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## Why Kant

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## WHY KANT

George P. Fletcher

These essays are the outgrowth of a conference on Kantian Legal Theory held at the the Arden Homestead in Harriman, New York, September 26–28, 1986.<sup>1</sup> Some of them are versions of papers originally presented at the conference (Weinrib, Murphy, Finnis, Fletcher); others are a response to the three days of provocative discussion (Richards, Grey, Benson).<sup>2</sup> The underlying premise of the conference was that although philosophers and academic lawyers have devoted considerable attention to Kant's moral theory, very few have written much about Kant's legal theory. I should add: written *in English*.<sup>3</sup> The recent German literature overflows with books and articles about the long neglected *Rechtslehre*.<sup>4</sup> The purpose of the conference, at least in part, was to correct this imbalance and to direct the attention of North Americans to Kant's importance as a legal thinker as well as a philosopher of theoretical and practical reason.

There was another purpose as well. But to state my own aims in organizing this event, I must digress and offer a personal, perhaps idiosyncratic, account of the current intellectual scene in North American law schools.

From the second world war to Kennedy's assassination and for several years thereafter, a consensus prevailed in law schools about the policies that should guide the law's development. The reigning policies were these: (1) in tort law: cost spreading, compensation of victims and discouragement of excessive risk taking; (2) in contracts: facilitation of economically productive exchanges; and (3) in criminal law: deterrence and confinement of dangerous offenders. The pursuit of these

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1. The conference was supported by a grant from the Liberty Fund, Indianapolis, Indiana.

2. The other participants were Bruce Ackerman, Meir Dan-Cohen, Douglas Dryer, Kent Greenawalt, Mary Gregor, Herbert Morris, Wolfgang Naucke, Andrzej Rapaczynski, Donald Regan, and Robert Paul Wolff.

3. The legal theory is found primarily in the *Rechtslehre*, which is the first half of the I. Kant, *Die Metaphysik der Sitten* (1797). Many libraries have the complete translation, *The Philosophy of Law (Rechtslehre)* (W. Hastie trans. 1887) [hereinafter *Philosophy of Law*]. The current, partial and flawed translation, *The Metaphysical Elements of Justice* (J. Ladd trans. 1965) (*Rechtslehre*) [hereinafter *Metaphysical Elements of Justice*], is more widely used. A full and accurate translation is necessary in order to direct more attention to this segment of Kantian theory. About the only book on Kantian legal theory in English is the useful monograph, J. Murphy, *Kant: The Philosophy of Right* (1970). For some valuable comments on Kant's concept of law, see M. Gregor, *Laws of Freedom* (1963).

4. See, e.g., H. G. Deggau, *Die Aporien der Rechtslehre Kants* (1983); W. Kersting, *Wohlgeordnete Freiheit (Quellen und Studien zur Philosophie, Bd. 20, 1984)*; K. Kühl, *Eigentumsordnung als Freiheitsordnung (Reihe Praktische Philosophie, Bd. 20, 1984)*; *Materialien zu Kants Rechtsphilosophie* (Z. Batscha ed. 1976).

policies in the least costly way defines a utilitarian approach to legal decision making. Brainerd Currie captured the reigning faith in policy analysis by insisting that the only sound basis for any law is the promotion of "governmental interests"—utilitarian policies by another name.<sup>5</sup>

So far as I know, there was no serious opposition to this orthodoxy of the law schools. An opposing view might have come from a natural lawyer. But no one like John Finnis was writing at the time.<sup>6</sup> An argument for the internal integrity of the common law might have been heard, but Ernest Weinrib had yet to speak out.<sup>7</sup> Perhaps someone seriously might have advanced an argument for retributive punishment, but neither Herbert Morris<sup>8</sup> nor Jeffrie Murphy<sup>9</sup> had yet protested against the reigning utilitarian orthodoxy.

In a recent description of the scene circa 1960,<sup>10</sup> Richard Posner claims that the prevailing consensus consisted of both agreement on general political objectives and a general aversion to interdisciplinary studies in the law.<sup>11</sup> He is obviously right that the liberal consensus of that period has dissolved in the face of new groups—blacks, women, activist Jews, gays—entering the debate over fundamental rights.<sup>12</sup> Looking back on the politics of our pre-liberation America, one wonders who was arguing with whom. It seems like most of us were then in the closet or in the wings waiting to join the action.

