, "A Non-Utilitarian Approach to Punishment," 250-251.

<sup>5</sup> *Ibid.*, 260

<sup>6</sup> *Ibid.*, 260

<sup>7</sup> *Ibid.*, 260

<sup>8</sup> Lode Walgrave. "Restoration in Youth Justice," In *Why Punish? How Much?: A Reader on Punishment*, ed. Michael Tonry (New York: Oxford University Press, 2011), 325.

<sup>9</sup> *Ibid.*, 325

proves to be limited in its ability to actually rehabilitate the offender, reinforce a victim's faith in the law, and underscore that law's validity. Furthermore, when considering the infliction of pain for the purpose of punishment and legal retribution separately from this justification, punishment becomes ethically questionable as a practice.<sup>10</sup> Walgrave makes the point that we only feel comfortable punishing so long as we think we use punishment to serve justice or act as a deterrent to criminal activity. Because retributivism is limited and because it employs morally questionable methods, it is an inferior justice theory, not actually reconciling harms or reinforcing faith in the system.

In response to these objections, the advocate for retributivism might say that these are unduly harsh critiques of his position, claiming that I emphasize the negative components of the method and fail to highlight the positive attributes. He might argue that while the law is the yardstick by which just punishment is enforced, and that an offence of the law undermines its authority, garnering compliance with legal standard and an adherence to the law is essential in securing justice for people. Furthermore, punishment, in the way that retributivism does it out, is not rendered unfairly.<sup>11</sup> Those who steal for their own personal greed and those who steal to feed their family have committed wrongs in the same way against the law. Both deserve to be punished. To level a harsher punishment against the investment banker than the bread thief is merciful. If both persons are given the maximum sentence, the judge passing the sentence is harsh, but not unjust.<sup>12</sup> Retributivism will pay some attention to the offender's instances in considering punishment and in its consideration of what is most just.<sup>13</sup> However, these considerations are always weighed against what consequences might result if this type of behavior is not impeded.<sup>14</sup> The ultimate test for what punishment is just is whether that punishment is "commensurate with the offense."<sup>15</sup> In this way, I believe that retributivism always falls back on a paternalistic punishment that *dictates* what is deserved, rather than considering what best rehabilitates the whole situation, ultimately proving to be limited in its ability to actually serve justice.

Because of this, I believe that retributivism fails to provide a holistic approach to justice, both for the wrongdoer and the victim. As Walgrave presents it, restorative justice has a different aim than retributivism, focusing on rehabilitating the damage done to a particular individual or community. Under Walgrave's restorative theory, harm is done when a crime is committed against a person.<sup>16</sup> Walgrave defines harm as "...the material damage, psychological and relational suffering by the victim, social unrest and community indignation, uncertainty about legal order and about authorities' capacity to assure public safety, and the social damage the offender causes to himself."<sup>17</sup> His view of harm presents a larger opportunity for justice and restoration. Not only does it seek to mitigate the losses

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<sup>10</sup> Walgrave, "Restoration in Youth Justice," 325.

<sup>11</sup> McCloskey, "A Non-Utilitarian Approach to Punishment," *Inquiry* 8, no. 1-4 (1965): 251. doi: 10.1080/00201746508601433.

<sup>12</sup> *Ibid.*, 260, 261

<sup>13</sup> *Ibid.*, 261

<sup>14</sup> *Ibid.*, 261

<sup>15</sup> *Ibid.*, 261

<sup>16</sup> Walgrave, "Restoration in Youth Justice," In *Why Punish? How Much?: A Reader on Punishment*, ed. Michael Tonry (New York: Oxford University Press, 2011), 321.

<sup>17</sup> *Ibid.*, 321

of singular victims, it can also move to heal the wounds of a community.<sup>18</sup> This is particularly important in communities that feel that justice has not been served. Whether or not laws exhaust justice in a particular context, there is an intuitive sense of when the harm done to oneself has not been fully restored. While legal channels may think they give the final word on the matter of a particular community's harm, the feeling of unresolved harm may linger.

In this way, one can see the benefit of restorative justice in applied contexts. Take the example of Ferguson. In this particular instance, legal channels have all but closed the books on the matter. Following a retributivist model, Officer Darren Wilson used the proper amount of force, and as such broke no law. He therefore deserves no punishment. This decision, in the eyes of the law, is just. However, it is hard to shake the feeling that there is lingering harm that needs to be resolved. Both Michael Brown's family and his community (as well as an extended community of like-minded individuals, concerned with implicit racism, institutional biases, and police brutality) may require further compensation for the harm to which they have been subjected. They lost a son, a friend, a person. Whether or not Officer Wilson is innocent or guilty in the eyes of the law matters little when compared with the harm that those surrounding Michael Brown feel. So while retributivists argue that the justice system itself should be the object of restoration, this seems artificial. Restorative justice highlights the reality that the *people* affected are the objects of harm. In this way, restorative justice seeks, first and foremost, to rehabilitate the harm visited upon the victims, reinforcing an authentic faith that the system will do them justice.

Furthermore, as restorative justice focuses on persons in the context of justice, its means of reconciling harm are more holistic in the employment of different deliberative processes between victim and offender. Walgrave argues that deliberation among the different parties is essential to arriving at a consensus for psychological and material compensation for a victim's suffering.<sup>19</sup> While controversial in his belief, Walgrave argues that the person who commits an offense is necessary for restoration.<sup>20</sup> Ideally, the offender consents to this deliberative process voluntarily.<sup>21</sup> Walgrave does acknowledge the possibility that when an offender might not willingly consent to deliberate as to what compensation is appropriate to restore the victim's harm, the reconciliation is arrived at through coercive means.<sup>22</sup> Furthermore, this enforced deliberation will likely yield "partial reparations."<sup>23</sup>

The virtue of the restorative model lies in the fact that deliberation, in any form, lends itself to a social healing, always focusing on the rehabilitation of the victim, first and foremost. The deliberative process not only allows for the exchanges of such emotions as "...shame, guilt, remorse, empathy, compassion, support, apology, and forgiveness in the offender, the victim, and other participants," but also a true awareness of "...the harm and

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<sup>18</sup> Walgrave, "Restoration in Youth Justice," 319.

<sup>19</sup> *Ibid.*, 320

<sup>20</sup> *Ibid.*, 321

<sup>21</sup> *Ibid.*, 320

<sup>22</sup> *Ibid.*, 320

<sup>23</sup> *Ibid.*, 320

suffering caused.”<sup>24</sup> The process allows for an environment of true reconciliation, in which the offender becomes aware of the extent of her wrongs and is truly earnest in her agreement to repair the pains inflicted.<sup>25</sup> The fact that she is treated as a morally considerable agent that has her own interests and flaws underscores the fact that the restorative process preserves the humanity of the offender. Ultimately, the process allows for “...the satisfaction of the victim, reintegration of the offender, and restored assurance of rights and freedoms in society.”<sup>26</sup> In this way, through direct interaction, the victim is more authentically restored, and the offender is truly rehabilitated in the way that he can see the error of his ways, rather than just fearing a punishment that might result.

With this intimate interaction between victim and offender, some might object to the restorative model putting undue stress on the victim. As the focus of the deliberative process, the victim might be unable to express her anger, resentment, pains, or aims. I think this objection is particularly strong in the case of rape victims. The rapist might maintain his innocence of any involvement. He might protest ignorance to her resistance to the act. He might do these things before, during, and after the deliberative process. This has several clear and harmful consequences. The deliberative process, in which a victim must engage her attacker, might cause further and deeper psychological harm that can neither be addressed in the deliberation process nor identified immediately. While this instance seems to introduce some very serious implications for the deliberative process, it does not render the system null and void. There are a number of alternatives to a direct encounter between an offender and a victim. A court-appointed litigator might advocate on behalf of the victim so she does not have to undergo any additional trauma. Furthermore, while these concerns are practical, they do not effectively discredit the purpose of the deliberative process. It seeks to aid in the restoration of a victim's faith in the system. It compensates her, both psychologically and perhaps financially, for the harm that has been inflicted upon her.<sup>27</sup> Justice is served by a direct intervention with the offender, whether actually or for all-intents-and-purposes.

For this reason, the justice system still plays an important role in the restorative model, acting as a member of the community of justice with certain limited privileges that ensure the deliberative process takes place. If law enforcement fails to arrest an offender, both the victim and her community are in a dangerous place that might allow for the loss of faith in the system. As such, she expects that they will protect her rights and freedoms, or dominion, as Walgrave refers to as the protection of these privileges.<sup>28</sup> “Crime is an intrusion upon dominion, and especially on the assurance of rights and freedoms.”<sup>29</sup> The justice system intervenes to play the role, as a member of the community, of ensuring dominion over one's affairs remains a “collective good.”<sup>30</sup> The system is still not the primary functionary, though. The power structure of the justice system takes on a role very similar to the United Nations does in global affairs. It acts as a third party mediator and peace

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<sup>24</sup> Walgrave, “Restoration in Youth Justice,” 323.

<sup>25</sup> *Ibid.*, 323

<sup>26</sup> *Ibid.*, 323

<sup>27</sup> *Ibid.*, 324

<sup>28</sup> *Ibid.*, 322

<sup>29</sup> *Ibid.*, 322

<sup>30</sup> *Ibid.*, 322

keeping force. Sentencing might be mediated by the courts system, but courts will not pass sentences down. Rather, a victim passes sentencing and her community that surrounds her supports her, for the crime affects the larger scope of the community.<sup>31</sup>

As a whole, in its aim of restoration on multiple fronts, restorative justice is a system that lends itself to a more holistic approach that repairs harms, all the while reinforcing the worth of each individual involved in the process. First, as a goal, it is aimed at social healing.<sup>32</sup> This is true for both individuals that have been harmed and communities that feel victimized. Furthermore, while restorative justice reinforces the rehabilitation of the victim first and foremost, it in no way leaves out the offender. Through a deliberative reconciliation process, it actively considers the rehabilitation of the flawed humanity of the perpetrator. Including the offender in this deliberative process, whether voluntarily or compulsively, ensures authentic rehabilitation. This is true for both the suffering the victim has encountered and the understanding of the offender of the entire situation. And while retributivism is a conversation between a system of laws and a perpetrator, restoration presents itself as a holistic conversation. It addresses and includes every social actor in the end goal of positive reconciliation and actual rehabilitation, rather than merely punitive judgment.

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<sup>31</sup> Walgrave, "Restoration in Youth Justice," 323.

<sup>32</sup> *Ibid.*, 324



## MOTIVATIONAL OVERDETERMINATION AS AN OBJECTION TO KANTIAN DEONTOLOGY

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Anyone who has studied Kant extensively will likely have encountered a joke by Friedrich Schiller, which served as a mockery, not only of Kant's Categorical Imperative, but of duty-based ethics in its entirety. Schiller wrote, "Gladly I serve my friends, but regrettably I do it with pleasure. Thus I am often troubled by the fact that I am not virtuous. The only advice for you is to try to despise them. And thus to do with repugnance what duty commands."<sup>1</sup> While the joke may be clever, it expresses a legitimate concern within the study of Kantian ethics, namely, when can one determine that an action is done "from duty"? Must the action be performed apart from all other motives, or can a dutiful action be executed alongside cooperative inclinations? Also, when can an action be attributed moral worth, and how is this concept affected by Schiller's objection? I will attempt to answer these questions by arguing that Schiller's refutation represents a severe misinterpretation of Kant's deontology, and in fact, when Kant is read correctly, he stands strong against the challenges of the overdeterminationalists.

