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Many lawyers, both inside and outside the law schools, suffer from insecurity about our discipline. Instead of thinking of ourselves as the curators of a grand tradition in Western thought, many of us think of the law as a collection of doctrinal formulas and rules imposed on us by legislatures and the highest courts. We are always looking elsewhere to find a source of wisdom that will give the law coherence and meaning. At various times in this century we have looked to sociology, anthropology, psychoanalysis and, of course, economics in an effort to ground our ideas in firmer soil.[1]

All of this transplanting from other disciplines has been carried out in the name of "inter-disciplinary studies." But the studies in fact have never been inter-disciplinary. We have sought to learn from others, but we have never assumed that the law had much to offer our colleagues in neighboring disciplines. However much we had to teach psychoanalysts about crime and punishment, we have not insisted on it. We apply economic analysis in the law, but the economists have not been influenced the slightest by legal thought. Legal thought is at the service of the smartest outside bidder, or at least we have come to think. This general, self-abnegating assumption about the intrinsic value of legal studies is shared by everyone from the economists to the various wings of Critical Legal Studies.

The most common assumption of all, which is the most nourishing influence for law, is found in morality. If law is rooted in morality, it will flourish; if it comes disengaged from the nurturing source, it will wither into a hulk of arbitrary rules. This is the bias, more widely held than I would like to think, that moves me to write.

I argue that the widespread openness of lawyers to infusions of moral thought is misconceived, that the moral tradition is in much greater difficulty than is the legal tradition and that if either discipline has much to teach the other, we lawyers have as much to teach as we have to learn from moral philosophers.

The self-conscious appeal to morality as a standard for judging law distinguishes us both from the ancient Hellenic and Jewish civilizations. While these ancient and indeed (so far as I know) all civilizations have had a notion of resolving disputes lawfully and justly, the notions of

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    1 For two different views of the intellectual development of the last quarter century see Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987), and Fletcher, *Why Kant*, 87 COLUM. L. REV. 421 (1987).

"morality" and "ethics" are themselves of recent vintage.[2] Morality's coming late on the linguistic stage is reflected in the similarity of these terms for the concept in virtually all of the languages of the Western world. As we find cognates for "radio," "television" and the other props of modern life in French, German, and Russian, we find the cognates for "moral" and "ethical" in all of these languages as well. The root for "moral" comes from the Latin and "ethical" from the Greek, but apparently neither of these terms existed in source languages.[3] Talmudists became lawyers par excellence without a concept of morality, as did their counterparts in other legal systems of the ancient world.

What do we moderns mean by morality? Sometimes people think of morality as a code of norms, crystallized as a matter of convention in every society. These norms prescribe not only that we abstain from the grand wrongs (murder, theft; rape) but that we engage in acts of everyday decency such as answering invitations and showing appreciation for gifts. Conventions governing sexual relations are readily associated with morality. No one has ever articulated these rules in a systematic code, but I dare say that in large swaths of the population these implicit rules do obtain. They are readily evoked when we are angry, hurt or disappointed by another's behavior.

Several problems attend this notion of conventional morality. First, is there a sensible way to draw a line between morality in this sense and other conventional rules, such as etiquette, table manners and the rules of *politesse* (e.g. saying "please" and "thank you.")? One approach is to talk about the weightiness of the matter at hand,[4] but there are many borderline cases. How would we classify the newly emergent convention that one must ask one's company whether one may light up a pipe or cigarette? Is this a matter of morality or merely of etiquette? It is hard to know. The claim might be that morality describes acts that are harmful to other persons, but this hardly works because the concept of harm is sufficiently elastic to encompass the disquieting effects of breaches of etiquette and politesse.