Posner also argues that the last quarter century has witnessed a radical change in attitude towards interdisciplinary studies.<sup>13</sup> I wonder whether he is right and indeed how we would go about assessing whether or not he is. From the standpoint of the interdisciplinary studies, the leading law schools in the Kennedy era were perhaps more serious places than they are today. Ehrenzweig in the West<sup>14</sup> and Joe Goldstein<sup>15</sup> in the East were culling the psychoanalytic literature for applications to legal problems. Kalven and Zeisel were then engaged in

5. See, e.g., Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. Chi. L. Rev. 227 (1958); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205 (1958).

6. See J. Finnis, *Natural Law and Natural Rights* (1980).

7. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 Law & Phil. 37 (1983).

8. H. Morris, *Persons and Punishment*, in *On Guilt and Innocence* 31 (1976).

9. See J. Murphy, *supra* note 3, at 140-44.

10. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 761 (1987).

11. *Id.* at 766.

12. *Id.* at 764-67.

13. *Id.* at 767-69.

14. See, e.g., A. Ehrenzweig, *Psychoanalytic Jurisprudence* (1971); Ehrenzweig, *A Psychoanalysis of the Insanity Plea—Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell*, 73 Yale L.J. 425 (1964), *revised in* 1 Crim. L. Bull., Nov. 1965, at 3.

15. See, e.g., J. Goldstein, A. Dershowitz & R. Schwartz, *Criminal Law: Theory and Process* (1974); J. Goldstein & J. Katz, *The Family and the Law* (1965).

their path-breaking study of the jury system.<sup>16</sup> Calabresi was writing his first major article in a field that later came to be called Law & Economics.<sup>17</sup> A generation earlier, Llewellyn had lived with the Cheyenne Indians and studied their law ways.<sup>18</sup> Perhaps, as Posner maintains, there was not much going on at Harvard.<sup>19</sup> But at Yale, Chicago, and Berkeley scholars approached neighboring disciplines with a zeal and open-mindedness that can still serve as a model to the profession.

What has changed, for good or ill, is an enormous shift in the center of gravity of interdisciplinary studies. Psychoanalysis and sociology are out; economics is in. In the early 1960's, the common view was that the law could not progress in its policy-making unless we had a better understanding of human behavior.<sup>20</sup> The disciplines in fashion were those that sought to understand the curious way that concrete individuals behave in their legal interactions.

Given that aspiration in the early 1960's, it is odd that law faculties should have shifted their loyalties to economics, a field that assumes the rational pursuit of self-interest in its model of human interaction. It is hard to imagine an assumption more foreign to the behavioral sciences. The best account of this shift comes from Leff, who attributes the appeal of economics to the yearning of law professors to feel empirical while they remained sitting in their armchairs.<sup>21</sup> The simplicity of the economic model enabled law professors to apply a method that produced results, and if not results, at least a great deal of literature.

Let us suppose, however, that Posner is correct in claiming an upsurge of interest in interdisciplinary studies. The connection between that trend and the disintegration of the political consensus is not at all clear. Posner claims that both testify to the decline of law as an "autonomous discipline."<sup>22</sup> But what does it mean to say that law is a "discipline" and moreover an "autonomous discipline?" I suppose a "discipline"—with mathematics as the model—presupposes well-defined criteria of argument, assertion and proof. To the extent that legal argument is now more overtly political than it once was, the law is that much less of a discipline: arguments reflect personal commitments more than the consequence of a shared method of working with sources. A discipline is autonomous, apparently, if it floats on its own

16. H. Kalven & H. Zeisel, *The American Jury* (1966).

17. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L.J.* 499 (1961).

18. K. Llewellyn & E.A. Hoebel, *The Cheyenne Way* (1941).

19. Posner, *supra* note 10, at 763. For another description of the prevailing orthodoxy at Harvard under the sway of Hart and Sacks, see Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 29, 61-91 (describing "legal instrumentalism").

20. See *supra* notes 14 & 15.

21. Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 *Va. L. Rev.* 451, 455-59 (1974).

22. Posner, *supra* note 10, at 766-67.

bottom, without relying on timber cannibalized from someone else's vessel. In this sense, interdisciplinary work undermines the "autonomy" of legal studies.