Analysis of these objections must begin with a precise understanding of Kant's deontology, his philosophical goals, and the ideas of moral worth and acting from duty. Kant argues that there are a priori ethical laws that should form every maxim and direct every action. These laws, like the laws of nature, are universal, and apply to every individual in every situation. All rational beings have a duty, Kant claims, to act in such a way that these ethically pure maxims are followed, regardless of any external circumstance or possible consequence.<sup>2</sup> While the content of these moral laws is the centerpiece of Kantian ethics, it is not the focus of this paper, and I feel it extraneous to address it in this context, as it may lead to a diversion of focus from the central problem, namely, the possibility of acting from duty at all.

It is significant to note that prior to the idea of moral worth, deontology is an action-based ethics (as opposed to one based entirely on intentions). One can act in a way that aligns with her duties, even if her motives are entirely based on inclination. In the *Groundwork*, Kant, after identifying beneficence as a duty, provides an example of an individual who simply finds pleasure in kindness. There are many benevolent souls, Kant says, whose motives and inclinations all direct themselves toward goodness, and, since their actions align with their duties, these individuals are living in accordance with their deontological obligations. However, Kant follows this admission by stating, "Yet I maintain that, however dutiful and kind an action of this sort may be, it still has no genuinely moral worth..."<sup>3</sup>

Interpretation of this passage is rather difficult since Kant neglects to identify the motive, which drives these souls; he simply states that there are inclinations present that align

<sup>1</sup> Friedrich Schiller, *Friedrich Von Schillers Sämmtliche Werke* (Cotta 1818) 299

<sup>2</sup> Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Oxford, NY: Oxford University Press, 2002) 195-245

<sup>3</sup> *Ibid.*, 199

with duty. Moral worth, it must be added, can only result from an action, which is done *from* duty, as opposed to actions, which simply happen to align with duty. Prima facie, it would appear that, under Kant's view, one's actions cannot be attributed any moral worth, unless the individual performing them has absolutely no cooperating inclinations (inclinations which would drive one to follow her duty, even if no consideration of the duty was present). Richard Henson, in his article *What Kant Might Have Said: Moral Worth and the Overdetermination of Dutiful Action* encounters the same problem, and he concludes, "Only when one acts *without any* (cooperating) *inclination* is one acting from duty."<sup>4</sup> After a careful analysis of Kant's surrounding passages within the Groundwork, I feel I must dissent from Henson's conclusion, or at least request that his judgment be suspended.

Henson calls for those who disagree with him to defend themselves with passages from Kant, which he claims have not yet been provided. It is true (to my knowledge) that Kant never explicitly states a concern for overdetermination, but if one considers some of the passages surrounding Kant's writing on inclination, I believe that assumptions can be drawn which help to understand Kant's views on the matter. While Kant's writing on the passage referred to above does not explicitly state the motivations which drove these souls to act in accordance with duty, he follows this by relating their situation to a similar one, which he calls the "inclination to honor." He states,

It is on a level with other inclinations—for example, the inclination to pursue honor, which if fortunate enough to aim at something generally useful and consistent with duty, something consequently honorable, deserves praise and encouragement but not esteem.<sup>5</sup>

It would seem to follow, from this passage, that Kant was in fact arguing that these souls were acting from inclination, rather than from duty. However, he makes no comment regarding the possibility of acting from duty while having other inclinations present.

To fully address Henson's claim, it is important to analyze the Kantian passage that led Henson to this conclusion. Kant provides an example of a man whose life has encountered so much hardship that his mind was "overclouded by the sorrows of his own which extinguished all compassion for the fate of others."<sup>6</sup> That is to say, he notices the sorrows and misfortune of others, but he is simply no longer emotionally affected by them, since he is overwhelmed by his own troubles. However, when he notices another individual in pain, he "tears himself out of this deadly apathy and does the action without any inclination, solely out of duty."<sup>7</sup> Only now, Kant says, can this man's actions receive the title of moral worth.

From this passage, Henson concludes that Kant's intention is explicitly clear: only when one has absolutely no inclinations supporting a given action, and many inclinations opposing it (and of course, this action aligns with one's duty) can one's actions have moral worth. Now, Henson addresses one objection to his interpretation, namely, that Kant was not arguing that this was the first time the sorrowful man's actions had moral worth; it is simply the first time the reader can *know* that his actions have moral worth. Henson vigorously dissents from this argument. He claims that this is not supported by any outside Kantian passages, and that those who perpetuate such an argument are attempting

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<sup>4</sup> Richard G. Henson, *What Kant Might Have Said: Moral Worth and the Overdetermination of Dutiful Action* (*The Philosophical Review*, 1979) 33

<sup>5</sup> Kant, *Groundwork of the Metaphysics of Morals*, 200

<sup>6</sup> *Ibid.*, 200

<sup>7</sup> *Ibid.*, 200

to apply ambiguity to a passage that has none.<sup>8</sup> I agree with Henson; it does not appear that Kant intended to claim that only when the sorrowful man was free from inclinations could we *know* that he was acting with moral worth. This is a misinterpretation. Rather, when examining the surrounding passages, I believe Kant's intentions with this passage were more nuanced than Henson first believed them to be.

The way in which Kant ends this paragraph is intriguing, and I think that it is important when we consider the shaping of Kant's story as a whole. Kant says, "It is precisely in this that the worth of character begins to show--a moral worth, and incomparably the highest--namely, that he does good, not out of inclination, but out of duty."<sup>9</sup> Kant's focus in creating the story of the sorrowful man, I believe, becomes clear after one encounters this passage. When the reader considers this man, his disposition, and his actions, she is not simply looking at the man's actions in isolation. Kant is expressing the development of moral character, and how one breaks away from his inclinations and his base desires in order to mold into the higher, moral character.

It is important to note that the sorrowful man did not act out of reluctance, as it would first appear. As his moral character developed, he *desired* to aid in the suffering of others, even though there was no inclination within him which drove him to such action. (I also think that it is interesting to note that, contrary to general assumption, there is nothing within this passage to suggest that this man had any inclination, which would drive him against helping others. Perhaps this man had already done as Kant prescribed, and constituted his nature in such a way that there would be no opposing inclinations.) Kant is telling the story of a man whose moral character has finally developed, and showing the reader that, even in the worst of circumstances, moral character can shine through.

Also, the ending of this paragraph mirrors Kant's story of the sympathetic souls almost verbatim. Kant says that the sorrowful man in his story did good *not* out of inclination, *but* out of duty. Again, Kant is not considering the possibility of *both* inclination and duty existing within the man.

This option, that it is possible for one to be acting *from duty* along with corresponding and opposing inclinations, must be addressed. It is a possibility which is considered by Allen Wood, in his book, *Kant's Ethical Thought*. While I disagree with some of Wood's conclusions in his section on overdetermination, he appears to draw the same overall conclusion that I did: Kant is painting the picture of a Good Will, a moral character, and not simply one of actions and duties.

Wood, like myself, disagrees with Henson's conclusion that one (or one's actions) cannot have moral worth unless her actions are performed from duty *alone*, separate from all corresponding inclinations. Wood points out that there are very few places in which anything close to an idea of motivational overdetermination is addressed by Kant, but one of them is in a journal article in which Kant says, "...he [the rational human being] must, as far as is possible for him, strive to become aware that no incentive derived from that gets mixed, unnoticed, into the determination of duty..."<sup>10</sup> Kant is not saying here that one cannot have incentives alongside duty; he is simply saying that they cannot be

<sup>8</sup> Henson, *What Kant Might Have Said: Moral Worth and the Overdetermination of Dutiful Action*, 46

<sup>9</sup> Kant, *Groundwork of the Metaphysics of Morals*, 200

<sup>10</sup> Immanuel Kant, *On the Common Saying: That may be correct in theory but it is of no use in practice* (*Berlinische Monatsschr.*, 1793) 8:279

mixed in the *determination* of duty. This confirms my earlier belief that, for an action to have moral worth, it must be *from* duty, but nowhere in this passage does Kant condemn corresponding inclinations which do not affect the actor's decision. In Wood's words, "... we must not let them corrupt our judgment about what our duties are."<sup>11</sup> Thus, Kant is, again, placing emphasis on the fact that we must transform our character in a way such that we act purely on duty, with a truly Good Will, rather than acting based on the whims of our inclinations.

Kant addresses the idea of mixed inclinations and duties again, in his *Critique of Practical Reason*, in which he says, "...it is even hazardous to let any other incentive (such as that of advantage) so much as cooperate *alongside* the moral law."<sup>12</sup> While Kant says that mixing inclinations with duties is hazardous, it does not necessarily imply that any moral worth is lost if this procedure is followed. Kant, showing his Rousseauian nature, believes that individuals are born with a purely Good Will, which gets corrupted by society over time. However, we can act in such a way that we steer our inclinations toward goodness. It is hazardous for us to let any inclination cooperate alongside duty since it may corrupt our judgment, but if we are able to act in such a way and preserve our ability to act *from* duty, Kant would not condemn it. This developed from Kant's theory of human nature, which he derived heavily from the Stoics. The Stoics separated all of philosophy into three parts: Logic, Physics, and Ethics. Logic was thought to be the driving force, which regulated all other study across all disciplines.<sup>13</sup> The rational mind, the part of human composition which determines and interprets logic, is the part which creates maxims, discovers moral principles, and legislates oneself. The subsequent part of human disposition is our nature, or the human condition, which is easily corruptible but can also be shaped by the rational mind. An understanding of this also helps one understand Kant's ultimate mission in the Groundwork, which was to lead his reader to develop the moral character, and shape herself in such a way that she aligns her nature with her rational mind.

Wood concludes by denying that a will can be good only when it acts from duty. He states, "The motive of duty is then seen as one of these [desires, impulses, or passions] tugging at us along with other inclinations and producing actions by something like a parallelogram of psychic forces."<sup>14</sup> It would seem to me, then, that Wood would subscribe to one of the options listed by Henson in his article, namely, as long as duty is one of those cosmic forces, one can be considered to be acting from duty. I agree with Wood in the sense that duty can cooperate alongside other forces, but I tend to dissent in this area. One is acting *from duty* if duty is the *only* force, which is driving her actions, regardless of the other inclinations, which would attempt to drive her. This is Kant's whole point in creating a moral character; it seems absurd to me that one would then conclude that Kant would allow almost any action to be considered from duty, as long as duty is one of the driving forces. Why, then, choose duty as the one that the action is "from"?

<sup>11</sup> Allen Wood, *Kant's Ethical Thought* (Cambridge, U.K., Cambridge University Press, 1999) 34

<sup>12</sup> Immanuel Kant, *Critique of Practical Reason* (Cambridge, U.K., Cambridge University Press, 1997) 5:72

<sup>13</sup> Diogenes Laertius, *Lives of Eminent Philosophers* (Cambridge U.K.: Cambridge University Press, 2013) 151

<sup>14</sup> Wood, *Kant's Ethical Thought*, 33

Let us imagine a man whose soul is not so pure as the ones provided in some of Kant's examples: a man who has been told a secret by another person, whom he hates. Now, one of their peers approaches this man and directly asks him a question which would expose the secret. "Good," the man thinks, "Now I can shame my enemy by refusing to lie and exposing his secret." However, this man has also read Kant, and he knows that it is his duty to refrain from lying. Thus, he has an inclination and a duty to tell the truth. Yet, are we to say that this man, by refusing to lie and exposing the secret, was acting *from duty*? If so, we must also say that this man was acting maliciously, out of hatred for his neighbor, and from an evil inclination. It would seem to me that this is not the moral character that Kant desired to inspire.