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2   The terms "moral" and "ethical" intertwine in complex ways. Sometimes they function as synonyms; sometimes only one of the pair is appropriate. Here are a few levers that we might use for unraveling the patterns of usage:
   1. The rules that people live by (don't lie or cheat, respect others) are aptly called moral rules; reflections about these rules, and efforts to systemize and explain are better called moral or ethical theories.
   2. Where what is at stake, however, is guiding a professional role, such as that of lawyer, doctor or teacher, the day to day rules of practice seems to be ethical rather than moral. The broader concept of morality seems better suited to addressing the flourishing of the individual in his or her entirety. This might explain why self-regarding conduct, such as taking drugs, suicide or sexual promiscuity might pose a moral problem, but would hardly be discussed under a rubric of ethics.
   3. The term "ethical" might in general be more appropriate to describe relative clear and teachable rules, adopted in much the same way legal rules are adopted. We have come to distinguish between conventional morality and critical morality, the former a matter of consensus, the latter a product of ideal theory. The notion of critical ethics smacks of neologism. Perhaps this is the key factor that makes the term "ethical" suitable for the rules of proper professional practice.
3   *See* A. MACINTYRE, AFTER VIRTUE 38 (2d ed. 1984).
4   This is the standard that Hart used, in part, to distinguish moral from legal obligation, H.L.A. HART, THE CONCEPT OF LAW 83-84 (1961).

Further, even if we could clearly distinguish morality from the other conventions of mutual respect, we should want to know: what makes these conventions binding? Why should anyone care what other people ordinarily do? One argument might be that the conventions induce expectations, and these expectations are frustrated when, for example, people eat with their hands or fail to respond to invitations. This argument might be a first step, but it calls for an important qualification. Expectations are worthy of respect only if they are reasonable and compelling on their own terms. Integration and miscegenation disturbed expectations of racists, but these frustrations hardly stood in the way of social justice. Women started smoking on the street and let conventions be damned. For a while in the sixties and seventies, chic people were saying "fuck" in polite company precisely to display their independence from convention.

Conventions can both be unjust and personally suffocating. We must break them, when necessary, to do what is right and sometimes just to be able to exult in our freedom. In order to decide which conventions we should keep, we have to go beyond the conventions themselves. Perhaps strong conventions, based on a deeply felt consensus (e.g., do not laugh at funerals) are presumptively binding. But we need some standard to distinguish binding from nonbinding conventions, or at least to decide whether the presumption no longer holds. The problem with conventional morality is that neither custom nor consensus can deliver this extrinsic test for validating the conventional rules.

The problem of authoritative grounding is resolved in a second approach to morality, which takes an authoritative text like the Bible as the source of moral prescriptions. Many people take the ten commandments as paradigmatic of moral prescriptions. But of course, the ten commandments are read selectively. Not too many take the observance of the Sabbath as a moral prescription, and surely very few people take the commandments to believe in God and the prohibitions against graven images as essential to the moral life. In the end the authoritative prescriptions are only those that prohibit murder, stealing, adultery, disrespect for parents, bearing false witness, and coveting one's neighbor's property.

If these commandments are authoritative because the Bible makes them so, then presumably other commandments in the Bible should have the same status. But if the kosher dietary rules are not considered moral obligations, why should one think that the prohibitions against stealing and murder have a "moral" status. It is not the Bible that makes these provisions morally authoritative, but rather an independent sense of the moral that leads us to pick some and not other Biblical commandments as binding.

But where does this sense of the moral come from? Analytic moral philosophy stresses our intuitive understanding of right and wrong. A good deal of literature is devoted to our supposedly intuitive sense that it is wrong, actively, to kill innocent people, say by changing the course of a

trolley car that is bearing down on five other innocent people.[5] Intuition supposedly supports the drawing of close distinctions as well as taking major distinctions, like the distinction between acts and omissions, as foundational. But surely this belief in intuition as a source of moral truth can only be viewed as an illusion. No one really believes today that intuition is a special faculty with access to objective moral truth.[6]

It turns out that conventional patterns of thought play a part in all three of the preceding conceptions of morality. Either these conventional judgments stand alone, or they come into play as the basis for discerning some portions of the Bible as authoritative. The third possibility is that they issue in our intuitions and thereby indirectly shape our moral judgments.