The notion of "autonomous law" conveys more than Posner attributes to it. The term suggests that judges can and do decide cases solely on the basis of legal materials—i.e., as "mechanical" decision makers. In the post-Realist age, it would be difficult to find an academic who takes the "autonomy" of the law seriously in this strong sense. The weaker sense of the term used by Posner stresses the virtues of Kelsen's "pure" theory of law. Kelsen argued that the law should stand as its own discipline, free of politics and independent of other bodies of knowledge.<sup>23</sup>

Until recently, I never understood why Kelsen's influence was so much greater in Latin America than in the English-speaking world. A conversation in Havana with a Cuban professor<sup>24</sup> brought home the appeal of the pure theory of law in countries where the alternative is coerced deference to the reigning political ideology. Because Americans are less fearful that any of the political currents now coursing through the law could ever become an official line to which we must adhere, we casually abandon the line between legal studies and politics, and between law and other disciplines, such as sociology and economics, that are vulnerable to political control.

The correct meaning of "autonomy" in law may not be worth arguing about, but it is important to get clear about the current intellectual landscape. It matters whether we regard the shift toward law and economics (L&E) as connected, in some important way, with the infusion of new political perspectives in the ongoing legal debate. I don't think that it is, except perhaps by accident of the personalities who ply the trade of micro-economics. Yet there is a widespread view that the practitioners of L&E stand for a right wing political agenda. One hears this claim most often from the self-styled left in the law schools, the surprisingly influential movement of Critical Legal Studies (CLS).

It is worth pausing to reflect on several characteristics of these two schools of thought, L&E and CLS, for these two are the best-organized, most ambitious voices in the law schools today. Eventually, I shall argue that the Kantian arguments reflected in this symposium represent a third way in legal thought, but first a few words about the competition supposedly on the right and on the left.

If one focuses on a group of people talking about ideas, and one wants to know whether they represent either a discipline or a school of thought, the first questions to ask, I think, are these: (1) Is there a common text that everyone in the school has mastered and can discuss competently? (2) Is there a shared understanding about what consti-

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23. H. Kelsen, *Pure Theory of Law* (M. Knight trans. 1967).

24. The conversation took place in March 1986.

tutes a contribution (a good argument or insightful point) within the discourse of the school? I would submit that without a shared understanding about which texts are central and what constitutes a contribution to discourse, we can hardly speak of a crystallized intellectual movement.

Applying these criteria, we could hardly say that legal thought in the United States is either one discipline or a school within a discipline. There is no common text that one would expect all candidates for teaching positions to have mastered. Perhaps there are some cases—*Palsgraf*, *Erie*, *Miranda*—that every educated lawyer can be expected to discuss. When, however, it comes to specifying what legal academics should know beyond the craft of lawyering, the profession flounders.

The foundational article in L&E, the one everyone has to know, is Coase's spectacular but simple refutation<sup>25</sup> of the conventional Pigouvian theory of externalities.<sup>26</sup> This article should have been the last economic word on the law, for the theorem holds that under ideal conditions, the law is irrelevant to the allocation of productive resources that the affected parties themselves will agree upon.

In the beginning Coase's article had very little influence on the thinking of law professors. Calabresi continued to write as though the Pigouvian theory was correct: automobile accidents were an externality of the activities that caused them.<sup>27</sup> If the field of L&E depended on Coase's article alone, it might have remained a peripheral inquiry into the impact of transaction costs on economic predictions derived from the Coasian model of bargaining under ideal circumstances. For economics to have a serious impact on law, what was needed was not a hypothesis about the law's irrelevance, but a norm that would help lawyers and judges get on with their work of deciding cases.

The critical move came in the revival of the Kaldor-Hicks conception of economic efficiency.<sup>28</sup> Pareto efficiency, which requires that everyone actually be better off (or no worse off) than under inefficient solutions, provides little help to the law; it rules out coercive interventions that make some people worse off. And what is the law except a system for doing precisely that? In contrast, the Kaldor-Hicks standard of efficiency permits the courts to intervene and harm one party for the sake of another. A court may coerce *A* to transfer an asset to *B* if under ideal conditions, *B* would have had the incentive to pay *A* an amount sufficient to induce *A* voluntarily to transfer the asset to him. From the point of view of efficiency, it does not matter whether *B* compensates *A*, for the transfer of the asset to the person who values it more (namely

25. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

26. A. Pigou, *The Economics of Welfare* 134 (4th ed. 1932).

27. Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 *Harv. L. Rev.* 713 (1965).

28. A. Feldman, *Welfare Economics and Social Choice Theory* 142–43 (1980) (definition of Kaldor-Hicks criterion).

B) is "economically" efficient. Compensation is a secondary question that belongs more to the domain of equity than of economic inquiry.