There is still a significant question which has gone unanswered, namely, how can one act from duty while still being influenced by cooperating inclinations? To answer this, we must again refer to the Stoics. It is important to remember that, while an individual can, to a certain extent, attempt to shape her disposition in a way such that her inclinations align with her duties, it is ultimately impossible to fully control our base desires. If we are to act from duty, we must acknowledge our animal inclinations, but ignore them in such a way that we are acting from our rational, logic-based mind, and not letting our inclinations control us. Only then can we truly embody Kant's moral character, and only then can we truly act from duty.

To conclude, let us return to Schiller's joke. It may be applicable if one were to subscribe to Henson's interpretation of Kant's deontology. However, if one analyzes Kant's arguments fully in context, one realizes that Kant's mission was not to define duty as simply impossible situations in which one's inclinations are fully aligned in such a way that acting from duty is immediately noticeable. Kant intended to portray a moral character, which allows the possibility of cooperating and opposing inclinations. Ultimately, when one studies Kant's true objective, one can see that Schiller's joke fails, Kant stands tall against objection, and his moral law shines through.

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## STREET'S EVOLUTIONARY DEBUNKING ARGUMENT: NUANCING A MORAL REALIST RESPONSE

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That there exist moral obligations which we, as moral agents, are ethically bound to uphold is a tenet of central importance to the moral realist. The term “moral realist” implies that there are moral obligations full stop. We might think of these obligations as duties in a Kantian sense, or as pain-pleasure calculations, but however we construe them, they are out there, says the realist. Of course, not all are of the same mind, and some have put out arguments against moral realism. Street in particular has constructed a potent evolutionary debunking argument. She relies on natural selection to argue that we have no way of coming to know these moral obligations which the moral realist asserts are out there. The challenge, as she puts it, is “to explain the relation between these evolutionary influences on our evaluative attitudes, on the one hand, and the independent evaluative truths that realism posits, on the other.”<sup>1</sup> To begin, I will reconstruct Street’s argument and examine exactly why she thinks the moral realist cannot meet this challenge. Then I will look at two replies to Street’s argument given by Copp and FitzPatrick.<sup>2</sup> I will then put forth my own argument— nuancing the intuitions of Copp and FitzPatrick to an extent— attempting to show that even if we grant evolution some influence on our moral judgments, evolution has only changed which moral tenets apply to our species, rather than distorting our knowledge of moral truths as Street claims. In other words, the kinds of beings we are, as a species, determine exactly which moral facts obtain for us: but more on this later. Finally, I will consider several consequences of this paradigm.

Street’s essay is quite lengthy, but here we will give a more concise presentation of her argument and then go from there. Here is Street’s argument<sup>3</sup>:

1. Human systems of moral, evaluative judgments are “thoroughly saturated with evolutionary influence” because natural selection has shaped human psychological dispositions.
2. Natural selection selected for those moral, evaluative judgments according to biological fitness (rather than tracking moral truths of the realist kind).
3. If human moral beliefs, shaped by evolution, align with moral truths, then this would be sheer coincidence.
4. We are not justified in thinking such a coincidence has occurred.
5. So, we cannot justifiably believe that our moral beliefs accurately represent independent moral truths.

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<sup>1</sup> Street, S., 2006, “A Darwinian Dilemma for Realist Theories of Value,” *Philosophical Studies*, 127: 109–66.

<sup>2</sup> Copp, D., 2008, “Darwinian Skepticism about Moral Realism,” *Philosophical Issues* 18: 186–206.; FitzPatrick, W.J. 2014a, “Debunking Evolutionary Debunking of Ethical Realism,” *Philosophical Studies*, doi: 10.1007/s11098-014-0295-y.; FitzPatrick, W.J. 2014b, “Why There is No Darwinian Dilemma for Ethical Realism,” in M. Bergmann and P. Kain (eds.), *Challenges to Moral and Religious Belief: Disagreement and Evolution*, Oxford: Oxford University Press.

<sup>3</sup> Street, S., 2006, “A Darwinian Dilemma for Realist Theories of Value,” *Philosophical Studies*, 127: 114-118.

6. So, realism must invariably give way to moral skepticism.

Notice that Street does not try to argue against the *existence* of moral truths; instead, she takes a more epistemological tact, arguing instead that, because of the pervasive influence of evolution on our psychological dispositions which supposedly lead to moral beliefs, we should not have very much confidence that our moral beliefs have tracked moral truths. We can imagine, for instance, that moral truths are kites, and that the string which leads from the kite to our hand is our ability to, in this case, quite literally grasp the truth. Street's argument is that *even if* there are moral truths flying up there, we have no good reason to think that the string we now hold is actually attached to a moral kite—as opposed to an immoral vulture or whatever flying entity one prefers. So, Street grants that there might be moral truths up there, but who really knows? Barring some kind of special revelation, the moral realist seems to be flightless.

What then are the moral realist's options? According to Street, they are quite grim. While the above argument is the gist of Street's evolutionary debunking argument, the consequence of such an argument come in the "Darwinian dilemma" she presents for the moral realist. The dilemma is nicely summarized by Street:

"On the one hand, the realist may claim that there is no relation between evolutionary influences on our evaluative attitudes and independent evaluative truths. But this claim leads to the implausible skeptical result that most of our evaluative judgments are off track due to the distorting pressure of Darwinian forces. The realist's other option is to claim that there is a relation between evolutionary influences and independent evaluative truths, namely that natural selection favored ancestors who were able to grasp those truths. But this account, I argue, is unacceptable on scientific grounds. Either way, then, realist theories of value prove unable to accommodate the fact that Darwinian forces have deeply influenced the content of human values."<sup>4</sup>

The hinge of the dilemma is the claim in favor of or against a relation between the influence of evolution on our moral beliefs and the truths in themselves. If the moral realist claims there is no relation whatsoever between our moral beliefs and the truths themselves, then they essentially deny the existence of any kite string at all; hence we find ourselves engrossed in skepticism. If the moral realist claims there is a relation between our moral beliefs—influenced by evolution—and the truths themselves, then the moral realist must be able to give a satisfactory account of how our evolutionarily-influenced moral beliefs were able to track these independent moral truths; that is, how the string was able to remain attached to the kite. Street assumes that this account will, as mentioned above, include some reference of natural selection, that it somehow "favored ancestors who were able to grasp those truths", but because of current evolutionary science, she refutes this claim.

It seems then that the moral realist is in trouble, that there is a proverbial hole in her kite—or whatever catastrophe one prefers. But not all are convinced. David Copp replies to Street's argument with a kind of naturalistic realism; that is, he grounds moral truths—

<sup>4</sup> Street, 2006, "A Darwinian Dilemma for Realist Theories of Value," 109-110.



no flying kites for him. Moral truths are, according to Copp, normative: they are to a large extent non-relativistic and apply to the whole of the human race, but they are grounded insofar as they have been influenced largely by humanity's social context, and this, according to Copp, has allowed us to remain with a great degree of morally evaluative accuracy.<sup>5</sup> Simply because these moral codes which have been shaped in the midst of human society promote harmony, peaceful interaction, politico-social stability, and the like. These are just the things which normative ethics attempts to accomplish. So Copp would accept premise (1) of Street's argument but deny (4): we *are* justified in thinking that our moral beliefs (forged within the context of human society) have sufficiently tracked independent moral truths.<sup>6</sup>

Street happens to have directly responded to Copp's argument.<sup>7</sup> Her reply is simply that Copp has not by any means avoided her argument; after all, Copp, relying upon his moral intuitions about moral truths (that they have been forged in the refining fire of human society), is making use of his evolutionarily-shaped mind to inevitably come up with an evolutionarily-shaped moral belief, thereby falling into the Darwinian problem that Street proposes all over again.<sup>8</sup> So we cannot accept Copp's account to be a good one because the moral truths he posits are simply those which we can expect from a mind shaped by evolutionary influences. Copp's account therefore does not have the power to escape Street's trap.<sup>9</sup>

But that is not the only reply the moral realist has. Part of the issue with Copp's account is that he allows for the pervasive influence of evolution on our moral beliefs which Street posits; that is, he grants premise (1), which is why he could not, according to Street, escape the force of her argument. But it is not evident, as FitzPatrick rightly claims, why we should have to accept premise (1) at all.<sup>10</sup> What reason is there to believe that our moral judgments are pervasively saturated with evolutionary influence? Street's argument is simply that our basic powers of reasoning are likewise influenced by evolution, and so, since these powers and faculties are the basis of our moral beliefs, then the evolutionary contamination is present in our moral beliefs too.<sup>11</sup> Needless to say, Street does not avoid

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<sup>5</sup> Copp, D., 2008, "Darwinian Skepticism about Moral Realism," *Philosophical Issues* 18: 186–190

<sup>6</sup> Similar arguments have been made by Wielenberg and Enoch. See Wielenberg, E., 2010, "On the Evolutionary Debunking of Morality," *Ethics*, 120: 441–64., and Enoch, D., 2011, *Taking Morality Seriously: A Defense of Robust Realism*, Oxford: Oxford University Press.

<sup>7</sup> Street, Sharon., 2008, "Reply to Copp: Naturalism, Normativity, and the Varieties of Realism Worth Worrying About," *Philosophical Issues*, 18: 207–28.

<sup>8</sup> *Ibid.* 214–218

<sup>9</sup> There have, naturally, been replies to Street's critique of Copp's argument. See FitzPatrick, W.J., 2014b, "Why There is No Darwinian Dilemma for Ethical Realism," in M. Bergmann and P. Kain (eds.), *Challenges to Moral and Religious Belief: Disagreement and Evolution*, Oxford: Oxford University Press.,; Locke, D., 2014, "Darwinian Normative Skepticism," in M. Bergmann and P. Kain (eds.), *Challenges to Moral and Religious Belief: Disagreement and Evolution*, Oxford: Oxford University Press.

<sup>10</sup> FitzPatrick, W.J. 2014b, "Why There is No Darwinian Dilemma for Ethical Realism," in M. Bergmann and P. Kain (eds.), *Challenges to Moral and Religious Belief: Disagreement and Evolution*, Oxford: Oxford University Press.

<sup>11</sup> Street, S., 2006, "A Darwinian Dilemma for Realist Theories of Value," *Philosophical Studies*, 127: 120–130

the issue with this reply; after all, the problem merely shifts one remove away: why should we doubt our capacities for reason? These are deep waters which I do not intend to dive into, for they drift too far afield of this paper's focus.<sup>12</sup> Simply put, it is not clear that the moral realist must accept premise (1).

The upshot of such a move is that the moral realist escapes Street's proposed dilemma and Street's argument without having to deal with certain devastating consequences. Recall Street's dilemma for a moment: "Either way, then, realist theories of value prove unable to accommodate the fact that Darwinian forces have deeply influenced the content of human values."<sup>13</sup> The whole dilemma is contingent on the application of this supposed fact: the Darwinian influence on the content of human values. But if the moral realist claims that there has been no such influence on the content of human values, then Street's dilemma and her argument lose all power. But what plausible account can the moral realist give which overrides the claim of pervasive evolutionary influence? For starters, autonomous moral reflection is perhaps the most intuitive of all. The moral realist can claim, *contra* Street, that we have the ability for rational, autonomous moral evaluations that are not merely the brute consequences of evolutionary impulses.<sup>14</sup>

I would like to take the gist of this response to Street and develop my own argument alongside it. I will play into Street's trap; that is, I will take her challenge head on, responding directly to her second horn of the dilemma and, like Copp, denying premise (4) and, like FitzPatrick, denying premise (1) as Street puts it. Here is the second horn:

"The realist's other option is to claim that there is a relation between evolutionary influences and independent evaluative truths, namely that natural selection favored ancestors who were able to grasp those truths."<sup>15</sup>

Before I launch my argument, I should post a couple caveats. For one, I will not grant Street's assumption here; that is, I will claim that evolutionary influences and independent evaluative truths are related, but I will not argue that natural selection has somehow selected ancestors who held those truths. Also, I will not deny premise (1) outright but rather amend it. Evolution has impacted our dispositions: prizing the clan above all others, seeking the survival of the self (though we seem to fight against this too), but not in the way that Street assumes. So, while I will take FitzPatrick's point that we have autonomous moral reflection for granted, I will not deny all evolutionary influence full stop. Here is the argument:

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<sup>12</sup> For further discussion see Nagel, T., 1979, "Ethics Without Biology", in *Mortal Questions*, Cambridge: Cambridge University Press, pp. 142–46.

