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Why the *Doctrine of Right* does not belong in the *Metaphysics of Morals*

On some Basic Distinctions in Kant's Moral Philosophy

Marcus Willaschek

I. Introduction

Despite the increasing number of important contributions on the *Metaphysics of Morals*[1], Kant's final statement of his moral theory is still one of the least understood among his major works. And in fact, the *Metaphysics of Morals* is a very difficult book, partly because of the difficult nature of the issues dealt with, but partly also because of obscurities and inconsistencies, real or apparent, in Kant's presentation. These shortcomings, I will argue, cannot be explained simply by a lack of effort on Kant's part (or even by the diminishing of his intellectual powers in his later years). Rather, many problems with Kant's late work can be traced to inner tensions in his moral philosophy – tensions whose discussion may be both of historical and of philosophical interest. In particular, I will try to show that Kant (inadvertently) employs two conflicting views about how the realm of right (*Recht*) is related to morality (*Sittlichkeit, Moral*) and ethics (*Ethik, Tugendlehre*) and that the resulting conflicts may account for many of the difficulties one may find with the *Metaphysics of Morals*. However, we will see that in order to avoid these problems, Kant would have had to exclude the *Doctrine of Right* from that work altogether, since the realm of right, as Kant at least implicitly seems to admit, does not form a part of morality (as defined by the categorical imperative) at all.

Kant's main objective in writing the *Metaphysics of Morals* was to present an a priori *system* of morality (*Sittenlehre*) (VI 205)[2], including a complete and consist-

[1] In addition to Mary Gregor's classic (*Mary Gregor,* Laws of Freedom: A Study of Kant's Method of Applying the Categorical Imperative in the Metaphysik der Sitten, Oxford: Blackwell, 1963), more recent important book-length studies include, among others, *Friedrich Kaulbach,* Studien zur späten Rechtsphilosophie Kants und ihrer transzendentalen Methode, Würzburg: Königshausen und Neumann, 1982; *Wolfgang Kersting,* Wohlgeordnete Freiheit, Frankfurt: Suhrkamp, ([1]1984) [2]1993; *Bernd Ludwig,* Kants Rechtslehre, Hamburg: Meiner, 1988; *Otfried Höffe,* Kategorische Rechtsprinzipien, Frankfurt: Suhrkamp, 1990; *Peter König,* Autonomie und Autokratie: Über Kants Metaphysik der Sitten, Berlin / New York: de Gruyter, 1994.

ent system of moral duties. However, as I briefly want to indicate (in order to set the stage for what follows), Kant did not succeed in this task. In the course of the book, he introduces a number of twofold distinctions between kinds of duties, all of which are meant to apply exhaustively to duty in general (as defined by the categorical imperative; VI 225): duties of right and duties of virtue (VI 219, 239), duties based on "external lawgiving" and duties based only on "internal lawgiving" (VI 219), duties one can be externally coerced to observe and duties one can only coerce oneself to observe[3] (VI 232, 380), duties concerning (external) actions and duties concerning (inner) ends (VI 239), duties to oneself and duties to others (VI 240), duties concerning (external) actions and duties concerning (inner) maxims (VI 388), perfect and imperfect duties (VI 240), narrow and wide duties (VI 390). Several of these distinctions are meant to be coextensional: Duties of right are all and only those duties which concern *only* external actions, are based on external lawgiving and which one can be externally coerced to observe; these duties Kant identifies with narrow duties, which in turn are implicitly equated with perfect duties (VI 390). Correspondingly, duties of virtue primarily concern inner maxims and ends, are based on internal legislation, and allow only of internal coercion; they are wide or imperfect duties.[4] Considered extensionally, we are left with only two distinctions between kinds of duties: one distinction between duties of right (external, narrow, perfect) and duties of virtue (internal, wide, imperfect), the other between duties to oneself and duties to others. How are these distinctions related?