So far as I know, the Kaldor-Hicks standard of efficiency first came to the attention of lawyers in Michelman's remarkable article on the takings clause.<sup>29</sup> But efficiency did not become a buzzword in theoretical legal discourse until after Posner's textbook claimed that there was nothing untoward about applying the standard of efficiency to solve cases.<sup>30</sup> Supposedly, judges in the common law have always sought the efficient solution to legal conflicts.

Within the parameters of L&E, it is fairly easy to identify a contribution to the field. The best thing to do is to show how the standard of efficiency accounts for other areas of law, to develop a new argument about why the legal system is efficient, or to propose legal reform that will advance efficiency.<sup>31</sup> As "normal science,"<sup>32</sup> this kind of work carries forward and confirms the methods and premises of the school.

As the basic texts of Critical Legal Studies, I would nominate Roberto Unger's first book, *Knowledge and Politics*<sup>33</sup> and Duncan Kennedy's first major article, "Form and Substance in Private Law Adjudication."<sup>34</sup> Unger's book convinced large numbers of thoughtful law professors that liberalism was rife with insoluble antinomies, causing many American academics on the left to distance themselves from the liberal left. Kennedy's article carries forward the theme of insoluble antinomies and argues that contract doctrine can never overcome the endless dialectic of individualism and altruism.

As the theme of efficiency can be played out across the domain of legal inquiry, so do the arguments of indeterminacy, antinomy and incoherence lend themselves to easy replication. It is not hard to argue that "general rules do not decide concrete cases" or that a particular argument in the law lends itself to manipulation.<sup>35</sup> It has all been said before.

As the two extremes in current thought, L&E and CLS have more in common than their respective practitioners realize. First, both are the offspring of well-established schools of legal thought that have

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29. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1174 (1967).

30. R. Posner, Economic Analysis of Law 6-8 (1st ed. 1973). A version of the same standard is found in Calabresi's influential theory of the "cheapest cost avoider." See G. Calabresi, The Costs of Accidents 136-40 (1970).

31. See Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977).

32. T. Kuhn, Structure of Scientific Revolutions 10 (2d ed. 1970).

33. R. Unger, Knowledge and Politics (1975).

34. 89 Harv. L. Rev. 1685 (1976).

35. Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591 (1981) (arguing that the temporal range of the criminal act arbitrarily expands and contracts).

gone out of style. Yet both movements anguish about their filial ties to the past.

Advocates of economic efficiency are the contemporary bearers of the basic Benthamite insight that all legal rules must serve a purpose and the only sensible purpose to pursue is the welfare of society. Also, the champions of the L&E version of efficiency, in contrast to mainline economists, concur in the Benthamite assumption that we can measure and compare the welfare of one person with that of another. Posner and his followers might disagree with Bentham about the proper standard of welfare;<sup>36</sup> Posner favors aggregate wealth rather than happiness as the standard of welfare.<sup>37</sup> This is but an in-house dispute akin to other disagreements such as whether to pursue average or aggregate welfare.

The anti-law wing of CLS draws on many arguments that I had always thought the realists from Holmes to Llewellyn had already beat into banality. Many of the realists, at least, had a clear, political motive behind their repeated attacks on law as a "brooding omnipresence in the sky."<sup>38</sup> They had a political agenda: to open legal discourse to new social and political possibilities.<sup>39</sup> Apart from internal law school politics, such as hiring practices and increasing their own influence, the goals of CLS remain a mystery.<sup>40</sup>

There is nothing about the literature of L&E that identifies the movement as rightist; or of CLS, as leftist. Utilitarianism, with its emphasis on social solidarity, tends to be a doctrine of the left, and anti-law skepticism can just as easily serve the purposes of the right or of New Deal liberals as it can serve the transient needs of CLS. (CLS thinkers should be the first to admit the intrinsic manipulability of their own doctrines.) This very connection to the past—that the same ideas have been deployed for different political purposes—may be precisely the reason that neither L&E nor CLS cultivates its debt to predecessors of different political persuasions.<sup>41</sup>

Now I should like to apply the same general criteria—shared text and consensus about "insights"—to explore the way in which the essays in this symposium reflect a third path of legal thought. The

36. R. Posner, *Utilitarianism, Economics and Social Thought*, in *The Economics of Justice* 48 (1983).

37. Posner also thinks he distances himself from utilitarians on the permissibility of theft when it serves the greater happiness of the thief. *Id.* at 63. He ignores the ingenuity of utilitarians in factoring in costly side effects—such as the demoralization of others—that easily support prohibitions such as the one against theft.

38. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 218 (1917) (Holmes, J., dissenting).

39. See B. Ackerman, *Reconstructing American Law* 6–22 (1984).

40. For a useful clarification of the CLS position on formulating a political agenda, see Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 *J. Legal Educ.* 505, 510–11 (1986).

41. On the problematic relationship of CLS to the Realists, see Tushnet, *supra* note 40, at 507–08.



boundaries of this school are defined by the twin premises: (1) individuals have rights that "trump" the demands of utility and efficiency,<sup>42</sup> and (2) it is possible to shape (if not determine) our moral and legal lives by constructing norms to live by. The first premise sets the third school apart from L&E, the second from CLS. There is no journal, no national conference, no charismatic leader that unites this loosely knit group of jurisprudential thinkers. But nonetheless I would submit that a large group of scholars in American and Canadian law schools are bound together in an effort to ground legal principles in sound, non-utilitarian values. Barnett refers to the third group as the "normative legal philosophers."<sup>43</sup> Ackerman characterizes their enterprise as Constructivism.<sup>44</sup> The label is not as important as the shared commitment to the stated premises of discourse.

The central text of our time that builds on these premises is Rawls' *A Theory of Justice*.<sup>45</sup> Virtually everyone disagrees with some aspects of Rawls' argument, but his is the text likely to be considered foundational by those who accept these two premises.

Rawls' text is foundational partly because it demonstrates the power of analytic philosophy in working out a substantive theory of justice. The centrality of Rawls in the third way, however, seems to relegate the study of Kant to a course in the history of philosophy. If we have a modern as teacher, why do we need an eighteenth century Königsberg professor? The question "Why Kant?" takes on new urgency.

The answer, partly, is that writers in this third group display a different attitude toward their precursors than we find in the competing schools. Rawls himself claims to be working within a contractarian tradition, in which Kant, along with Locke and Rousseau, are regarded as "definitive" theorists.<sup>46</sup> If work grows out of a tradition, then it is important to know what that tradition teaches and to clarify the way in which the contemporary argument both draws on and departs from its sources.

Further, Rawls' principles of justice and the methodology of the original position are explicitly limited to working out the basic framework of social cooperation. The perturbations that constitute the stuff of legal controversy belong to the field of "partial compliance," a field of justice that Rawls, for good reason, excludes.<sup>47</sup> Typically, the threshold question in a private legal dispute is whether one person has

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42. See, e.g., R. Dworkin, *Taking Rights Seriously* xi (1977).

43. Barnett, *Book Review*, 97 *Harv. L. Rev.* 1223, 1230-34 (1984).

44. B. Ackerman, *supra* note 39, at 72-104; B. Ackerman, *Social Justice in the Liberal State* 327-48 (1980).

45. J. Rawls, *A Theory of Justice* (1971).

46. *Id.* at 11 n.4. Rawls obviously regards Kant as more influential in his work than either Rousseau or Locke. See the section entitled "The Kantian Interpretation of Justice as Fairness," *id.* at 251-57. There is no comparably extensive discussion of any other philosophical precursor.

47. Rawls, *supra* note 45, at 351.

improperly transgressed against or harmed another. Rawls' method of the original position has little to teach us about the rules we should fashion to cover these disputes, for there is no way in the original position to adopt a rule that would be satisfactory to both transgressor and victim.<sup>48</sup>

Kant, by contrast, explicitly addresses not only the foundations of the legal system but also specific details of the law of property, contracts, family relations, and criminal law. Whether we ultimately agree with Kant, he offers us more than does Rawls in his challenge to conventional views about the basic institutions of the law. These are some reasons, then, for our turning to Kantian legal theory.