<sup>13</sup> Street, S., 2006, "A Darwinian Dilemma for Realist Theories of Value," *Philosophical Studies*, 127: 109–110.

<sup>14</sup> Again, a fuller account of this discussion can be found, for starters, here: Nagel, T., 1979, "Ethics Without Biology", in *Mortal Questions*, Cambridge: Cambridge University Press, pp. 142–46., and FitzPatrick, W.J. 2014b, "Why There is No Darwinian Dilemma for Ethical Realism," in M. Bergmann and P. Kain (eds.), *Challenges to Moral and Religious Belief: Disagreement and Evolution*, Oxford: Oxford University Press.

<sup>15</sup> Street, S., 2006, "A Darwinian Dilemma for Realist Theories of Value," *Philosophical Studies*, 127: 109–110

1. If there are moral truths (obligations, duties, etc.), then they are the kinds of things that have to do with ends; that is, the moral perfection of an individual.
2. If they are the kinds of things that have to do with the ends of individuals, then there is no one limited set of moral propositions (simply because there are, or possibly are, different species—kinds of individuals—to which moral truths can apply).
3. If there is no limited set of moral propositions, then it is possible that a different set of moral truths could have applied to humans (and other moral beings).

I begin without the assumption that there are moral truths simply because this is not an argument, like Street's, for the existence or non-existence of independent moral truths. And what is more, I can safely assume that moral truths have to do with the ends of moral individuals simply because this is a common definition, and given my caveat about our having autonomous reasoning, there is no apparent reason to doubt this; after all, when we think of moral obligations, we imagine that the individual who fulfills them all is somehow an exemplary individual: perfect in some way.

The language of (2) might be confusing, but the basic point is simply this: the number of moral propositions that exist is greater than the number which apply to the human species alone. We can call this idea "species relativism". Perhaps we have good reason to think that incest is immoral amongst human beings. But if there is an alien species which, for whatever reason, must propagate through means of incest, then it does not seem reasonable to assume that such an alien species is somehow acting immorally by having incestual relations. However, it may be the case that while incest is morally impermissible for humans and morally permissible for Martians, murder is nevertheless morally impermissible for Martians and humans alike, for whatever normative reasons we might apply. The gist of it is simply this: morality is species-relative. Moral truths direct moral beings to their respective *teloi*; that is, their ends, but not all ends are the same simply because not all species are alike. And finally, premise (3) is a natural consequence of (2) and the notion of the evolution of species. Maybe in some possible state of affairs human beings evolved to be a radically different species than we are today. According to (2), if such were the case, then there would be differing sets of moral truths which human species A and human species B are obligated to follow. Our moral obligations would simply be different because we are different kinds of beings with different kinds of ends.

What is the upshot of this argument? First of all, it meets the challenge of Street's second horn; namely, it gives an account which explains how evaluative truths and evolutionary influences are related. It is not so much that evolution has influenced the content of our moral beliefs in my account; instead, evolution has influenced which moral beliefs can reasonably be held by human autonomous, rational, moral reflection because evolution, amongst other factors, has shaped the kinds of beings—the species of creatures—we are. It is because we are able to engage in reflection on our own nature that we can know which moral truths apply to us; for in examining our species, we find exactly what leads to human flourishing—what leads to the fullness of *eudaimonia*, to call upon Aristotle.

Secondly, it resists the hyper-rational, individualistic implications of FitzPatrick's critique of Street's argument. If moral truths are faithfully tracked because humans have the capability for autonomous, rational, moral reflection, then it seems as though individuals of the human species, like severally mentally handicapped individuals, have

no ethical standing, and it seems as though, based on this criterion, that they count for something less than human. But if moral truths are broadly construed as applying to the human species broadly construed, then individuals like those who are severally mentally handicapped now have moral status and are a part of our collective moral life. Also, it encourages us to think in terms of the whole human species; thus, ethics is still objective and normative insofar as it applies to human beings and their experiences. Third, by taking on this species-relative view, we are able to resist making claims like Copp's which fall prey to Street's critique. And even though my caveat about premise (1) allows me to escape her objection, I think that even without this it is still possible. For in the end, I do not claim exactly what the moral truths actually are, unlike Copp; rather, there is room for such normative argument amongst the members of our species even while giving an account of how evolution relates to moral truths and our moral beliefs about them. Such normative arguments must take into consideration the kind of beings we are, our relation to other species, and our relation to the world at large.

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## PERNICIOUS PROHIBITION: AN ARGUMENT FOR THE LEGALIZATION AND REGULATION OF ADULT PROSTITUTION

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In excerpts from *The Guilt Project*, Vanessa Place relates the horrors to which two women, Dakota and Rickie, were subjected by their pimp “MacD.” Featuring examples of rape, vicious beatings, and psychological abuse, the passages illustrate the severity of contemporary prostitution’s impact on women. Place offers two options to combat these ills, each alternative specifically designed to alleviate harms at a distinct level of the practice. Outright prohibition of pornography, the first route to addressing this issue, would theoretically prevent “whoring” from occurring altogether whereas tightly regulated, legal adult prostitution would minimize its harm to women<sup>1</sup>. Neither of these solutions is absolutely superior to the other; each has certain, positive features that the other lacks. As is typically the case in decision-making, there is no clear, “correct” answer to this topic. In spite of this, I argue in this essay that if we are to ensure that we reach the most beneficial resolution, that is, the outcome *most* conducive to human flourishing, we should implement a policy molded around this latter proposition. First, I define “patriarchal sex” to provide a framework for the damaging attitudes that produce male demand for both pornography and prostitution. Second, I analyze the relationship between pornography and prostitution in regards to their potential to diminish the well-being of all women in society. Finally, I critique the potential benefits and harms of both legal adult prostitution and pornography prohibition. Through this analysis, I show that the legalization of adult prostitution, provided that government regulation would be implemented alongside such a policy, would produce the environment most conducive to human flourishing.

Patriarchal sex in America, as described by Robert Jensen, is any sex that reflects the belief that the “natural” roles to be fulfilled by men and women are, respectively, dominance and submission<sup>2</sup>. For Jensen, patriarchal sex reinforces the eroticization of control in male-female relationships; subsequently, heterosexual men’s attitudes towards their sexuality produce a sense of entitlement to “taking” women for sexual satisfaction<sup>3</sup>. Evidenced by the deleterious impact of pornography and prostitution, the propagation of patriarchal attitudes towards sex causes a panoply of consequences. The tendency for men seduced by patriarchal attitudes is to view women as a mere means, or objects, to satiate their sexual desires<sup>4</sup>; consequently, if these desires are not satiated by “real” women, men may presumably turn first towards pornography and then, if they are so inclined, prostitution<sup>5</sup>. The issues of pornography have been examined by a number of philosophers; whether exploiting gender inequalities to effectively reduce women to “just

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<sup>1</sup> Vanessa Place, *The Guilt Project* (New York: Other Press, 2010), 179.

<sup>2</sup> Robert Jensen, “Patriarchal Sex” in *Philosophy and Sex*, ed. Robert Baker. (Amherst, NY: Prometheus, 1998), 537.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

sex” or promoting the rape myth that the victim “was asking for it,” this issue possesses a number of consequences<sup>6-7</sup>. Perhaps the most insidious aspect of pornography is that the demand for women’s bodies is warped to the point where pornography not only becomes enjoyable, but *necessary* for men, as though it were an addiction<sup>8</sup>. As I will soon show, this habit-forming characteristic of pornography consumption exposes the primary weakness to approaching the issue of prostitution with a strict prohibitive policy. Before analyzing these policies, we must first consider how prostitution and pornography not only reflect, but reinforce, patriarchal attitudes towards women.

Given the *current* model of prostitution in the United States, the practice will inherently exemplify patriarchal attitudes. In this model, the “market” for prostitution features a standard “business” structure; male “pimps” advertise their “product” – women who are given denigrating labels such as “whore” or “bitch” – to other men, or “johns,” for their sexual pleasure<sup>9</sup>. It is important to note the distinction that I make between referring to women who prostitute as “products” rather than “employees” in the present-day sex-service industry; “employee” implies that these women have autonomy over the terms of their “employment” in the industry, including the right to terminate said service. Although some argue that these women fully control the conditions of their employment, the psychological abuse that pimps utilize to subject these women suggests otherwise<sup>10-11</sup>. As Vanessa Place describes in harrowing detail, it is not uncommon for pimps to take the money their “ho’s” earn in addition to indiscriminately beating and raping them<sup>12</sup>. In essence, pimps reinforce the patriarchal ideal of female submission by stripping prostitutes of financial and personal autonomy to reduce them to a sub-human level. Prostituted women seemingly have no say in what services they provide; they are sold as “products” to johns for the sole-purpose of male satisfaction, reinforcing the objectification of all women. To further illustrate this point, if a prostitute is beaten or robbed by a “trick,” the pimp’s ensuing rage derives from his perceived “financial setback” rather than genuine concern for the woman’s health<sup>13</sup>. Although patriarchal attitudes seem intrinsic to prostitution, Jensen’s limited definition of patriarchal sex to American society is critical. I will later show that prostitution does not derive from patriarchal attitudes across all cultures; thus, we can draw inspiration from these contexts to reform prostitution into a model that produces more good than its current, blatantly harmful structure produces.

Now that we have considered how contemporary prostitution supports patriarchal attitudes, we turn our attention to pornography and its relation to both patriarchal sex

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<sup>6</sup> Catherine MacKinnon, “Pornography: On Morality and Politics” as excerpted in *Philosophical Problems in the Law*, ed. David M. Adams. (Belmont, CA: Wadsworth, 1992), 264:1, 265:2.

<sup>7</sup> Rae Langton, “Projection and Objectification” in *The Future for Philosophy*, ed. Brian Leiter. (Oxford: Oxford University Press, 2004), 294-95.

<sup>8</sup> Alan Soble, “Why Do Men Enjoy Pornography?” in *Philosophy and Sex*, ed. Robert Baker. (Amherst, NY: Prometheus, 1998), 557, 559.

<sup>9</sup> Vanessa Place, 179.

<sup>10</sup> Vanessa Place, 148, 151.

<sup>11</sup> Rebecca Whisnant, book review in *Hypatia of Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*, ed. Kamala Kempadoo. (Boulder, CO: Paradigm Publishers, 2005), 211.

<sup>12</sup> Vanessa Place, 149.