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[2] Kant's works are cited according to the "Akademie-Ausgabe" (Kants gesammelte Schriften, Berlin: de Gruyter 1900ff.). English translations from the Metaphysics of Morals are *Mary Gregor's,* from the Groundwork *H.J. Paton's,* from the Critique of Practical Reason *L.W. Beck's,* from Religion within the Limits of Reason Alone by *Th.M. Greene* and *H.H. Hudson,* and from Perpetual Peace by *Ted Humphrey,* although I sometimes take the license to make changes in the translations when this is necessary to bring out more clearly an aspect of the original I rely on. Locations throughout are given by reference to the "Akademie-Ausgabe" (volume and page number).

[3] Here and in what follows, I have changed the translation by substituting "coercion" for "constraint" in order to have the same word for "*Zwang*" and "*zwingen*" throughout. The significance of this issue will emerge below.

[4] These identifications are not without their problems: In which sense, for instance, do duties of right concern "external actions" only? "External" here cannot just mean "physically characterized behavior, regardless of motivation", since motivation often *is* legally relevant, as Kant himself implicitly acknowledges by appealing to maxims in the "Universal Principle of Right" (VI 230). And why doesn't the observance of duties of right allow of degrees (as is characteristic of wide and imperfect duties) as much as the observance of duties of virtue (a view which forces Kant to deny that there can be such a thing as equity right; VI 234/5)? The reason, if any, does not seem to be the reason Kant offers (that an external action can be prescribed in a definitive way, while acting on a maxim admits of degrees, VI 390), but rather that duties of right do not concern "positively" specified actions at all, but only the refraining from certain kinds of acts (cf. *Kersting,* op. cit. fn. 1, 192). Again, this might turn out to be too narrow as a characteristic for all duties of right. On the side of duties of virtue, the most problematic identification seems to be the one of duties concerning maxims with duties concerning ends.

On the one hand, according to Kant's table of duties in the "Introduction to the Doctrine of Right" (VI 240), the distinction between duties to oneself and duties to others seems to be applicable both to duties of right and duties of virtue. On the other hand, however, Kant explicitly defines the realm of right as "the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom" (VI 230). This suggests that one can have duties of right only to others. How people treat themselves, as long as others are not concerned even indirectly, is not a matter of right but of ethics, since no conflict between "the choice of one" and "the choice of another" can possibly occur. And in fact, no duties to oneself are mentioned in the *Doctrine of Right.*

But what then of *strict* or *perfect* duties to oneself, which according to Kant's identification of perfect duties with duties of right would have to be duties of right to oneself? Astonishingly enough, the main text of the *Doctrine of Virtue* begins with a whole book on "perfect duties to oneself", in which Kant deals, among other things, with suicide, masturbation, and lying (VI 417 - 442). Now this is doubly astonishing. First, according to the "Introduction to the Doctrine of Virtue", all perfect duties should be duties of right, whereas now Kant presents perfect duties which clearly do not belong to the realm of right (but neither do they belong to ethics as defined in the "Introduction to the Doctrine of Virtue"). Second, while it certainly is a moral duty to be honest with oneself, there also exists a moral duty to be honest *with others,* which, as Kant admits, also is a duty *to others* (VI 430; cf. VIII 426). This duty, too, is not a duty of virtue, since it does not concern a maxim of action, but the action itself, and consequently does not admit of degrees in its observance (either you're truthful or you're not). But neither is truthfulness to others a duty of right, since its observance, by contrast for instance to the keeping of promises, cannot be enforced by external coercion. The same seems to be true of many other duties, such as keeping a private secret someone shared with me or warning someone in case of danger. All these are at least *prima facie* moral duties which should, according to Kant, be derivable from the categorical imperative, but which can be classified neither as ethical (duties of virtue) nor as juridical (duties of right).

Kant, in effect, identifies duties of right with *narrow* (perfect) duties *to others,* and equates duties of virtue with *wide* (imperfect) duties to oneself and to others.[5] This is inadequate in two respects: First, it forces Kant to subsume narrow duties to oneself, against his own systematic division in the "Introduction to the Doctrine of Virtue", under the heading of duties of virtue. Second, it leaves no place at all in Kant's system of duties for those narrow moral duties to others which are not duties of right.

[5] That Kant really conceived of juridical duties as duties to others is confirmed by the fact that, after saying "Ethics has its special duties as well", he adds "e.g. duties to oneself" (VI 220).