In contrast with these conventional moral perceptions, critical moral theories erect an independent standard for judging whether either conventions or supposedly authoritative texts make a compelling case for the right and the good. In contemporary legal theory, the discussion of critical theories has centered on the conflicting claims of Kantian and utilitarian theories. Both of these critical standards, I will argue, impose unrealistic demands on the human condition. If conventional morality gets no further than what people actually do, Kantian and utilitarian standards prescribe modes of behavior that the ordinary mortal can not attain.

Both Kantian and utilitarian moral theories represent claims of Enlightenment thinkers which ground the moral ideal in secular criteria. Before turning to my critique of these Enlightenment efforts, let us turn briefly to claims of critical morality made in the pre-Enlightenment religious tradition. The religious claim is that true morality consists in following the will of God as expressed in authoritative religious texts. Morality is submission. As Abraham demonstrated his submission to God's command to sacrifice his beloved son Isaac on Mount Moriah,[7] all humans should suspend their intuitive sense of right and wrong and surrender to the perceived commands of the Almighty. In this tradition, the enthronement of personal intuitions of right and wrong is treated as arrogance and self-indulgence.

Numerous objections attend this conception of morality as surrender. As a matter of linguistic logic, how could it be the case that God's commands were morally conclusive? If every command were per se right, then the notion of right conduct would be no more than tautological restatements of God's willing that we engage in a certain action. To paraphrase Plato's decisive challenge to the piety of his time: Is conduct holy because God wills it? Or does God will because it is holy?[8] Plato's

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5   For a discussion of a classic conundrum that many have approached by relying on intuitions, see Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

6   *Cf.* MACINTYRE, *supra* note 3, at 69 ("Twentieth century moral philosophers have sometimes appealed to their and our intuitions; but one of the things that we ought to have learned from the history of moral philosophy is that the introduction of the 'intuition' by a moral philosopher is always a signal that something has gone badly wrong with an argument.").

7   *Genesis* 22:1-14.

8   PLATO, EUTHYPHRO 10.

question separates the questions of God's command from an evaluation of that command. The separation is necessary for the concepts of piety and morality to have content; but once the separation is made, we can no longer assume that God's command displaces the need for human judgment.

The Jewish tradition also recognizes that the legend of Abraham's submission is not only perspective on the correct relationship between human judgment and God's will. In the story of Sodom and Gommorrah, Abraham argues with God whether it is right to destroy the entire city and "kill the righteous along with the wicked."[9] And he bolstered his argument by a challenge to God to exercise his power in conformity with independent criteria of right and wrong: "Shall the Judge of all the earth not do justice?"[10] If there were no independent standard of justice, if the principle of not punishing the righteous were not binding on God as well as on man, this challenge would be meaningless. And if God's will were conclusive on questions of morality and justice, there could be no independent standard binding on the "Judge of all the earth."

The rabbinic tradition also recognizes that the revealed word of God cannot be sufficient to determine how we ought to live. The finite number of words of the Revelation require interpretation. The entire Talmudic tradition builds on the premise that human judgment must clothe the naked words of the Revelation with a content and understanding applicable to concrete human predicaments.[11] As "abstract propositions do not decide concrete cases" in the common law tradition, the words of Revelation alone cannot resolve the full range of human interactions that arise in a just legal system. The Talmud self-consciously acknowledges that after the initial act of legislation—the Revelation at Sinai—human judgment is necessary to adapt and shape the Law to the conditions of human flourishing. If human moral sensibilities were but arrogance and self-indulgence, the magnificence of the Talmudic tradition would dissolve in a collection of personal preferences and subjective judgments.

The Enlightenment tradition of morality, then, begins in the religious tradition of living under and by the law. The question, however, is whether the Enlightenment has been faithful to the perception of the human potential that informs the Talmudic quest.

Let us begin with the problematic meaning of morality in Kantian thought. Kant's basic usage of the term "moral" is restricted to the acts expressing a good will, which comes to mean decisions taken for the sake of duty, and this, in turn reduces to acting out, freely out as a matter of necessity, the dictates of pure practical reason. For conduct to be moral, it must express the highest capacity of human beings—their reason, the capacity that brings them into a common matrix with divine beings. By

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9   *Genesis* 18:25.