<sup>13</sup> Vanessa Place, 155.

and prostitution. In this essay, “pornography” refers to any depiction, whether textual, photographic, or cinematic, of sexually explicit material designed to satisfy the sexual desires of men. It is pertinent to note that, although women also consume pornography and purchase the services of prostitutes, it is men who constitute the *substantial* majority of individuals who produce and consume these goods. The fact that so many men consume pornography can be explained in several ways; whether a means to reaffirm men’s sexuality in a world where they do not get as much sex as they feel they should, or a way to provide some semblance of control to men who feel like they have none, pornography has an indisputable allure<sup>14-15</sup>. Through pornography, women are not merely reduced to their sexuality, but that sexuality becomes projected upon women by pornographers<sup>16</sup>. Men who consume pornography are presented a picture of female sexuality that reflects their own desires; the most submissive women are the most desirable ones. In some cases, the presentation of the ever-obedient woman in pornography deludes men into accepting rape myths; the “reality” that these men have come to understand from pornography is that the woman will *always* give in to sex and will always enjoy it<sup>17</sup>. Additionally, pornography can cause strain in mutual relationships. For example, a man may substitute an intimate, physical relationship with his loved one for pornography if she does not comply with his porn-influenced fantasies or if the prospect seemingly requires too much effort<sup>18</sup>. The cases of prostitution and pornography each illustrate a similar relationship to the ideals of patriarchal sex. In each instance, patriarchal attitudes about women and sex are reflected through male dominance and female submission. Men consume pornography and purchase prostitutes’ bodies; the women who are objectified are expected to comply, lest they are beaten or raped. Given these similarities, one may argue that, to prevent patriarchal attitudes from harming women, all forms of pornography and prostitution should be banned.

The primary appeal of prohibiting pornography is that women would theoretically not turn to prostitution<sup>19</sup>; that is to say, since pornography is the realm in which prostitutes are born, its prohibition would prevent women from being introduced to either legitimate or illegitimate forms of sex work<sup>20</sup>. The principle drawback of banning all forms of pornography to prevent prostitution is that we would fail to treat the patriarchal attitudes that promote “consumption” of prostitution in the first place. Leaving these beliefs untreated, combined with the prohibition of any legal means to satisfy desire for sexual gratification, may prove more detrimental than beneficial to human flourishing. To support this claim, let us consider the case of drug dependence, specifically alcoholism, on both an individual and a societal level. First, assume that an alcohol-dependent individual has been admitted to a hospital for treatment at the constant urging of her relatives. The chief physician on staff informs the patient’s family that she is to avoid alcohol entirely

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<sup>14</sup> Michael Kimmel, “Hooking Up: Sex in Guyland” in *Guyland: The Perilous World Where Boys Become Men*. (New York: Harper Collins, 2008), 172.

<sup>15</sup> Alan Soble, 561.

<sup>16</sup> Michael Kimmel, 173.

<sup>17</sup> Michael Kimmel, 170.

<sup>18</sup> Michael Kimmel, 179.

<sup>19</sup> Vanessa Place, 179.

<sup>20</sup> *Ibid.*

yet provides no medication to curb her cravings. While the patient's family may be able to eliminate an opportunity for her to drink by creating a "dry" environment at home, her untreated cravings may encourage her to find other, potentially more harmful, means to maintain her habit. For example, perhaps the individual begins sneaking out to bars and lying to her relatives because does not wish to disappoint them. Now, as her opportunities to go out to drink without raising suspicion are limited, the individual develops the tendency to binge drink whenever she does go out. In this situation, failure to provide any means to help the individual overcome her dependence has potentially increased the consequences of her behavior; not only does the increased risk of overdose put the individual's life in greater danger, but, if discovered, her deceit would surely wound her relatives.

Now, assume that policy-makers, concerned with the growing prevalence of alcohol dependence, are tasked with combating this growing disease. These politicians, in the interest of reaching an outcome most conducive to human-flourishing, consider two options; a stance of absolute prohibition or one of strict regulation and increased public education about the potential consequences of drinking. Given the portrait painted by the previous example of a substance-dependent individual, it is apparent that illegalizing alcohol would cause more problems than it would solve. Given this hypothetical society's prominent use of alcohol, one may assume that demand for this substance in a "dry" society would create market pressures that would lead to the formation of a volatile black market. In such a market, criminal dealers would assume control of the market's supply and would attempt to maintain this control by any means necessary. These suppliers may turn to violent methods, perhaps forming gangs armed with weaponry funded by illegitimate funds, to usurp control from "rival merchants." In spite of the best intentions of policy-makers in implementing a prohibitive policy, the prevalence of violent crimes would rise due to formation of a black market in addition to leaving unfavorable demand unaltered. In order to avoid this obviously detrimental scenario, politicians would be wise to consider implementing a policy that combined tight regulation and education to reduce the rate of alcoholism in society. Such a policy would first avoid producing a black market by maintaining the legal status of alcohol. Second, by providing certain regulations, such as the prohibited sale of alcohol to minors and limited legal blood-alcohol-content for drivers, the government could theoretically mitigate threats such as adolescent dependence and drunk-driving accidents respectively. Additionally, by taxing the sale of alcohol, the government could use this income to fund awareness programs that would educate the public about the potential consequences of alcohol consumption. Through such programs, individuals who drink may choose to do so responsibly due to an enhanced awareness about the risks of binge-drinking and chronic alcohol consumption. Overall, demand for alcohol may decrease as awareness increases; thus, the prevalence of alcoholism in this society would predictably drop without causing unintended consequences.

Now that we have analyzed the potential consequences of alternate policies in this hypothetical example, we can apply similar analysis to the issue of prostitution. First, let us consider some unintended consequences that result from the prohibition of pornography and prostitution. A purely prohibitive stance towards pornography and prostitution, similar to our example of rampant alcoholism, would fail to address the underlying cause for the consumption of these "goods." In addition, despite the argument that prohibition would prevent women from turning towards prostitution, one fails to consider the



potential for trafficking women into the industry<sup>21</sup>. As I have shown, pornography and prostitution are linked in that they both reflect and reinforce patriarchal attitudes about women's sexuality. As Soble suggests, it seems as though a significant portion of men in America are dependent upon a steady supply of pornography<sup>22</sup>. Given the prevalence of American men's "addiction" to pornography, one may expect that, faced with prohibition, the pressures of this extreme demand would produce a black market for pornography that may actually exacerbate the already problematic black market for prostitution.

As previously noted, the prostitution market is controlled by pimps who sell women for the sexual satisfaction of men. If pornography were prohibited, similar men may sell objectifying material to satiate male demands for women. It is possible that, given the inherent relationship between pornography and prostitution, pimps would also assume control of the illicit pornography market. For example, a pimp could "diversify" the number of products advertised to a buyer. Depending upon the buyer's current preferences, or level of desperation to satiate his desires, he may choose to purchase either the "standard" pornographic film or "upgrade" to the services of a prostituted woman. Provided that the consumption of pornography reinforces the patriarchal belief that the sole purpose of women's sexuality is to satisfy male desires, placing it in the hands of violent suppliers who also advertise actual women may introduce a greater number of men who "need" pornography for sexual satisfaction to participation in the illegitimate sex industry. As is typically the case when demand for any good rises, economic pressures will induce a greater number of suppliers to enter the market; thus, more women may turn towards prostitution, whether "willing" or not, and subjected to criminal pimps' coercion.

If our ultimate aim of reforming prostitution laws is to produce the most possible good while causing the least amount of harm, then a stance of strict prohibition seems misguided. Instead, let us consider the potential benefits of legalizing and regulating adult prostitution. As was briefly mentioned, if prostitution could be shown to not derive from patriarchal attitudes across all cultures, the practice's supposedly "inextricably" harmful nature could be disproven; thus, we could theoretically reshape prostitution so that it does not produce the harm it causes now. Appealing to the desirability of prostitutes as wives in medieval France, Laurie Shrage argues that the practice of selling one's sexual services does not imply a negative connotation in all cultural contexts<sup>23</sup>. In fact, as evidenced by Babylonian temple prostitution's sacred role in promoting Nature's fertility, the practice can even be essential to a culture<sup>24</sup>. Ultimately, Shrage seeks to demonstrate that prostitution's meaning cannot be divorced from the culture in which it exists<sup>25</sup>. Following from these examples, one may imagine a culture in which prostitution is esteemed as an invaluable societal institution, one in which prostitutes' subjectivity is not only recognized, but respected. Given that prostitution and patriarchal attitudes are not intrinsically connected, one may consider that the benefits of reshaping the practice may outweigh any potential costs. The immediate impact of legalizing adult prostitution is that the government would take a now-legitimized prostitution market out of the hands of pimps. That action alone

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<sup>21</sup> Rebecca Whisnant, 210.

<sup>22</sup> Alan Soble, 559.

<sup>23</sup> Laurie Shrage, "Should Feminists Oppose Prostitution?" in *Philosophical Perspectives on Sex and Love*, ed. Robert M. Stewart. (Oxford: Oxford University Press, 1995), 72:2, 73:1.

<sup>24</sup> Laurie Shrage, 72:2.

<sup>25</sup> Laurie Shrage, 73:2.

would protect women who turn to prostitution in its reformed incarnation from the psychological, physical, and fiscal abuse that they would be subjected to by pimps. Despite benefitting individual women, though, pressing concerns remain regarding prostitution's societal role; might legalized prostitution not only perpetuate, but strengthen, patriarchal attitudes?

Although one may note the apparent benefits of legalizing adult prostitution, one may make the case that the practice could potentially *reinforce* patriarchal attitudes, thus diminishing human flourishing overall. For example, by legalizing adult prostitution, men might perceive that society has effectively legitimized their views of male-dominant and female-submissive sexuality. Now, the men who previously paid for pornography to receive sexual satisfaction may turn towards prostitution with a similar conception of having unquestioned control over women's bodies. If projection of male sexuality upon women can influence the propagation of rape myths, one can imagine the negative impact the myth that all women are willing to have sex, provided that the price is right, may have on individual and societal flourishing. If men develop this misconception about female sexuality, then a man who offers monetary compensation to a woman and is refused may consequently feel validated in raping said woman. If this act significantly increased due to the legalization of prostitution, then our desire to enhance human flourishing would be unrealized. Despite this admittedly persuasive argument against legalizing prostitution, I maintain that regulating adult prostitution could actually dispel patriarchal attitudes towards prostitutes and women in general.

In contemporary American society, the words commonly used to refer to prostituted women are blatantly derogatory. Terms such as those which I have previously mentioned effectively reduce prostituted women to the level of subservient animals or mere sexual objects, implying that a prostitute is not to be cared for and loved, but rather exploited sexually, harmed, and used<sup>26</sup>. In order to alleviate this ill, we must reform prostitution in such a way that the autonomy of individuals who participate in the practice is guaranteed. If we implemented a model in which prostitutes were given complete authority over their services, rather than being subject to the john's wishes, then these women could be thought of as "sexual professionals" rather than mere objects<sup>27</sup>. These women could even obtain the status of a "sexual therapist" if they advertised their services as being able to resolve issues of human sexuality<sup>28</sup>. Furthermore, if a certain woman was asked to provide a service she was uncomfortable with providing, she could instead refer the client to a "sexual fetish expert" rather than exposing herself to danger by not complying. By ensuring autonomy, a message could be sent to men that they are not entitled to the services which these individuals provide<sup>29</sup>. In legalizing and regulating prostitution in such a way, dominant patriarchal attitudes which fail to recognize women's subjectivity may be subverted and reformed rather than necessarily being reinforced.

In this essay, I have argued that, in order to produce a society most conducive to human flourishing, government should implement a policy of highly regulated adult prostitution rather than maintain its current prohibition. By showing that the current

<sup>26</sup> Robert Baker, "Pricks' and 'Chicks': A Plea for "Persons," in *Philosophy and Sex*, edited by Robert Baker. (Amherst, NY: Prometheus, 3d ed. 1998), 294.