We must conclude that Kant's system of moral duties is neither consistent nor complete.[6] But why is this so? I think that it would be too easy an explanation just to call this failure (a failure after all concerning the main objective of the book) an accidental oversight. Rather, we must ask why Kant felt compelled to include a kind of duties in the doctrine of virtue which clearly does not belong there and leave other duties out of the picture altogether, even though that picture was meant to be all-encompassing. The answer obviously has to do with Kant's assumption that the right-ethics-distinction is *exhaustive* of the moral domain. As we have just seen, this assumption is mistaken, since there are moral duties which are neither duties of right nor duties of virtue. In order to understand why Kant nevertheless subscribed to it, I propose to take a closer look at the distinction between the two kinds of "lawgiving" in the "Introduction to the Metaphysics of Morals". On this fundamental distinction, which underlies the distinctions between right and ethics, between legality and morality, between the two parts of the book, and between perfect and imperfect duties, the structure of the whole book is built.

I will begin by comparing Kant's (diverging) formulations of the distinction between morality and legality within the *Metaphysics of Morals* as well as in the *Critique of Pure Reason* (Part II) and will try to explicate two different senses in which "the idea of duty" is the incentive "ethical lawgiving" connects with its laws (Part III). Next, I will turn to the question of what the corresponding incentive in "juridical lawgiving" consists in and how it is related to the concept of right as defined in the "Introduction to the Doctrine of Right". This will lead to a distinction between two conflicting views about the relation between right and morality (*Sittlichkeit*)[7]. On the "official view" (which underlies the structure of the *Metaphysics of Morals*) the realm of right is one of the two parts of the moral domain based on the categorical imperative. On the "alternative view", by contrast, the fundamental laws of the realm of right are expressions of human autonomy akin to, but independent from, the moral domain. I will argue that *both* views are operative in the *Metaphysics of Morals* since Kant was committed to his "official" view, but tried to get around its weaknesses by appealing to the "alternative" view (Part IV). The resulting tensions may account for some of the perplexities connected with Kant's system of duties and the relationship between the two parts of the *Metaphysics of Morals* (Part V).

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[6] Cf. Bernd Ludwig's introduction to *Immanuel Kant*, Metaphysische Anfangsgründe der Tugendlehre, ed. *B. Ludwig*, Hamburg: Meiner, 1990, where he points out that the systematization Kant develops in the "Introduction to the Doctrine of Virtue" differs from the one actually employed in the main text (XXII). Mary Gregor, in the same volume, offers a clear analysis of Kant's system of duties in the Doctrine of Virtue (*Mary Gregor*, "Kants System der Pflichten", ibid., XXIX-LXV) and argues that indeed there can be perfect duties of virtue (LX-LXII). Nevertheless, she admits that Kant is inconsistent in this respect (LXI).

[7] In this text, I use "morality" both as a translation of "*Moral*" or "*Sittlichkeit*", meaning the whole moral domain, and as a translation of "*Moralität*" which contrasts with "*Legalität*" and characterizes a specific type of actions. Where the context does not suffice to make clear in which meaning "morality" is used, I added the corresponding German expression in brackets.

II. Legality and Morality

Kant introduces the distinction between "morality" and "legality" in the *Critique of Practical Reason:* "And thereon [whether or not "subjective respect for the law" is "the sole mode of determining the will"] rests the distinction between consciousness of having acted *according to duty* and *from duty,* i.e., from respect for the law. The former, legality, is possible even if inclinations alone are the determining grounds of the will, but the latter, morality or moral worth, can be conceded only where the action occurs from duty, i.e., merely for the sake of the law" (V 81).[8] Kant here uses the terms "legality" and "morality" to express the same distinction that already played an important role in the *Groundwork* between acting "in conformity with duty" (*pflichtmäßig*) and acting "from duty" (*aus Pflicht*) (IV 397 ff.). The legality or lawfulness of an action consists in its conformity with the moral law, its morality or "moral worth" consists, in addition to its lawfulness, in its being motivated by the feeling of *respect* for the moral law.