In reading these essays the reader must pay close attention to certain problems of translation. There is no clear way to render the German terms *Recht*, *Gesetz*, *Wille*, and *Willkür*. In brief, the term *Recht*, best translated as Right, stands for law in the ideal sense; *Gesetz*, for law in the sense either of enacted law or empirically established scientific law.<sup>49</sup> Though these two conceptions of law can be readily kept apart, two traps can easily ensnare the unwary readers of the articles in this symposium. First, the reader should watch out for the words "just" and "justice"; it is never clear whether the topic under discussion is justice (*Gerechtigkeit* in German) or the concept of Right (*Recht*).<sup>50</sup> The confusion originates with John Ladd's incorrect translation of Kant's treatise on legal theory, *die Rechtslehre*.<sup>51</sup> Apparently, Ladd regarded the term Right, relied upon by Hastie in his nineteenth century translation,<sup>52</sup> as archaic and opted for "justice" as the best translation of *Recht*.<sup>53</sup> Because his translation is the only one now readily available in English, it is widely used, with accompanying confusion.

A related problem of translation is hardly avoidable. When Kant speaks of the categorical imperative as the moral "law," he uses the term *Gesetz*. Even though this law stands as an ideal of human behavior, it is treated as analogous both to enacted positive laws and to scientific laws.<sup>54</sup> The different terms for law in German keep distinct the ideal of

48. All legal systems concur, for example, that a woman may use deadly force to prevent being raped. In the original position, however, no one would know whether he would turn out to be a rapist or a victim. It would not be rational, therefore, to agree in advance to a rule that permitted one to be killed, should one turn out to be a rapist. On the requirements of the maximin solution that every possible outcome be acceptable, see *id.* at 152-57.

49. For further elaboration, see Fletcher, Two Modes of Legal Thought, 90 Yale L.J. 970, 980-84 (1981).

50. The difference between these two concepts is important. See Fletcher, Law and Morality, 87 Colum. L. Rev. 533 (1987).

51. *Metaphysical Elements of Justice*, *supra* note 3.

52. *Philosophy of Law*, *supra* note 3.

53. Ladd has a useful discussion about the terms *Recht* and *Gesetz* in his introduction. See *Metaphysical Elements of Justice*, *supra* note 3, at xv-xviii.

54. It is not clear to me which analogy is stronger. The connection with enacted laws is that both stem from a lawgiver; in the case of the moral law, reason legislates for

the moral law from the ideal law, the principles of Right that govern human interaction in civil society.

The terms *Wille* and *Willkür* both translate as "will" and therefore special caution is required in discussing Kant's notion of free will. In Kant's moral theory the dominant term is *Wille*; it is the medium by which reason becomes practical and issues in action.<sup>55</sup> In the legal theory the dominant term is *Willkür*, which is typically translated as choice.<sup>56</sup> I tend to think of *Willkür* simply as the realization of preferences, regardless of their conformity with reason and the moral law.<sup>57</sup> Animals have *Willkür*, i.e., inclinations and preferences, but they do not have *Wille*.<sup>58</sup> Problems arise in joining the adjective "free" to either of these German terms for "will." The resulting *freier Wille* is redundant, for the *Wille*, when it renders pure reason practical, is by definition free.<sup>59</sup> There is a point, however, to distinguishing a free *Willkür* from one not free. Kant defines the former as *Willkür* "that can be determined by pure reason."<sup>60</sup> Human *Willkür* is free in so far as it is affected by impulses but not determined by them. "[I]t can . . . be determined to actions by pure Will (*Wille*)."<sup>61</sup> The freedom of *Willkür*, therefore, consists in its potential: the possibility that the actor will act freely, determined only by reason and *Wille*.

In encountering the terms "free choice" or "free will" in these pages, particularly in Weinrib's essay, the reader should remember that what is meant is not free will in the contemporary sense of being able to choose any act freely, but in the limited Kantian sense of *Willkür* that is capable of being determined by reason alone. The criminal does not act freely, but he does have the potential of transcending the impulses that lead to criminal deeds. In the latter sense alone he has "free will" or "free choice."

I will close with a few words about the positions staked out in this symposium. In the debate between Finnis and Richards, we are treated to a confrontation that rarely occurs in modern America. We find two

itself. See I. Kant, *Foundations of the Metaphysics of Morals* \*432 (L. Beck trans. 1969) [hereinafter *Foundations of the Metaphysics of Morals*]; *Metaphysical Elements of Justice*, supra note 3, at xv. The connection with scientific laws derives from the element of necessity in both. Scientific laws state a necessary connection between events, and the moral law necessitates a response from autonomous reason. On the role of necessity in deriving the categorical imperative as a law, see Fletcher, supra note 50, at 538-40.

55. See *Foundations of the Metaphysics of Morals*, supra note 54, at \*446-47 ("will is a kind of causality of living beings so far as they are rational").