<sup>27</sup> Laurie Shrage, 73:1, 77:2.

<sup>28</sup> Laurie Shrage, 77:2, 78:1.

<sup>29</sup> Vanessa Place, 179.

model of prostitution reinforces ideals of “patriarchal sex,” I highlighted the detriments of such a system. I then showed that a stance of prohibition would fail to address male attitudes that promote demand for pornography and prostitution; thus, the black market controlled by abusive pimps would be maintained and cause significant harm to prostituted women. Finally, by displaying that the legalization and regulation of adult prostitution would provide women who enter the industry to maintain autonomy over their offered services, government would both prevent the harms caused by criminal pimps and could reshape society’s conception of prostitutes. Although the legalization of prostitution is not superior to pornography prohibition in every way, as patriarchal attitudes may actually be reinforced, policy-makers should still consider reforming the current model. If we, as a society, commit ourselves to promoting human flourishing, then the benefits of legalizing adult prostitution would significantly outweigh its harms and the consequences of prohibition.

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## “VIRTUE RULES AND UNIVERSALIZABLE RULES”

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Attempting to describe the relation in meaning between the imperatives, ‘Be honest’ and ‘Tell no lies,’ seems to be an effective way to illustrate the dilemma posed by talk of virtues and rules. That being honest entails the abstaining from telling lies is obvious. That abstaining from telling lies entails being honest, however, is a much more contentious statement. A “proud thief,” for example, may exhibit honesty in readily confessing to his crimes, bragging about his skills of deceit, while nevertheless maintaining a dishonest character by regularly committing the dishonest act of theft.

What, then, is the root of this asymmetry of meaning between the two imperatives? The asymmetry here seems to follow from the fact that, rather than focusing merely on the act of lying or acting right in general, honesty has much more to do with possession of certain inner qualities. Are such qualities, however, capable of providing us with clear rules for action? Or, to narrow the question further, are imperatives like ‘Be honest’ capable of providing us with clear rules for *right* action? ‘Act candid,’ ‘Act trustworthy,’ ‘Act sincere,’ etc. are indeed treated as standards characteristic to honesty, but asking someone what each trait means will nevertheless produce vastly different responses depending on who is asked. Therefore, as a character trait it appears that honesty assesses first and foremost not particular actions, but persons and their states of character, feelings, and perceptions, among else.<sup>1</sup> The difference between the two imperatives, then, may be summarized as follows: ‘Tell no lies,’ prescribes only the direct action to refrain from telling lies, whereas ‘Be honest’ prescribes a state of mind that possesses general qualities of candor, trustworthiness, sincerity and fairness.

Here, the prominence of (1) *eliminativism* among early virtue ethicists appears obvious: if the virtues are defined foremost by appeal to character traits rather than actions, it follows that the virtues eliminate any need for rules formulated as prescriptions for action. In fact, that leading a moral life requires far more than the following of clear-cut rules has been a central point for many virtue ethicists from Aristotle onwards.<sup>2</sup> Skepticism towards rules, the virtue ethicist contends, results from the fact that rules are unable to account for all the possible particularities that life may bring.

How might we go about reclaiming the subject of right action for the virtues following such a skepticism towards moral rules? If talk of the virtues indeed opposes the formulation of rules, focusing instead on inner character qualities, then it follows that a virtue-ethical approach to right action would be predicated on such character qualities. This is the logic employed in the talk of “correct perception” as the primary involvement of the virtues.<sup>3</sup> Under the ‘correct perception’ approach, an act is the right thing to do insofar as it is in accordance, not with the correct rule or rules, but a type of perception dependent on certain inner qualities – perception of correct reasons from the correct

<sup>1</sup> Stephen Hudson, *Human Character and Morality* (London: Routledge, 1986).

<sup>2</sup> Aristotle, *Nicomachean Ethics*, trans. W.D. Ross (Franklin Park, IL: World Library Publications, 2009), 1131a11-25.

<sup>3</sup> John McDowell, “Virtue and Reason,” *Monist* 62 (1979): 331–50.

salient moral features of the situation-at-hand, that is. In particular, such perception relies on the twofold practice of discernment and deliberation: first one discerns what features of a situation are relevant to the dilemma at hand, and then one deliberates about how such salient features provide favoring or disfavoring reasons for performing a particular action. Only then, after careful consideration, does an answer to the question “What is the right thing to do?” become available.

This is not to suggest that the application of u-rules does not also demand a level of perceptual sensitivity. Consider a case where one has to choose whether or not to break a promise to a friend, when doing so means saving a stranger from becoming ensnared in a lie. A utilitarian might argue that the correct action is that which will prove most beneficial for all those involved, and as such accords with the u-rule, ‘Do what maximizes utility.’ Alternately, a deontologist might characterize the problem as an effort to determine what he or she would do if the situation were reversed, and as such is being guided by the u-rule, ‘Do unto others as you would be done by.’ In others words, defenders of u-rules as sufficient tools for action guidance are also quick to stress the point that such rules cannot, reliably, be applied correctly without exercise of practical wisdom, because u-rules require situational appreciation just as do v-rules.

Distinguishing u-rules from v-rules requires, then, focus on the function of perceptual sensitivity: unlike v-rules, which demand sensitivity to how each particular situation involves factors irreducible to universal rules, u-rules demand sensitivity to how each particular situation relates to a given universal maxim. A utilitarian, for example, denies an obligatory status to any general type of action beyond the foundational obligation to ‘Do what maximizes utility.’<sup>4</sup> Murder, however despicable, may be justified when taking a single life may save multiple lives. Conversely, a deontologist, in qualifying multiple actions as obligatory, would say that a moral quandary arises from a merely *prima facie* conflicting presence of multiple universal rules.<sup>5</sup> In the above example of breaking a promise, an agent is presented not only with the obligation to ‘Do unto others as you would be done by,’ but also with the obligations ‘Do not lie’ and ‘Do not break promises.’ The function of perceptual sensitivity as regards to u-rules, therefore, is in the arbitration of which rule out of several is the correct rule to apply.

Yet it seems intuitive that the eliminativist approach to moral rules cannot make sense of common notions of intrinsic rightness. No virtuous person, it seems, would ever argue against the unconditional wrongness of telling a lie that places someone’s life at risk. Perhaps we might locate a sort of middle ground between *eliminativist* sentiments and a more rigid defense of intrinsic rightness or wrongness: this is the starting point to the (2) *complementarist* approach. To argue the wrongness of, say, the lies that Hitler or Pol Pot perpetuated to retain power on the sole basis of their misguided perceptions and poor character is too weak. The extreme wrongdoing of such actions results from something deeper. One might condemn such actions insofar as they violate basic human needs, denying a group of persons their basic rights. Conversely, one might condemn them insofar as they violate the general rule, ‘Do not put another’s life at risk.’ Either way it seems undeniable that the actions themselves violate basic intrinsic notions of rightness. Therefore, given such cases, the (2) *complementarist* argues: while certain concerns highlighted by the

<sup>4</sup> John Stuart Mill, *Utilitarianism* (Indianapolis: Hackett Publishing, 1979), §5.

<sup>5</sup> W.D. Ross, *The Right and the Good* (Oxford: Oxford University Press, 1930), *passim*.

virtues are indeed important for moral evaluation, it is also true that an account of moral evaluation needs to be complemented as well with a definition of intrinsic rightness, independent of any relation to the virtues. Virtues may provide us with some of the tools to evaluate an action, but to stop there and deny certain intrinsic senses of rightness and wrongness would be erroneous.

Is it erroneous too, then, to deny the intrinsic sense of rightness and wrongness regarding honesty? Let us return to the question of whether or not honesty generates any u-rules. That ‘tell no lies’ is too general a command to constitute a universal standard of honesty has been demonstrated already, so perhaps the rules about lying apply only to particular classes of lies rather than lies *tout court*. Again, a “proud thief” may exemplify an instance of truth-telling while maintaining a dishonest character, but there are plenty of ways to lie while maintaining an honest character as well. White lies, to begin with, are said to be those harmless untruths that even persons of high moral rectitude regularly commit – for example, the common etiquette to decline unwanted social invitations by feigning business. On the other hand, some types of permissible lies, such as lies to children and jocose lies, are often not only harmless, but beneficial. Innocent, nonsensical platitudes are often told to children to be used as, to borrow Wittgenstein’s turn of phrase, “steps to climb beyond them,” pointing to a greater truth.<sup>6</sup> Tales of the existence of Santa, for instance, can be an effective pedagogical tool in instilling a sense of desert in the young: promise of gifts or fear of the lack-of, however misleadingly materialistic, can help elucidate a sense of which actions are deserving of what. Similarly, a jocose lie depicted through irony can express insights that cannot be expressed in an otherwise straightforward manner, and therefore seems to be of beneficial value.

The idea of a ‘virtuous lie’ poses an additional difficulty here: how are we to consider instances where telling lies is not only beneficial, but seemingly obligatory to being honest? The popular thought experiment which asks, “if you were approached by the Nazi Gestapo while hiding a Jew, and were asked whether you are hiding a Jew, do you lie or tell the truth?” illustrates this dilemma well. Coming clean to the Gestapo would not be considered the virtuous action by any means.

Here the conversation seems to have turned to reducing the act of honesty to an exhaustive list of its respective prohibitions, permissions, and obligations. This is the logic informing the (3) *reductivist* approach. A tentative account of the prohibitions might include, following the above discussion of justifiable lies, something along the lines of, ‘Do not tell barefaced lies,’ ‘Avoid confabulation,’ ‘Avoid deception,’ ‘Do not tell half-truths,’ ‘Do not lie by omission,’ and ‘Do not lie to oneself.’ Then, a list of permissive lies might include ‘Permit jocose lies’ and ‘Permit lies-to-children’ – pending appropriate discretion, of course. Coming up with all the obligations concerning lying, however, proves to be even more difficult. Inverses of the listed prohibitions, i.e. ‘Be truthful to oneself’ and ‘Tell the whole truth,’ make for an obvious starting point, but stopping there would be inadequate. Plenty of other obligations seem characteristic to honesty. Being truthful to oneself, for example, sounds a lot like talk of modesty: does that mean we ought to add to our list of honesty’s obligations those that are characteristic to modesty as well? Common parlance

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<sup>6</sup> Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, trans. C.K. Ogden (New York, NY: Cosimo, 2007), 6.54.

treats these two virtues as overlapping, insofar as a person who is modest, or acts modestly, is said to be equivalent to a person who is honest with oneself, especially in regards to one's achievement or self-worth. It seems that 'Do not lie to oneself' would form a central prohibition to both honesty and modesty.

It might be argued to the contrary, however, that modesty does involve on occasion the act of lying to oneself. To borrow Julia Driver's example, that Einstein is said to have been the paragon of modesty follows from the fact that, while of course cognizant of his own talents, Einstein always regarded his colleagues as more intelligent than himself. Of course, the historical reality of his contributions to science is evidence that Einstein was wrong in considering himself less than his colleagues. Thus, it seems that by advocating a sort of willful ignorance, modesty here obligates an instance of "lying by omission," and thus contradicts the earlier-discussed prohibition to 'Do not lie by omission.'<sup>7</sup>

Here we see just how shapeless the (3) *reductivist's* effort to reducing virtues to their respective list of characteristic rules is. The transitive relation tells us that if obligation-A entails obligation-B, and if obligation-B entails obligation-C, it follows that obligation-A entails obligation-C. However, if being honest effectively entails being modest, and if the obligations derived from honesty are equally valid in regards to modesty, it follows that 'Do not lie by omission' is prohibitory to both honesty and modesty. The above discussion of modesty as a case of obligating lying by omission, then, seems to present an intractable logical inconsistency.