Let us now compare this distinction to a corresponding one in the "Introduction to the Metaphysics of Morals": "The mere conformity or nonconformity of an action with the law, irrespective of the incentive to it, is called its *legality* (lawfulness); but that conformity in which the idea of duty arising from the law is also the incentive to the action is called its *morality*" (VI 219). Despite some verbal differences, at first this may seem to be substantially the same distinction as the one familiar from the earlier works. If we take a look at the context of the quote, however, this impression soon disappears. The section of the Introduction from which the quote is taken ("On the Division of a Metaphysics of Morals") starts with a distinction between the two elements of "all lawgiving" (*aller Gesetzgebung*), namely a *law* (that says *what to do*) and an *incentive* (that says *why to do it)* (cf. VI 218). Kant then contrasts two kinds of lawgiving "with respect to the incentive" (VI 219). If the incentive of duty is *included* in the law, the lawgiving is "*ethical*"; by contrast, if it "does not include the incentive of duty in the law and so admits an incentive other than the idea of duty itself" the lawgiving is "*juridical*". This distinction is not quite symmetrical. It seems that in juridical lawgiving nothing specifically corresponds to the idea of duty in ethical lawgiving. As I will argue below, however, this impression is mistaken. In any case, if the two kinds of lawgiving differ in what is *included* in the law, it follows that the *laws* of ethical and of juridical lawgiving, even if they prescribe the same observable behavior, do not have the same content: While the latter just say what to do, the former also pre-

[8] The very first time *Kant* draws this distinction (in his published writings) is in a passage in the second Critique a little earlier than the one quoted above, at the beginning of the chapter "On the Incentives of Pure Practical Reason": "If the determination of the will occurs according with the moral law but only by means of a feeling of any kind whatsoever [...] and if the action does not occur for the sake of the law, it has legality but not morality" (V 71). The same distinction, in the same terminology, can be found already in a lecture-transcript from 1784 ("Naturrecht Feyerabend", XXVII, 1327).

scribe a motive why to do it (namely to do it because that's what the law demands). And in fact, some pages earlier Kant says as much explicitly: "In contrast to laws of nature, these laws [i.e. practical ones; M.W.] are called *moral* laws.[9] As directed merely to external actions and their conformity to law they are called *juridical* laws; but if they also *require* that they (the laws) themselves be determining grounds of actions, they are *ethical* laws" (VI 214; 3. emphasis mine). Consequently, there is not just a difference between two kinds of *lawgiving,* but also between two kinds of *laws,* juridical and ethical, in that the latter "require" their addressees to act from duty while the former do not. And Kant goes on: "and then one says that conformity with juridical laws is the *legality* of an action and conformity with ethical laws is its *morality*" (VI 214).

Now this last distinction obviously is at variance with the earlier definitions: In the second *Critique* the difference between legality and morality is defined with regard to the *aspect* under which we regard an action: while legality is a quality an action can have "*irrespective*" of its incentive, an action has moral value only if, over and above being lawful, its incentive lies in the "idea of duty". According to the *Metaphysics of Morals* (VI 214), however, the difference is defined with regard to the laws an action conforms with. Let's call this the "distinction-of-laws" between legality and morality as opposed to the earlier "distinction-of-aspects". The two distinctions are *not* coextensional: If an ethical law requires, say, that one ought not to lie *and* that one ought to obey that law because that's what the law requires, then I do not even act *lawfully,* with respect to that particular law, if I tell the truth for merely prudential reasons. In other words: With respect to ethical laws (as defined in the *Metaphysics of Morals*), legality (as defined in the second *Critique*) implies morality. If an ethical law is obeyed at all, it must be obeyed from duty. The distinction-of-aspects can be meaningfully applied only to juridical laws. By contrast, according to the distinction-of-laws in the *Metaphysics of Morals,* any conformity with juridical laws is called "legality".[10]

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[9] Previously, Kant had mentioned only *the* moral law (singular). Obviously, he is now referring to the "practical principles" mentioned in the paragraph preceding the quote, thus not just the moral law itself, but also the more specific practical rules that qualify for universal legislation.

