

# Humanity and the Law

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The article by Professor Markovits<sup>1</sup> is thoughtful and careful – perhaps painfully so – but it simply and systematically ignores the human condition. The human condition is what law and law practice address, or, as they say these days, what law is “all about.”

The normative premise of Professor Markovits’s analysis is that all real-world persons are equal. This premise is drawn chiefly from the philosophy of Immanuel Kant. From this point of departure, it is supposed to follow that all persons should be treated equally. From this, it follows in turn that any vocation or calling that requires different treatment of various persons is ethically suspect. Indeed, such a vocation is ethically wrong, maybe evil. The practice of law, as defined by its function, its traditions, and its ethical norms, is a vocation that requires its practitioners to accord different treatment to various persons. It follows that the practice of law is ethically suspect, perhaps evil.

Students: Welcome to the Yale Law School!

The same lesson is purveyed at many other law schools these days, particularly in professional ethics courses. I think this is demoralizing. Moreover, it is incorrect as a reading of Kant and as an understanding of the human condition. In my understanding of Kantian moral philosophy, that source does not support a premise of equality among real-world persons.

Kant’s ethical theorem is the “categorical imperative,” the substance of which does imply universal equality. But in Kant the categorical imperative is a methodical step in a concept of morality, not a concept of legality. Broadly and inexactly described, Kant’s categorical imperative is presented as a substitute or equivalence for the traditional Christian (and Jewish) idea of God’s will. At the same time, it was an argument against David Hume’s thesis that thought (including moral thought) is a product of experience. In vulgar terms, Kant was arguing that “nature” (human

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<sup>1</sup> Daniel Markovits, *Legal Ethics from the Lawyer’s Point of View*, 15 YALE J.L. & HUMAN. 209 (2004).

reason) is the source of morality, whereas Hume was arguing that the source is “nurture” (human experience).

This is not an appropriate occasion for exploring these implications. I will undertake only two steps. The first is a brief address of Kant’s theory of morals. The second is a brief address of the morality of law practice.

The key formula in Kant’s moral philosophy is the “categorical imperative.” In Kant’s *Groundwork of the Metaphysics of Morals*, the concept is expressed as follows: “I ought never to act except in such a way that I can also will that my maxim should become a universal law.”<sup>2</sup> Another translation renders it: “I should never act in such a way that I could not also will that my maxim should be a universal law.”<sup>3</sup>

In contemporary America legal philosophy, these formulations are often taken as the place of departure for analyses of law and legal institutions. From this premise, it follows that legal rules and institutions that do not fulfill the standard of the categorical imperative are morally deficient and therefore obnoxious. Such is the approach in Professor Markovits’s exposition. However, I think this is a mistaken interpretation of Kant. In particular, I suggest that it is a mistaken conflation of distinct normative levels in Kant’s approach to moral philosophy.

It should be recognized that Kant was addressing the *metaphysics* of morals. That is the title of his work. “Metaphysics” means essentially “theoretical foundations.” In contemporary parlance, metaphysics seeks to provide an answer to the question, “What are we talking about when we talk about ‘morals’?” In the *Groundwork*, Kant is framing the problem of what, according to him, this talk is about.

In the *Groundwork*, as noted above, the term “universal law” is linked to “my maxim.” This linkage is commonly interpreted as meaning “My maxim should be a universal law,” with “maxim” understood as “a norm governing my real-world action.” I think this is an erroneous interpretation, especially when judged in relation to a later work of Kant’s in which he developed the concept.

In this subsequent and more elaborate work, *The Metaphysics of Morals*, Kant repeats his formula concerning “maxim” and “universal law.” And he does so again in terms that can be read as meaning “a norm governing my real-world action.” In *The Metaphysics*, the concept is stated as follows: “[A]ct upon a maxim that can also hold as a universal law.”<sup>4</sup> In *The Metaphysics*, however, the formulation just quoted is preceded by a discussion indicating various *types* of norms and the

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2. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 70 (H.L. Paton trans., 3d ed. 1956) (1785) (emphasis added).

3. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 18 (Lewis W. Beck trans, 1959) (1785).

4. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 17 (Mary Gregor trans, 1996) (1797).

relationship among them. These types include “principle,” “natural law” and “external law,” as well as “maxim.” The discussion plainly indicates that “maxim” means something different from “principle,” as well as “natural law” and “external law.” The discussion is as follows:

Obligatory laws for which there can be an external lawgiving are called external laws (*leges externae*) in general. Those among them that can be recognized as obligatory a priori by reason even without external lawgiving are indeed external but natural laws, whereas those that do not bind without actual external lawgiving (and so without it would not be laws) are called positive laws. A principle that makes certain actions duties is a practical law. The rule that an agent makes his principle on subjective grounds is called his maxim; hence different agents can have very different maxims with regard to the same law.<sup>5</sup>

It is after this preliminary discussion that Kant states the categorical imperative: “The categorical imperative . . . is: act upon a maxim that can also hold as a universal law.”<sup>6</sup>

These different normative types – “external law,” “maxim,” etc. – can be placed in what one might call descending order of virtue. Thus:

*Maxim*, which is “subjective” and distinctly personal to each agent or actor;

*Principle*, which is general and interpersonally intelligible, and perhaps equivalent to “natural law”;

*Natural law*, which is a norm “that can be recognized as obligatory a priori by reason even without external lawgiving”; and

*Positive law*, which includes norms “that do not bind without actual external lawgiving.”

These several normative categories can also be put in ascending order of real-world legality, starting with the norms that are most clearly and conventionally “legal.” Thus:

*Positive law*, which is distinctively the product of “external lawgiving.” Contemporary examples of positive law include the highway speed limit, the requirement that federal income tax returns be filed by April 15, and the requirements in an SEC 10K filing.

*Natural law*, which describes norms universally recognized among all human communities and formulated in more or less the same terms. Examples include many of the rules in the Ten

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5. *Id.*

6. *Id.* at 17.

Commandments (“Thou shalt not kill,” etc.). The concept of natural law has a long and rich history. In this tradition, a classic distinction is drawn between *malum prohibitum* and *malum in se*. That distinction evidently is reflected in Kant’s differentiation between positive law and natural law.

*Principles*, which apparently are norms like those of natural law but formulated in looser and generally more abstract terms. Examples are “Give every person his due” or “Contracts should be performed.”

And, finally, *maxims*, which are defined by Kant in *The Metaphysics* as follows: “A maxim is a subjective principle of action, a principle which the subject himself makes his rule (how he wills to act).”<sup>7</sup>

Kant then immediately goes on to say (somewhat confusingly): “A principle of duty, on the other hand, is a principle that reason prescribes to him absolutely and so objectively (how he *ought* to act).”<sup>8</sup> In between the two foregoing propositions, Kant says: “The conformity of an action with the law of duty is its *legality* (*legalitas*); The conformity of the maxim of an action with a law is the *morality* (*moralitas*) of the action.”<sup>9</sup>

After these propositions, Kant relates the concept of *maxim* to the idea of a person’s freedom. Accordingly, to Kant, it is an individual’s power to determine his subjective maxims that is the expression or the constitution of the person’s freedom.<sup>10</sup>

To say the least, these passages are not transparent. But two things are clear. First, Kant has drawn a distinction between moral *maxims* on the one hand and laws – both external and natural – on the other, and thus a distinction between legal duty and morality. Other visions of moral philosophy consider law and morals to be interlinked. One linkage is that morals feed law, and another is that law tutors popular morals. Or, perhaps more likely, there are two-way or “feedback” linkages between morals and law. Indeed, Kant himself can be understood to embrace such a proposition.

But that is not what he was about in *The Metaphysics*. The categorical imperative is not a legal principle; it is a concept of moral ideal.

Thus, the concept of moral ideal as developed in Kant is incommensurable with law as such. Moral ideals – categorical imperatives – are subjective, whereas law is objective in that it depends on interpersonal relationships. There may be linkages between morals and law, as indeed I believe there are. But linkages are one thing; identities or sequiturs are something else.

7. *Id.* at 18 (emphasis in original translation).

8. *Id.* (emphasis in original translation).

9. *Id.* at 17.