10   *Id.*

11   Sophisticated religious thinkers describe this tension as the "paradox of the interrelatedness" of God and man. *See* L. MEIER, JEWISH VALUES IN PSYCHOTHERAPY 4 (1988).

implication, moral conduct cannot respond either to inner physical needs or to external circumstances. Kant expresses the unique nature of moral conduct by conceptualizing a distinct form of causation between the good will and the moral act. Sub-moral acts reflect natural causes. However moral acts spring not from bodily causes, but from *Wille*, the medium of pure reason.

This is the basic principle that enables Kant to make the transition from the notion of moral conduct to a law of morality. In his derivation of this law, the key notion is not "law" but the "necessity" of acting out of the law-like nature of universalized maxim of conduct. Necessary acts are not responsive to the sensual impulses that render conduct less than moral. This kind of necessity arises in following a rule or law only if it is the abstract ruleness of the law (*die Gesetzlichkeit als solche*) that dictates the conduct. Being guided by the factual referents of a law brings one's motivations into conduct with external circumstances and therefore dethrones the act from the high plane of duty and pure reason.

This analysis of how moral action is possible does not in itself deliver any precepts or principles that we would call moral teachings. From this first formulation, however, Kant derives the more familiar principle that we should never treat anyone merely as a means, but always as an end in himself. Obeying this imperative is a way of realizing the possibility of action that bespeaks one's own reason and respects the reason of others.

Kant's theory lends itself to easy criticism either for the formality of his conception of moral action or for the ambiguity of the injunction to respect others as ends. As I see it, however, these common attacks miss the point. The point of Kant's teaching is that moral action is logically possible, but not readily accessible to humans who suffer from constant tension with their sensual impulses. In the final pages of the *Grundlegung* Kant concedes that there is no way of proving that any human action is indeed moral, i.e. an action born of reason alone.[12] Moral action stands as an ideal that we should seek to attain, but our failure to attain it is hardly a great failing. It is our nature as human beings that we unsuccessfully seek the moral.

Kantian theory reminds us that we are endowed with reason, that we are capable of a form of action that transcends the physical causation of the natural world. These are valuable teachings, but *the* subject of his inquiry is arguably not morality at all, but rather the way in which reason can be translated into action.

Yet Kant himself thought he was delivering a firm grounding for the common moral precepts of his time. In the course of the *Grundlegung* he tries twice to bring to bear his abstract formulations of the categorical imperative to explain four concrete cases. These paradigmatically moral questions include whether it is permissible to commit suicide, whether one may make a promise with the intent not to perform under particular circumstances, whether one is under a duty to develop one's talents, and whether one is under a duty to aid others in distress.

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12   I. Kant, Foundations of the Metaphysics of Moral *406-07 (L. Beck trans. 1969).

The categorical imperative (do not act on a maxim unless you can will it to be a universal law) arguably implies that one may not commit suicide, that one may not make a promise without intention to perform, that one must develop one's talents and that one must aid others in distress. However great a thinker Kant was, the logical anomaly of his explaining these results has proved to be one of the more embarrassing passages in his life's work. He sneaks in assumptions about human nature, claiming human beings have an impulse to live and a fear of being abandoned, in order to support his conclusions about suicide and the duty to aid others.

Kant's moral theory turns out to be an amalgam of the banal and the unattainable. Virtually all the maxims that provide the data for his moral theory find easy support in Judeo-Christian tradition. Any child with a proper eighteenth century European upbringing would subscribe to these Sunday school rules about killing, promising falsely and helping others.

The unattainable dimension of Kantian morality is the requirement of moral action itself, namely that one must adhere to these maxims not as a nonthinking conformist, but as a purely rational being. One must do the right thing for the right reason. Acting out of our fear of divine punishment or of social censure is not moral. Paradoxically, the right reason, namely acting out of reason and duty alone, eludes the capacity of ordinary morals.