[10] To make things worse, Kant adds yet another definition within the pages of the Introduction: "The conformity of an *action* with a 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" (VI 225; 1. and 3. italics mine). This may seem to be the same distinction that can be found in the earlier works, since here, too, the difference lies in whether or not we consider the action's motivation (its maxim). But this is misleading. According to the Groundwork, as well as the second Critique, in order to determine whether an action conforms with the (moral) law, we have to check whether its maxim (say "I want to cultivate my talents") can be 'universalized'; but the action has "moral worth" (in which its morality consists) only if its maxim can be universalized *and* it is an action done from duty. Thus, if Kant in the Metaphysics of Morals says that the morality of an action consists in the conformity of its maxim with a law, this cannot be the maxim we are to check for its universalizabilty, since if *that* maxim "conforms" with a law (i.e. if it can be universalized) this would guarantee only the legality of the

We thus must acknowledge that Kant developed two different distinctions between morality and legality, one to be found in the earlier writings and the other operative in the *Metaphysics of Morals.*[11] Before we can ask why Kant substituted one for the other, we must consider the question whether the later distinction makes any sense at all. From what we have seen so far, it may seem that there is something severely wrong with Kant's concept of an ethical law on which the distinction-of-laws between morality and legality is based. This issue will warrant a brief digression whose results will help us to understand the relation between Kant's account of juridical lawgiving in the "Introduction to the Metaphysics of Morals" and his concept of right as developed in the "Introduction to the Doctrine of Right".

III. The Command to Act from Duty and the Incentive of Ethical Lawgiving

As we have just seen, ethical laws as defined in the *Metaphysics of Morals* differ from practical laws in general (as introduced for instance in the *Critique of Practical Reason,* V 19 - 20, but also in the *Metaphysics of Morals,* VI 225) in explicitly requiring that compliance with these laws be motivated by the recognition that this is what the law demands. In the "Introduction to the Doctrine of Virtue", Kant expresses this idea in the neat formula (which he calls "universal ethical command"): "Act in conformity with duty *from* duty [*Handle pflichtgemäß aus Pflicht*]" (VI 391). Now the problem with this ethical command, as well as with all other "ethical" laws, is that it seems to give rise to an infinite regress. If a law commands that I ought to do X *and* that I ought to do X from duty, it seems that I can comply with the second part of the command (that I ought to act from duty)

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action. Acting from duty means that one has adopted the maxim of acting only in accordance with the moral law (cf. IV 400 - 401 and below, section III). It is this maxim, according to the third definition in the Metaphysics of Morals, on which the morality of an action depends. However, if this maxim ("I will act only on maxims that conform with the moral law") is supposed to *conform* with a law, *that* law must itself "require" that one follow it from duty. Correspondingly, if an "action" can conform with a "law of duty", irrespective of its (moral or non-moral) motivation, the law obviously does not require that the action is one done from duty. Thus, the third morality-legality distinction in the Metaphysics of Morals differs from the distinctions in the earlier writings in presupposing the conception of ethical laws developed in the Metaphysics of Morals. In fact, it is just another version of the distinction-of-laws. – Although the definition from the Metaphysics of Morals quoted first (VI 219) verbally corresponds to the distinction-of-aspects between legality and morality, I think that the context makes it clear that it, too, is meant to express a distinction-of-laws, so that we may ascribe to Kant one consistent conception of the contrast between legality and morality in the Metaphysics of Morals.

[11] Thus it is correct, but misleading to say that there are two notions of "legality" involved, one "juridical" and the other "moral" (cf. *Otfried Höffe,* "Recht und Moral: ein kantischer Problemaufriß", in: Neue Hefte für Philosophie 17 (1979), 23; *Kaulbach,* op. cit. fn. 1, 139; *Kersting,* op. cit. fn. 1, 178). Rather, we are dealing with two altogether different distinctions between morality and legality.

either from duty or from some other motive. For instance, it would be possible that I obey that command because I am afraid of eternal damnation. In order to exclude this, we would have to assume that there is another command to the effect that the command to act from duty itself ought to be obeyed from duty, and so on. An infinite regress would be inevitable. It might be objected that if I obey the command to act from duty only out of fear of damnation, I do not really act from duty at all and thus do not obey the command in question. Ethical laws, on this view, issue commands concerning the *ultimate* motive of someone's obeying them. But then someone who, at a given time, is ultimately motivated by fear of damnation (or any other motive except that of duty) has no possibility to obey that command at all, because he could only obey it for a reason which makes obeying it impossible (viz. fear of damnation or whatever his ultimate motive may be). A command that can only be followed by those who would follow it anyway (namely those who are ultimately motivated by "the idea of duty") is empty. Thus it seems to follow that either ethical laws are empty or they lead to an infinite regress.