10. *Id.* at 18.

In Kant's terminology, legal norms are "objective" phenomena — meaning, at the least, norms that are interpersonally intelligible, as distinct from being "subjective." Such norms include the concepts of and relationships between "citizen" and "government," "judge" and "litigant," "lawyer" and "client," "tort victim" and "tortfeasor," etc. These and other relationships are not only "objective" in an empirical sense, but they are also legal in normative terms. Analysis of law and of roles such as that of the lawyer accordingly should presuppose interpersonal relationships and should not, as in the categorical imperative, presuppose their exclusion and relegation (or perhaps elevation) to Kant's category of the "subjective."

For the foregoing reasons, I think it inappropriate to use Kantian philosophy to anchor a critique of legal ethics or of the lawyer's vocation.

Professor Markovits goes on to say in substance that the lawyer's vocation is inconsistent with prevailing moral sentiment in the larger community. I think that he is correct in this proposition. He also seems to me to be correct in the corollary that law students should be aware that they are entering a profession of which people are widely suspicious and disdainful. This popular attitude is probably stronger today than it was fifty years ago, and it is probably stronger in this country than elsewhere. In any event, the development of this attitude seems to me to be a consequence of the incremental expansion over the last century of legal institutions' role in the ordering of modern society. But this attitude surely is not new: "The first thing we do, let's kill all the lawyers."

Perhaps there should be a further exploration of the relationship between the popular suspicion and disdain of lawyers and the popular morality from which it derives. The following is a sketch of such an analysis.

Popular morality in the modern era centers on the proposition of the equality of persons and the equality of their treatment by others, particularly in the exercise of authority. Accordingly, every person should receive equal regard in political and economic transactions and, to facilitate equal treatment, should have equal access to information about events that could affect his or her well being. This theme underlies such measures as the universal right of suffrage, the disclosure rules governing the marketplace, Freedom of Information legislation, and the Equal Protection Clause itself. It is also reflected in the Wilsonian approach to foreign policy: "Open Covenants, Openly Arrived At." In contemporary popular culture, the courtroom trial and trial-type hearing are model forms of discourse in that they (are believed to) reveal the truth for all to see.

This popular conception of political virtue can be linked to our predominantly Christian culture's Christian morality. "Do unto others. . ." is a predicate from which a rigorous concept of equality can be derived. As a matter of cultural history, the popular egalitarian ethic in this country

can be interpreted as a secularized version of Protestant Christian morality. As a matter of historical fact, this seems to me to be a more relevant ascription than the Kantian analysis tendered by Professor Markovits. In any event, the popular conception of political virtue corresponds to the prevalent religious component in contemporary political sentiment.

Popular egalitarianism is not only thus morally intelligible, but it is also a good political strategy for the average citizen. Average citizens generally do not participate directly in many of the deliberations that lead to decisions affecting their lives, including the formulation of legislation at the national, state, and local levels; executive decisions by myriad agencies at all levels of government; business decisions in the corporations that run our economy (and thus create or eliminate jobs and wages for average citizens); and court proceedings in which facts are authoritatively determined and laws enforced. On the other hand, lawyers do participate as advisers and scriveners in all of these deliberations.

Indeed, lawyers provide confidential counseling to the participants in these deliberations both before the deliberations begin and during their progress. A familiar popular image is that of an official with thoughtful look listening to advice being whispered by his lawyer.

The whispers are shielded by a special rule, the attorney-client privilege, which generally prohibits inquiry into client-lawyer communications. That rule creates a right for the client who receives advice, but it also operates as a rule of privilege for the lawyer who gives it. The attorney-client privilege and the "right of audience" before courts (the right to present legal argument on behalf of others) are the legal foundations of the lawyer's vocation. We are thus a specially and unequally constituted group within a larger community that, in the modern setting, is founded on the concept of equality. Little wonder that we are subject to popular suspicion, disdain, and fear.

But would popular sentiment support repeal of the rule allowing a person to obtain confidential assistance from a lawyer under the attorney-client privilege? I rather doubt it. There is thus some kind of contradiction involved between popularly professed morality and the law governing the practice of law.