The one place where Kant ventures to upstage the conventional morality of his time invites the greatest skepticism. On the basis of his moral theory, he concludes that under all circumstances it is wrong to lie, even if necessary to deceive a murderer who is about to kill one's friend.[13] No one can act on a maxim of lying, even for a good reason, and at the same time will the maxim to be a universal law. If the maxim were universalized and lying were therefore commonplace, the act of deception on a particular occasion would be impossible: the would-be murderer would not be deceived. There is very little said for this position except that it follows from Kant's basic principle of logical universalization.

Perhaps the best reply to Kant's moral stringency is simply this: would you choose someone as a friend—or even as a roommate—who would not lie to a murderer in order to save your life? Of course, the notion of morality might have nothing to do with the qualities we value in friends. But if human relationship turns out to be less important than an abstract ideal called morality, we should know the reason why. Kant just assumes, without reason, that only action expressing reason can qualify as moral.

I assume that the book of Genesis provides at least a suggestive guide to morally emulable conduct. Yet these legends abound with acts of deception. Abraham falsely tells Abimelech that Sarah is his sister;[14]

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13 I. Kant, *On a Supposed Right to Lie from Altruistic Motives*, in I. KANT, CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 346-50 (L. Beck tran. 1949), reprinted in S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 267-72 (1978).

14 *Genesis* 20:2.

Rebecca designs a fraud on Isaac by dressing up Jacob in animal skins and passing him off as his older brother.[15] The Jewish midwives lie, blatantly, to Pharaoh's soldier about the birth of Jewish children.[16] Sometimes these falsehoods serve the purpose of saving human life; sometimes, as in deceiving Isaac, they simply express familial intrigue.

Even God seems to place other values above a punctilious regard for the truth. Note the disparity between Sarah's reaction to God's telling her that she will bear a son and God's report of the conversation to Abraham:

> Therefore Sarah laughed within herself, saying, After I am grown old shall I have pleasure, my lord being old also? And the Lord said to Abraham, Why did Sarah laugh, saying, Shall I indeed bear a child when I am old? Is anything too hard for the Lord?[17]

In speaking to Abraham, the Lord omits the hint that Abraham is no longer potent. This passage lends itself to the interpretation that suppressing the insult and thereby protecting the relationship between Abraham and Sarah trumps—even in the divine moral example—an abstract devotion to truth-telling.

Kant's insistence on truth-telling, whatever the cost, characterizes his deontological commitment to purity and integrity. Do not get your hands dirty by lying to the murderer. After all, if he kills, it is his doing, not yours. Underlying this strain of purity one detects a radical conception of human agency. The actions of the murderer can be totally separate from the matrix of influences that could further or hinder his act. And those who could intervene should think only about their integrity, about maintaining their purity by not lying, whatever the cost.

The illusion of autonomous agency—each person acts alone, with no one else sharing responsibility for his acts—goes hand in hand with an illusion of total control in moral behavior. I have control over my acts, and you over yours. This explains why neither of us shares in the other's wrongdoing.

This commitment to total control lies at the foundation of Kant's morality. Each of us has the power of becoming autonomous (in the narrow sense) by abstracting ourselves from the pressures of sensual stimuli and entering the noumenal world of pure reason. It may be very difficult to do this; perhaps there is no evidence that anyone has ever done it.[18] But it is possible, Kant claims, and whether we achieve the moral depends solely on each of us.

Robert Paul Wolff criticizes Kant for conceptualizing morality in such a way that interacting morally with other people becomes logically impossible.[19] If moral conduct springs from pure reason, the noumenal world that unites us all, then it seems that our ideal moral acts do not occur in interaction with other moral agents. In the noumenal world of

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15   *Genesis* 27:16-18.
16   *Exodus* 1:19.
17   *Genesis* 18:11-12.
18   *See* note 12 *supra*.
19   R. WOLFF, THE AUTONOMY OF REASON 15 (1973).

pure reason, we are all one and therefore we cannot confront each other as distinct agents. The criticism is one point, but even more significantly, the ideal of morality rests on a yearning to think about human beings as agents wholly independent of their environment. Morality is a struggle of each person with himself, not the pursuit of an accommodation between the demands of self with the needs of others.