However, I do not think that Kant's conception of ethical laws runs into this dilemma. We can see how Kant avoids this problem if we take a look at the "Introduction to the Doctrine of Virtue". Giving a preliminary exposition of what it is to say that "one's own perfection" is an "end that also is duty" (viz. a "duty of virtue"), Kant writes: "A human being has a duty to carry the cultivation of his *will* up to the purest virtuous disposition, in which the *law* becomes also the incentive to his actions that conform with duty and he obeys the law from duty" (VI 387). How this cultivation is to be brought about Kant explains some pages later. The duties of virtue, among them the duty to cultivate "our morality in us", are *wide* or *imperfect* duties, since they do not prescribe specific actions, but only a maxim of action: "The greatest perfection of a human being is to do his duty *from duty* [...]. – At first sight this looks like a *narrow* obligation, and the principle of duty seems to prescribe with the precision and strictness of a law not only the *legality* but also the *morality* of every action, that is, the disposition. But in fact the law, here again, prescribes only the *maxim of the action,* that of seeking the basis of obligation solely in the law and not in sensible impulse [...], and hence not the *action itself*" (VI 392). And after reminding us that "a human being cannot see into the depths of his own heart so as to be certain, in even a *single* action, of the purity of his moral intention and the sincerity of his disposition" (ibid.), Kant concludes: "Hence this duty too – the duty of assessing the worth of one's actions not by their legality alone but also by their morality (one's disposition) – is of only wide obligation. The law does not prescribe this inner action in the human mind but only the maxim of the action, to *strive with all one's might* that the thought of duty for its own sake is the sufficient incentive of every action conforming to duty" (VI 393; last emphasis mine).

We may conclude, then, that someone acts from duty just in case the "thought of duty for its own sake", i.e. the simple recognition that this is what the moral law demands, "is the sufficient incentive of every action conforming to duty" (which

does not exclude the possibility that there are further incentives that motivate one's actions). Now ethical laws "require" us to act from duty. Because of the opacity of one's inner disposition, however, they cannot require this in a straightforward way. What ethical laws can and, according to Kant, do require is the "cultivation" of our moral character, the striving for moral perfection. Thus, the moral worth of individual *actions* ultimately depends on the moral quality of the *person.* In this way the dilemma that seemed to face Kant's conception of ethical laws (regress or emptiness) can be avoided. We still may wonder how exactly one is to "strive with all one's might" to make the "thought of duty" a "sufficient incentive". Kant may have had in mind a monological version of the techniques of probing and adjusting one's inner disposition employed in his "Fragment of a Moral Catechism" (VI 480 - 484). People less prone to Protestantism perhaps will prefer other methods of moral (self)-education. In any case, the cultivation of one's moral character is a task that can meaningfully be prescribed.

However, it seems that we only have exchanged one problem for another, because now we seem to lose our grip on the distinction between ethical and juridical lawgiving and their respective laws. If the command to "make duty the incentive" really amounts to nothing more than the requirement to "cultivate one's moral disposition", it seems to be only a further substantial moral duty besides others. But Kant says explicitly that ethical and juridical lawgiving do not just differ in what actions they "make a duty". Rather, they are supposed to "be distinguished with respect to the incentive" (VI 219). Obviously, neither the cultivation of one's moral personality nor the corresponding duty can meaningfully be called an incentive. And further, how can the "idea of duty" *be* the ethical incentive if at the same time we are ethically required to *make* it an incentive?