It is difficult to argue that a list of the classes of justifiable lies is necessary to determine the justifiability of a particular lie. Imagine a virtuous person, to repeat an earlier-provided example, faced with the imperative to break a promise when doing so would save someone else from becoming ensnared in a lie. The (3) *reductivist* might envision the person first noting a few relevant features of the situation, foremost that keeping a promise here would result in lying to another person. She next refers to her list of honesty's rules, and identifies the act of breaking the promise here as a 'virtuous lie.' Then, recognizing the obligatory status of virtuous lies, she decides that breaking the promise is the right thing to do. This image of the virtuous person equipped with her "list of rules," however, is of course absurd: a mature, intelligent person ought to *simply know* which actions constitute the general rules incumbent to a virtue, without need for an exhaustively enumerated list of them. However, denying the (3) *reductivist* approach here is not to return to the (1) *eliminativist* position that denies any characteristic rules. Rather, a more moderate middle ground between approaches (1) and (3) is needed – and thus the discussion must turn to the (4) *irreducibilist* approach.

Introducing the (4) *irreducibilist* first requires making explicit how such an approach might be distinguished itself from the previous three already criticized. Merely (1) *eliminating* talk about what constitutes the characteristic actions of a virtue betrays the common sense notion of what it means to have a virtue, as being honest clearly places constraints on how one acts. However, alternately (2) *complementing* the virtues with, or (3) *reducing* the virtues to, an exhaustive list of these kinds of characteristic actions proves equally disastrous: again, what it means to be honest cannot ever be captured by a list of prohibitions, permissions, and obligations. A more moderate, middle ground approach to these issues remains: rather than denying the descriptive constraints of a virtue, or alleg-

<sup>7</sup> Julia Driver, *Uneasy Virtue* (Cambridge: Cambridge University Press, 2007), 18-20.



ing that such constraints can be exhaustively enumerated, why not simultaneously uphold the u-rules as reducible to their v-rules and the v-rules as irreducible to their u-rules? Herein lies the crux of the (4) *irreducibilist* approach.

Let us return to the idea that ‘Tell virtuous lies’ constitutes an obligation for being honest. The (3) *reductivist* describes this obligation as universally *necessary* to being honest: an honest person knows when a lie is virtuous enough that he feels obligated to tell it, regardless of his interests or desires. The (4) *irreducibilist* also admits a kind of obligatory status to ‘Tell virtuous lies,’ but, in arguing that the relevant interests or desires cannot be overlooked, takes it as a *characteristic* rather than *necessary* obligation. Ways in which the rule to tell virtuous lies might fall short are numerous. To return to the earlier example, it might be the case that someone does not know that confessing to the Gestapo would result in the sure death of the Jews they are hiding, and as such falls outside the agent’s wisdom. That a German citizen might not have known about the evolving terror of the Holocaust in the early years of Nazi rule is plausible. Similarly, it might be the case that one does not have the willpower to blatantly lie to the Gestapo, out of fear of the repercussions, and as such the obligation falls outside the agent’s ability. Such cases assuredly do not negate the telling of virtuous lies as important to being virtuous, but simply, again, point to the moderate position that the rule is characteristic, not obligatory to the virtue.

Ultimately, then, the (4) *irreducibilist* approach seems to be logical approach to understanding the relationship between v-rules and u-rules in virtue ethics. The first step may indeed be to (1) *eliminate* talk of rules altogether, given the complexities of the modes of moral response that the virtues demand. The next step then may be (2) *complement* these complex moral responses with a list of straightforward, universalizable rules, which in turn prompts one to ask, “Why not just (3) *reduce* all the different modes of moral response incumbent to the virtues to their corresponding universalizable rules?” But who would say that a finite list of moral rules is all that a virtuous person needs to be virtuous? Does not a virtuous person *simply know* and recognize that the v-rules in general are characteristically inclusive, while nevertheless (4) *irreducible*, to the u-rules? The above essay has been an attempt to demonstrate the validity of this claim.

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# CONSCIENTIOUS OBJECTIONS IN NORMATIVE JURISPRUDENCE: ANALYZING THE ETHICAL ARGUMENTS FOR TOLERATING LIBERTY OF CONSCIENCE

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## 1. INTRODUCTORY REMARKS

The issue of whether and to whom the state should permit exemptions from neutral laws of general applicability is a contentious issue, with authors frequently trading salvos in contemporary discussions of legal philosophy, normative jurisprudence, and constitutional scholarship. In *Why Tolerate Religion?*<sup>1</sup> Brian Leiter considers the case for permitting such exemptions under the aegis of religious claims of conscience, claiming,

[N]o one has been able to articulate a credible principled argument for tolerating religion, that is, an argument that would explain why, as a matter of moral principle, we ought to accord special legal and moral treatment to religious practices.<sup>2 3</sup>

What Leiter is after, then, is a sound normative precept which justifies the privileged status religious claims of conscience are accorded in legal systems within Western liberal democracies. Michael McConnell aims to justify this privilege, citing the inherent uniqueness of religion itself, in that injunctions are prescribed to adherents from a transcendent authority.<sup>4</sup> These claims are thereby “prior to and of greater dignity than the claims of the state.”<sup>5</sup> Yossi Nehushtan summarizes a complementary argument, which he terms *The ‘Special Harm’ Argument*: “[T]here is something special about the anguished state of the religious believer who is forced to act against his beliefs and therefore takes the risk of eternal suffering in the afterlife.”<sup>6</sup> I will argue, in concert with Leiter, that while we have sound moral reasons for permitting liberty of conscience, there are no commensurately sound reasons for privileging religious over secular claims of conscience. Moreover, I will argue that despite their *prima facie* plausibility, neither of these arguments for the uniqueness of religion sufficiently justifies the special protections religious claims of conscience are accorded.

The paper will begin with considerations of the meaning and content of toleration, supplied by semantic and conceptual analysis. I will then canvass the two broad philosophical traditions of deontology and utilitarianism for moral arguments in support of

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<sup>1</sup> Brian Leiter. *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013). Henceforth, *Religion*.

<sup>2</sup> Leiter. *Why Tolerate Religion?* p. 6.

<sup>3</sup> Considerations of toleration will be limited to contexts of normative jurisprudence. I will not be addressing tolerance in interpersonal or professional contexts.

<sup>4</sup> Michael McConnell. “Accommodation of Religion,” *The Supreme Court Review* 1985 (1985): 1-59.

<sup>5</sup> McConnell, “Accommodation of Religion,” p. 15

<sup>6</sup> Yossi Nehushtan. “Religious Conscientious Exemptions,” *The Journal of Law & Philosophy* 30 (2011): 143-166. p. 151.

tolerating claims of conscience. Having established reasons for countenancing toleration, I will then develop normative constraints intended to limit and qualify our toleration. Next, I will consider whether any of these arguments justify privileging religious over secular claims of conscience. I will then address two arguments *for* privileging religious claims of conscience on account of their inherent uniqueness. Finally, I will consider what ethical implications can be extracted from these arguments.

## 2. TOLERATION: SEMANTIC & CONCEPTUAL ANALYSIS

In the block quote from §1, Leiter asserts that there is no *principled argument* for *tolerating* religious claims of conscience. Before addressing Leiter's actual arguments for this claim, some conceptual and semantic groundwork is in order. Toleration is commonly taken to mean 'indifference' or 'ambivalence' toward particular individuals or communities whose actions or beliefs are disapproved of but abided nonetheless. We may consider this variety of toleration as a species of benign neglect. However, these are not components of toleration as we will be defining it. "I do not 'tolerate' my neighbors who are nonwhite or gay," Leiter clarifies, "because I am *indifferent* as to the race or sexual orientation of those in my community."<sup>7</sup> The implication is that toleration can only be recognized when one group "*actively* concerns itself with what the other is doing, believing, or 'being'"<sup>8</sup> With our concept of toleration fleshed out, what does it mean to say we have a *principled reason or argument* for toleration?

The distinction between principled and unprincipled reasons is parsed along moral and pragmatic lines. Group A has pragmatic – which is to say, *instrumental* – reasons for tolerating Group B when a cost-benefit analysis determines that it runs contrary to Group A's interests to exterminate Group B's beliefs and practices. Leiter terms this a "Hobbesian Compromise," which is when "one group would gladly stamp out the others' beliefs and practices, but has reconciled itself to the practical reality that it can't get away with it – at least not without the intolerable cost of the proverbial 'war of all against all.'"<sup>9</sup> Excepting ethical theories which define moral behavior as pursuing one's own self-interest, there are no purely normative – or as Leiter prefers, *principled* – reasons, whether ethical or jurisprudential, animating this iteration of tolerance. Thus, "Where a genuine 'principle of toleration' gets its purchase," Leiter concludes,

[I]s in the cases where one group (call it the "dominant" group) actively disapproves of what another group (call it the "disfavored" group) believes or does; where that dominant group has the means at its disposal to *effectively* and *reliably* change or end the disfavored group's beliefs or practices; and yet still the dominant group acknowledges that there are *moral* or *epistemic* reasons (that is, reasons pertaining to knowledge or truth) to permit the disfavored group to keep on believing and doing what it does. That is "pure" or "principled" toleration, and the question, then, is whether there is such a reason to tolerate religion.<sup>10</sup>

<sup>7</sup> Leiter, *Why Tolerate Religion?* pp. 8-9 (emphasis added)

<sup>8</sup> Leiter, *Why Tolerate Religion?* p. 9

<sup>9</sup> Leiter, *Why Tolerate Religion?* p. 10

<sup>10</sup> Leiter, *Why Tolerate Religion?* p. 13.

Leiter commonly runs together ‘beliefs with practices and actions’ in *Religion*. While actions are, to some extent, the children of beliefs, these categories are both conceptually and practically distinct. I do not take Leiter to be arguing that intolerance should be extended to *beliefs*. In addition to the intractable issues associated with policing and prosecuting beliefs,<sup>11</sup> it is not beliefs *qua* beliefs that are of material harm, but rather beliefs *qua* impetuses for action, which inflict harm.<sup>12</sup>

### 3. THE MORAL ARGUMENTS FOR TOLERATION

Arguments for tolerating claims of conscience go largely uncontested in Western liberal democracies. It would be a strange *liberal* democracy indeed which did not admit of considerations of individual claims of conscience. John Rawls offers an ethical argument for toleration from a broadly Kantian standpoint, asserting that rational individuals in his ‘original position’<sup>13</sup> would choose to endorse toleration, as it “follows from the principle of equal liberty.”<sup>14</sup> Spinning out the ‘original position’ thought experiment, Rawls concludes that the only way to guarantee that each individual would be permitted claims of conscience in the society they were engineering would be to permit *everybody* equal liberty of conscience, that is, each citizen is accorded the same basic rights and liberties.<sup>15</sup>

From a utilitarian perspective, the paradigmatic case for liberty of conscience comes from John Stuart Mill. Leiter introduces Mill’s argument with a disclaimer: “Many arguments trade, at bottom, on a simple idea: namely, that *being able to choose what to believe and how to live*...makes for a better life.”<sup>16</sup> While not amenable to a *a priori* demonstration, the idea here appears pretty uncontroversial. If we value freedom of conscience, and accept the notion that believing according to the dictates of your conscience is indispensable to your quality of life, then we must countenance a sort of conscience pluralism. Granting that Mill’s thesis is at least plausible, we have then a utilitarian argument for toleration. Mill’s argument for toleration, however, is not completely unqualified. In considering the limits of toleration, Mill invokes the Harm Principle, which allows the state to exercise

<sup>11</sup> Orwell’s notion of ‘thought-crime’ in 1984 strikes me as paradigmatic of this practice.