It is difficult to hunt down the origins of the ideal of purity in Western moral thought. One plausible guess is that the ideal of becoming a self-contained moral ideal comes to us from Jesus' preaching, in the Sermon on the Mount, of categorical love in response to one's enemies. The rabbinic culture to which Jesus reacts stressed law, justice and reciprocity as the basis of social order. Turning the other cheek, abandoning the normal yearning for justice—there could be no more dramatic way for Jesus to set himself apart from a law-based morality. Discerning right and wrong in particular cases, probing the protean variety of possible cases in the mode of rabbinic analysis, invariably takes its toll on the spirit. We are uplifted by the thought that there is one simple answer to all of these conflicts: renounce the practice of judging and imitate instead God's capacity to love his children.

The ideal of purity lies essentially in seeking to become god-like. For Jesus, this imitation consists in the gospel of love; for Kant, in seeking union with a secularized version of the transcendent God—the noumenal world of pure reason. And thence we derive the idea that morality should lead us to become less human by abstracting ourselves from the corrupting effects of our earthly needs.

Though the ultimate spiritual goal, *immitatio dei* may not be the proper perspective for capturing the moral life. So far as conventional morality captures something important about understanding of morality, the gap between these conventions and the ideal of purity requires explanation. Think about the moral maxims of the Ten Commandments, at least those that history has certified as the core conventional morality. Characteristically, these commandments—as well as the golden rule and other moral rules of thumb—are about human interactions, about the endless and detailed questions that arise in working out the boundaries between interdependent human beings. Typically, the moral maxims of the Decalogue stand for a principle of nonaggression between persons—e.g., the prohibitions against bearing false witness, murdering, stealing and committing adultery. The duty to honor one's parents requires affirmative action to maintain a critical relationship between God and humankind, e.g., the commandments to believe in God, not to erect graven images and to observe the Sabbath.

Observing the Ten Commandments does not make a person godlike. The commandments that define the relationship with God make one subservient to God and the commandments to honor one's parents and not to harm others simply make one a decent human being.[20]

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20   One could find the notion of *immitatio dei* in the obligation to observe God's commandments and to "walk in his ways." *Deuteronomy* 19:9. But imitating God's ways and observing His law cannot be reduced to emulating any single essence, such as love or reason.

In this context, it is worth recalling the long historical debate about the proper meaning of the tenth commandment: "You shall not covet your neighbor's house . . . your neighbor's wife, his manservant, his handmaid, his ox, his donkey, or anything else that belongs to your neighbor."[21] Those influenced by the ideal of purity are likely to read this as a prohibition against lusting in one's heart. In the tradition of Jewish thought, however, the favored reading is that there is no violation of the commandment until the lusting expresses itself in aggressive behavior toward one's neighbor.[22] The former reading makes us all sinners; the latter is a rule we can accept with a realistic understanding of our weaknesses as human beings.

Note that this interpretation of the tenth commandment imports into morality a standard feature of legal thought. Immorality is not a matter of the heart, but rather an acting out, in the external world, violations of the norms necessary for reciprocally harmonious social life.

The ideal of purity stands, in my mind, for a confusion of the spiritual and the moral. Only by subjecting oneself to the most arduous demands on our spiritual development can one hope to imitate God's love, achieve the unique causality of reason, and purify one's soul from the temptations of the justice. Whether the path is one of love or of reason, only the saint can hope to make his way.

However uplifting this confusion of the spiritual and moral may be, it maps a wrong turn in Western thought. It takes a conception of proper conduct that should be accessible to every normal person and perverts it into an occasion for incessant self-criticism. It is as though the standards of correct grammar were within the sights of only those who could write brilliant poetry.

If Kant is the chief perpetrator of the ideal of purity in moral thought, then one would expect his utilitarian opponents to be exempt from this uplifting vice. But if we look at utilitarianism closely, we find that it too shares in limiting moral conduct to the most virtuous among us.