As Kant had explained before, in "all lawgiving [...] there are two elements: first, a law, which represents an action that is to be done as *objectively* necessary, that is, which makes the action a duty; and second, an incentive, which connects a ground for determining choice to this action *subjectively* with the representation of the law" (VI 218).[12] Now if "all lawgiving" needs an incentive, juridical lawgiving needs an incentive, too, which according to Kant can only be taken from people's sensuous motivation. We will return below to the question of what the juridical incentive exactly consists in. In any case, it is no incentive which could meaningfully be "included in the law" in the way in which ethical laws include the motive of duty in their content, because this would mean that one violates juridical laws by following them from duty, which of course is absurd. Rather, in juridical lawgiving, the incentive is supposed to supply not a necessary (i.e. obligatory), but only a *sufficient* motive for obeying the law („an incentive suited to the law", VI 219). (I will refer to the two kinds of incentives as "juridical" and "ethical" incentives, respec-

[12] Kant proceeds: "Hence the second element is this: that the law makes duty the incentive". As far as I can see, this must be a mistake because it would be correct *only* for ethical lawgiving and not for lawgiving in general with which Kant is concerned in this passage.

tively.) But then it becomes clear by contrast that the ethical incentive is supposed to be both (motivationally) sufficient *and* (morally) necessary. Insofar as the motive of duty is morally *necessary* for obeying ethical laws, it is made part of the content of ethical duties: "Act according to duty from duty". We have just seen how this can be a meaningful command if it is understood as a requirement to cultivate one's moral character. Now the impression that according to this interpretation acting from duty becomes merely a further substantive requirement as opposed to an incentive can arise only if we overlook the role duty plays as *sufficient* motive for obeying ethical laws. Implicitly, Kant acknowledges this distinction by saying that, with respect to *juridical* obligations (which do not *require* the idea of duty as incentive), "all that ethics teaches" is that even apart from any juridical incentive, "the idea of duty by itself would be *sufficient* as an incentive" (VI 220; emphasis mine).

Since Kant is not entirely clear about the difference between these two roles that duty plays in ethical lawgiving, he does not state as clearly as one would have wished that with respect to providing a *sufficient* motive for obeying their laws, ethical and juridical lawgiving proceed in strictly parallel ways: Laws are given and sufficient incentives are supplied for their addressees to obey them. The asymmetry we noted earlier concerns only the question whether there *also* is a (morally) *necessary* incentive connected with the law (and thereby "included" in what is required), which is the case in ethical, but not in juridical lawgiving. Before we turn to the question of what the sufficient *juridical* incentive consists in – which will prove to be the key to an understanding of Kant's concept of right – it will be helpful to ask first what precisely Kant means by saying that "the idea of duty" is a (sufficient) incentive for acting in accordance with ethical laws. Of course, this is the old question of what it means to act *from duty.*

In a general way, this question can be answered as follows: As Kant argues in the *Groundwork* and in the *Critique of Practical Reason,* the moral law can be understood as the result of rational self-legislation insofar as we must acknowledge the moral law as binding in order to regard ourselves as free and rational agents. Acknowledging the moral law results in a *prima facie* motive to obey it. Kant calls this motive "respect for the moral law". Someone acts from duty just in case this motive is a sufficient incentive for her acting lawfully. But when is the motive of duty (or of respect for the law) a *sufficient* incentive for acting? This question has an obvious answer in those cases where acting lawfully goes against one's other inclinations. If our inclinations motivate us to act against the moral law, acting from duty consists in acting against one's own inclinations, motivated solely by the recognition that this is what the moral law demands. Things become more complicated when our inclinations motivate us to act in *accordance* with the law. If we want to avoid the classical misinterpretation that in these cases one simply can't act from duty and thus should get rid of one's inclinations first, we will have to say that duty is a sufficient motive even in the presence of other motives for acting lawfully just in case one would have acted in accordance with the law even if one's inclinations had been against it. This means that in the cases at issue

acting from duty consists in the truth of a counterfactual claim about how one would have acted if circumstances had been different.[13]