<sup>12</sup> Perhaps because Leiter limited the scope of his treatment of religious liberty to American jurisprudence he did not feel compelled to address and develop this line. Removed from the American legal system, however, we see instances of Western liberal democracies actually prosecuting violators of such laws. It is illegal in Germany, for example, under *Strafgesetzbuch* (German Penal Code) §130 Incitement to Hatred, to “approve of or deny” the holocaust.

<sup>13</sup> By “Original Position” Rawls conceives a thought experiment where citizens select the principles which will determine the basic structure of the various social, legal, economic, and political institutions in a well-ordered society. These decisions are made behind a “veil of ignorance,” an epistemic constraint depriving participants information concerning their socioeconomic status, gender, ethnicity, doctrinal commitments, etc. The idea is to cultivate from scratch a perfectly just society unsullied by prejudice and biases. See §4.6, “John Rawls” entry in *Stanford Encyclopedia of Philosophy*.

<sup>14</sup> John Rawls. *A Theory of Justice, Revised Edition*, (Cambridge, MA: The Belknap Press of Harvard University Press, 1971). p. 214. All references are to this edition.

<sup>15</sup> Rawls. *A Theory of Justice*, pp. 206-7.

<sup>16</sup> Leiter. *Why Tolerate Religion?* pp. 17-8.

power “over any member of a civilized community, against his will, to prevent harm to others.”<sup>17</sup>

From 3.1 and 3.2 we should extract two related but distinct theses. The first is that there are morally sound reasons to support individual liberties of conscience. The second, and for our purposes the more significant point: though these arguments give us clear reasons for countenancing liberty of conscience, *they do not provide any reasons for privileging religious over secular claims of conscience.*<sup>18</sup>

#### 4. THE LIMITS OF TOLERATION

Liberal theories tend to discourage excessive intolerance, and often at their peril. In order to accommodate this tendency, a convoluted balancing act ensues, which requires exercising principled tolerance to a point. The question is, Where is that point? What is called for, then, is a normative criterion which legitimates exemptions emanating from claims of conscience if they satisfy certain conditions. In §3.2 we saw that, for Mill, toleration is limited by considerations of harm. Put simply, the Harm Principle stipulates that my freedom to swing my fist ends at your nose.<sup>19</sup> Leiter offers the *burden-shifting* criterion, where exemptions are considered burden-shifting when they “impede the lawful pursuit of the general welfare – whether it is exemptions from zoning regulations for religious institutions or from mandatory vaccination schemes.”<sup>20</sup> Conversely, examples of *non-burden-shifting* exemptions would permit individuals the right to “wear certain religious garb, or to use certain otherwise illegal narcotics in rituals.”<sup>21</sup> It is important to note that whether an exemption is classified as burden-shifting is context-dependent. For instance, if a Catholic pharmacist refuses to dispense birth control, and she is the only pharmacist in town, then it is burden-shifting and she should not be exempted from discharging the obligations of her office; however, if there are any number of pharmacists in that area, all capable of dispensing these very prescriptions, then there is no significant burden being shifted to the consumer should that same pharmacist refuse.<sup>22</sup> The operating assumption here, and one I submit should be taken as morally axiomatic, is that “we should require people to bear the costs of their beliefs rather than transfer those costs to others.”<sup>23</sup>

While I completely accept Leiter’s burden-shifting criterion, I would add a further proviso, which requires that considerations of exemptions should be non-discriminatory. A NDC has two components. First, the decision to exempt coercive cooperation from a law of general applicability on the basis of conscientious objections should be made in

<sup>17</sup> John Stuart Mill. *On Liberty*. Indianapolis: Hackett Publishing, 1978. p. 9.

<sup>18</sup> In §5 I will address two arguments which aim to protect religion’s special treatment. It is not my intention to suggest that Rawls’s and Mill’s treatment of toleration is exhaustive; only that neither of these arguments can be used to demonstrate a normative priority for religious claims of conscience.

<sup>19</sup> Zechariah Chafee. “Freedom of Speech in Wartime,” *Harvard Law Review* 32 (1919): 933-973. p. 957

<sup>20</sup> Leiter. *Why Tolerate Religion?* pp. 99-100.

<sup>21</sup> Leiter. *Why Tolerate Religion?* p. 100

<sup>22</sup> Leiter. *Why Tolerate Religion?* p. 162, n. 11

<sup>23</sup> Peter Jones. “Accommodating Religion and Shifting Burdens.” *Criminal Law and Philosophy* (2014): 1-22.

ignorance of the particular ideologies maintained by the objector, whether religious, political, or otherwise. In other words, we should not determine who is eligible for requesting exemptions on the basis of their religious or political commitments – just as we do not discriminate on the basis of socioeconomic status, race, gender, etc. A NDC de-privileges religious claims, thereby equalizing all claims of conscience under the law. Given the theoretical assumptions about, and value of, equality in a just liberal state, the baseline should surely be equality of conscience – which is, incidentally, exactly what Rawls and Mill concluded in their moral arguments for liberty of conscience.

The second component to my NDC states that no exemption shall be permitted if the intention of that exemption is discriminatory. Exempting a practicing Muslim who wishes to wear a veil for her driver's license picture is not discriminatory.<sup>24</sup> Requesting an exemption to refuse service to homosexuals, on the other hand, is clearly discriminatory and, failing to satisfy the NDC, should be rejected. An intellectual debt is owed to Karl Popper in conceiving this criterion. In *The Open Society* Popper articulates the Paradox of Tolerance (PoT):

Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.<sup>25</sup>

I would contend, then, with Popper, that the limits of toleration are intolerance, i.e., unjust discrimination. So stated, the 'setback to interests' proviso in Mill's Harm Principle is coterminous with Popper's PoT and my NDC.

A criticism commonly encountered at this point asks us to imagine the following scenario:

Suppose Mary, the owner of a bakery, whose fidelity to scripture requires her to consider homosexuality an abomination, is approached by a same-sex couple hoping to enlist her services in constructing a wedding cake. Per your proposal, Mary would *not* be able to refuse her services to this couple on the grounds that she finds their marriage to be morally unconscionable.

This is correct, as far as it goes. The objector continues:

Suppose, moreover, that Darrell, a Grand Wizard of the KKK, approaches Mary for a cake riddled with swastikas and other paraphernalia of the white supremacist movement. Is Mary obliged to accommodate Darrell as well?

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<sup>24</sup> It is likely, however, that this individual's claim of conscience would fail to meet Leiter's burden-shifting criterion. Driver's licenses contain pictures so that authorities can identify the licensed individual; a veil very clearly defeats that purpose. In so doing, it shifts the burden to the authorities, who would then have difficulty determining whether the individual photographed is the one handling them the license.

<sup>25</sup> Karl Popper. *The Open Society and Its Enemies: Vol. 01*. Princeton: Princeton University Press, 2013. See Notes to Ch: 7, Note 4.

This, it should be clear, is a false equivalency. Mary is in the business of selling wedding cakes to the members of her community. By refusing to offer services to particular individuals that she offers to the wider community, she is practicing discrimination. However, Mary, by refusing to sell a Neo-Nazi cake she is refusing to offer services to Darrell that she would likewise refuse to everybody else. In other words, whereas the same-sex couple is being treated differently than the other members of their community, insofar as Mary refuses to sell Neo-Nazi cakes to *anybody*, Darrell is being treated exactly the same as those other members.

## 5. EVALUATING THE ARGUMENTS FOR PRIVILEGING RELIGIOUS CLAIMS OF CONSCIENCE

McConnell argues that religion is unique in that the injunctions imposed on adherents issue from a supernatural authority, which has profound and *sui generis* ramifications for believers. Moreover, when obligations to God conflict with obligations to the state, adherents are bound to invest those duties to God with moral and spiritual priority.<sup>26</sup> Further compounding this argument is the consideration that adherents have to contend with the fear of metaphysical consequences should they choose to honor their obligations to the state before God. This consideration, though, is asking not that we exempt adherents from laws on account of conscientious objections, but rather that we indulge them in protecting their self-interest. Permitting exemptions on the basis of protecting or advancing self-interest, i.e., exempting individuals from laws when it would serve their interests not to follow them, would undermine the entire legal system; the purpose of which is to compel us – particularly in moments where we might be egoistically motivated to promote our self-interest – to constrain our actions by considering the interests and welfare of the public. Christopher Eisgruber and Lawrence Sager similarly reject the ‘Special Harm’ Argument, as

It expects us to treat the religious believer’s very long-term self-interested reason for obedience as motivationally more powerful than other persons’ immediate self-interest and driving passions...it also asks us to accept as true for the believer that heaven and hell are at stake, while holding to the contrary as a matter of our belief.<sup>27</sup>

Another argument supporting my thesis comes from John Rawls’s *Political Liberalism*, where Rawls develops an iteration of liberalism centered on his thesis of public reason. There, Rawls advances the idea that reasons cited for political action – in this case, exemptions – should be shared or publically and epistemically accessible.<sup>28</sup> In other words, they should not rely on or appeal to privately held convictions, which are neither universally shared, nor accessible. When enacting and enforcing generally applicable laws

<sup>26</sup> McConnell, “Accommodation of Religion.” p. 15

<sup>27</sup> Christopher Eisgruber & Lawrence Sager. “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct.” *University of Law Review* 61 (1994): 1245-1315. p. 1263.

<sup>28</sup> John Rawls. *Political Liberalism, Expanded Edition*. New York: Columbia University Press, 2005. p. 216.



that limit and interfere with claims of conscience, we are compelled to justify our actions with reasons which connect with a reasonable persons' sense of moral values. There is a dual commitment on the part of the state and the citizen: the state's normative authority to enforce laws of general applicability, and an individual's claim to be exempt from them, should appeal to community-shared commitments to rational moral principles and values.

Granting that reasonableness is an indispensable political virtue, even provisional acceptance of Rawls' public reason liberalism entails that the state has certain obligations. Conversely, there are some obligations the state is not obliged to honor. For instance, it is, presumably, not incumbent on the state to compromise the interests of either individuals or the public in general to allow for the accommodation of adherents attempting to discharge their religious obligations.<sup>29</sup> While Rawls' arguments for public reason are powerful, it may be, in this case, that they prove too much. It is not my intention to argue that religious adherents should have no recourse to exemptions on the basis of conscientious exemptions unless they can provide shared and publically accessible reasons. My intention is to argue the more moderate claims that there are 1) sound moral reasons to extend (qualified) toleration to conscientious objectors, and 2) no commensurately sound reasons for privileging religious claims of conscience over non-religious claims of conscience. I am interested in advancing tolerance for, and equalizing the legal standing of, all claims of conscience, not prohibiting them.

## 6. CONCLUDING REMARKS

One of the central assumptions underwriting my thesis – and constituting, therefore, a potentially fruitful line of counter-argument – is a pre-commitment to the value of equality, especially in social and political contexts. I have taken as axiomatic the normative proposition that legal equality is presumptively just, and that deviations from the baseline of legal equality require justification – with increasing levels of inequality requiring proportionately increasing levels of justification. Until and unless a sound moral or epistemic argument is advanced which concludes otherwise, I see no reason to continue the unjust practice of legally privileging the claims of any one conscience over another.

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<sup>29</sup> Nehushtan. "Religious Conscientious Exemptions," p. 152

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