If Kant turns away from human needs, Bentham enthrones them as his starting point. His psychology holds that all human beings seek pleasure and avoid pain.[23] From this factual claim, he concludes in an extraordinary leap that the best social policy is the one that will bring about what people seem to want—the greatest possible pleasure and least pain. One could think of the entire society as one organism seeking what individuals are after—the greatest possible pleasure and least possible pain.

Let us leave aside well-known problems in the quality and ranking of pleasures and just assume that we can sum up pleasures and pains over people and compute what would be good for the society as a whole. The demand on each individual in the society is that he think of himself as having pleasures and pains that are important not because he feels them,

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21 *Exodus* 20:17.

22 MAIMONIDES, MISHNEH TORAH, LAWS OF ROBBERY AND PROPERTY, ch. 1, Halakha 9.

23 J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1907).

but because they are felt by someone, anyone. The only thing that matters is that these pleasures and pains occur.

In making individual moral decisions, individuals must renounce their individuality. They must divorce themselves from that which is apparently of supreme importance to them, namely their own pleasures and pains. They may not plead, "If you prick me, do I not bleed?" but rather they must think of all bleeding in the society as of equal weight. Utilitarianism therefore becomes the teaching of extreme altruism. The true follower of Bentham must think to himself or herself: the other is as important as myself, and many other persons overwhelm my insignificant existence with their collective capacity to feel pleasure and pain. As Kantian thought submerges the individual in a transcendental world of reason, Benthamite theory loses the moral agent in a sea of social pains and pleasures.

As no real human being can free himself of the demands of the inner sensual impulses, no one with a healthy ego can give himself over to the altruistic demands of utilitarianism. One theory like the other exacts a purity that is not of this world. Moral conduct becomes as much a part of our daily life as the perfect vacuum becomes the medium for experimental physics.

The paradox in this tradition of purity is that both schools seek merely to explain the obvious. Kantian deontologists and Benthamite utilitarians offer an account of the moral maxims that people, by and large, manage to live by. Whether these maxims spring from pure universalized reason or whether they serve the greatest happiness for the greatest number, the maxims themselves are not problematic. There might be some disagreement about the contours of the moral rules protecting life, property, sexual integrity and human dignity, but we do concur, in thought and in behavior, on the core cases.

The perversity of the post-Enlightenment moral tradition derives not from the data to be explained, but from the mode of explanation. Both modes of explanation deprive us of the support and confirmation of a morality that is within our grasp as normal human beings.

A contrary outgrowth of Enlightenment thinking, the social contract theory of Hobbes and Locke, as well as Kant, stresses our individual need for security as well as order and justice in our relationships with others. But the social contract theory leads us not to a theory of morality in the tradition of *immitatio dei*, but to a project of building legal institutions that will insure the claims of justice in an ordered society.

The social contract offshoot of the Enlightenment receives its share of criticism. The contract is purely hypothetical. It seems to relegate morality to a place less compelling in our social arrangements than we accord institutions of government. Yet the great virtue of the contractarian mode of thinking is that it is rooted in the individual's quest for justice and stability, rather than the spiritual ambition of imitating God on earth. In Rawl's achievement we find the merger of Kantian reason and a theory of justice based on a version of contractarian thinking.[24]

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24 J. RAWLS, A THEORY OF JUSTICE (1971).

The contribution of contractarian thinking is to take us back to the pre-Christian tradition of the Greeks as well as the Jews, a tradition in which law and the theory of justice stand at the center of our reasoned efforts to infuse our social ordering with a higher meaning. The turn toward purity and *immitatio dei* that infuses the great moral theories since the Enlightenment leads us astray. We may appreciate the inspiration offered by the Kantian appeal to reason abstracted from the human condition and the Benthamite appeal to altruistic self-denial, but we should not be deceived into thinking that these inspirational moral perspectives are the only or even the primary source of value in the law. In the intricacies of our legal debates, we find a sensitive concern for justice as fashioned to the human condition. If morality is made for humans—and not humans for morality—we should pay less attention to the demands of purity and appreciate more fully the richness of our legal tradition.