56. Ladd uses the term "will" for both but capitalizes "Will" for *Wille*, and uses lower case "will" for *Willkür*. See *Metaphysical Elements of Justice*, supra note 3, at xxv-vi.

57. But see Benson, *External Freedom According to Kant*, 87 *Colum. L. Rev.* 559 (1987) (disputing this interpretation).

58. *Metaphysical Elements of Justice*, supra note 3, at \*213.

59. *Foundations of the Metaphysics of Morals*, supra note 54, at \*446.

60. *Metaphysical Elements of Justice*, supra note 3, at \*213.

61. *Id.*

serious philosophers engaging each other on both the moral quality of homosexual love and the legitimacy of prohibiting this and other forms of private, consensual sexual conduct. The debate about prohibiting certain disfavored sexual practices typically turns on speculations whether these practices (or rather public perceptions of what happens in other people's bedrooms) offends ordinary sensibilities, and if so, whether this offense justifies the intervention of the criminal law. Rarely do philosophers seek to get behind conventional views of "sin" and assess the intrinsic quality of the conduct.<sup>62</sup> Finnis and Richards shift the discussion away from an inquiry into whether immoral conduct harms society, and toward the more basic question of whether homosexuality is immoral in the Kantian sense. Finnis favors a narrow reading, Richards a broader, more accommodating interpretation of Kant's moral theory. Both seem to agree, however, that the dictates of the moral theory should shape the legitimate range of legal coercion.

The problem of fathoming the relationship between Kant's moral and legal theory engages virtually all the contributors to this symposium. Weinrib, Grey, and I implicitly part company with Richards and Finnis on the structure of Kant's thought. Weinrib locates the general problem of the relationship in the context of the wider discussion today about the priority of the right over the good, the former associated with the legal, the latter with the moral theory. Weinrib claims not only that the legal is logically prior to the moral, but that the moral should be seen as a reasoned instantiation of rightful legal interactions. For Weinrib, the priority of the legal theory derives from its concern with human interaction or "purposiveness" in general; the moral theory directs our attention to specific purposes dictated by reason.<sup>63</sup> Thus Weinrib differs from Finnis and Richards by stressing the distinctive domain of the moral life.

If Grey and I differ from Weinrib, it is not so much on the issue of the scope of the moral and the legal, as it is on the logical relationships between these two dimensions of Kant's thinking. As Weinrib insists that the law itself must be understood as an intelligible, integrated whole, he finds in Kant the conceptual connections that have eluded many readers of the same texts.<sup>64</sup> Grey adds an important dimension to the discussion by bringing to bear Kant's political and historical writings and thus underscoring the historical contingency of many of Kant's legal prescriptions. My own paper turns inward to the text of

62. This is the shortcoming of the discussion a generation ago. See P. Devlin, *The Enforcement of Morals* (1965); H.L.A. Hart, *Law, Liberty and Morality* 17-24 (1963) (responding to Devlin).

63. See Weinrib, *Kantian Legality as Idea of Reason*, 87 *Colum. L. Rev.* 472 (1987); *infra* notes 66-67.

64. Professor Wolfgang Naucke of the University of Frankfurt, West Germany, agreed strongly with Weinrib that the legal and moral theory must stand in some close logical connection. He does not necessarily concur with Weinrib's specific view of this connection.

the *Rechtslehre* and works through many important details of Kant's views of law and morality.

No area of Kantian thinking provokes us more than his stringent injunction on punishment. Even if a society were to disband, he claims, the last murderer languishing in prison must first be executed.<sup>65</sup> Any deviation from the principle of retributive punishment would entail the death of justice and mean that it would "no longer [be] worth while for men to remain alive on this earth."<sup>66</sup> The themes of law, justice, and morality invariably converge in a judicial judgment sending one of us to the gallows.<sup>67</sup> No wonder then that Murphy wrestles with Kant's theory of punishment as a microcosm of conflicting strains in Kant's thoughts.<sup>68</sup>

The disagreements that emerge in these discussions demonstrate the vitality of our inquiry. These essays may be the first step in discovering and appreciating this neglected aspect of Kant's thinking.

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65. *Metaphysical Elements of Justice*, supra note 3, at \*333.

66. *Id.* at \*332.

67. For further elaboration, see Fletcher, supra note 50, at nn. 550-52.

68. Murphy, *Does Kant Have a Theory of Punishment?*, 87 *Colum. L. Rev.* 509 (1987).