Now we may distinguish two interpretations of what Kant means by "acting from duty" according to what the truth of the counterfactual is supposed to depend on (its "truth-condition"). On the first interpretation, the counterfactual is made true by the *decision,* at the given time, to act one way or another. If someone's decision is based on a feeling of respect for the moral law which is stronger not just than all her actual inclinations, but even stronger than any inclination she is capable of having, then the decision results in an action from duty. Therefore, it would be conceptually (if not psychologically) possible for someone to act from duty only once in a lifetime, acting *against* the law every time before and after, if only at the relevant time her respect for the law is strong enough. On the second interpretation, this is impossible even on purely conceptual grounds. What makes the relevant counterfactual true is not a momentary motivational state of the agent but rather her having a particular maxim. Someone who acts from duty makes her decisions to act *depend* on their conformity with the moral law. The only way to do this is to adopt the maxim *always* to act in accordance with the law. In effect, on this interpretation, acting from duty consists in acting on the maxim "I intend always to act lawfully, *come what may*", because it is someone's having this maxim which makes true the counterfactual claim that she would have acted lawfully even if her inclinations had been against it. Since a maxim is a principle on which someone really *acts* (IV 421), someone who acts lawfully only once cannot be said to have adopted the maxim *always* to act lawfully even for that single instant. According to this "dispositionalist" interpretation, as opposed to the "decisionist" interpretation, acting from duty presupposes the acquisition of a long-standing disposition of acting in accordance with the moral law.[14]

While some of what Kant says in the *Groundwork* may seem to favor the decisionist interpretation, even there strong evidence can be found for the dispositionalist view. For instance, Kant writes: "Now an action done from duty has to set aside altogether the influence of inclination, and along with inclination every object of the will; so there is nothing left able to determine the will except objectively the *law* and subjectively *pure reverence* for this practical law, *and therefore*

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[13] Cf. *Henry Allison,* Kant's Theory of Freedom, Cambridge: Cambridge University Press, 1990, ch. 6; *Marcus Willaschek,* Praktische Vernunft. Handlungstheorie und Moralbegründung bei Kant, Stuttgart / Weimar: Verlag J.B. Mezler 1992, chs. 4 and 9. Alternative readings of what it means to act from duty are discussed, for instance, in *Barbara Herman,* "On the Value of Acting from the Motive of Duty", in: Philosophical Review 90 (1981) 359- 382 (now also in Barbara Herman, The Practice of Moral Judgment, Cambridge (Mass.): Harvard University Press, 1993); *Karl Ameriks,* "Kant on the Good Will", in: Otfried Höffe, ed.: Grundlegung zur Metaphysik der Sitten. Ein kooperativer Kommentar, Frankfurt: Klostermann 1989, 45 - 65.

[14] These decisionist and the dispositionalist views about what it is to act from duty correspond, roughly, to the "single intention" and the "total character" views about the good will distinguished by *Ameriks,* op. cit. fn. 14.

the maxim of obeying this law even to the detriment of all my inclinations", IV 400; last emphasis mine). In his *Religion within the Limits of Reason Alone,* Kant finally leaves no doubt that acting from duty consists in the adoption of a maxim according to which the moral law is the "supreme condition" of one's decisions.[15] As we have seen, this means that one acts from duty only if one has the maxim *always* to obey the moral law.[16] Acting on this "maxim of lawfulness", as we may call it, must be sharply distinguished from just *always acting* lawfully, which of course is compatible with acting from *mere* inclination. Really acting on the *maxim* of lawfulness means that one is willing to obey the moral law, to use Kant's harsh phrase, "even to the detriment of all my inclinations".[17]

These reflections now allow us to state more clearly what it means to say that the idea of duty is the morally necessary and motivationally sufficient incentive connected with ethical laws. It is a *necessary* incentive in that ethical laws *require* us to act from duty. Acting from duty consists in acting lawfully on the maxim of lawfulness, i.e. on the maxim always to act lawfully come what may. But then, if an ethical law requires me to do X, the idea of duty is a *sufficient* incentive, since knowing what the ethical law requires in itself is *sufficient* for motivating me to do X. For someone who has adopted the maxim of lawfulness, knowing that an ethical law prescribes, say, to help the weak, is a sufficient incentive to go out and help

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15 "The law, rather, forces itself upon him irresistibly by virtue of his moral predisposition; and were no other incentive working in opposition, he would *adopt the law into his supreme maxim as the sufficient determining ground of his will*, that is, he would be *morally good*" (VI 36; emphasis mine). (Of course, to be "morally good" presupposes or, rather, consists in, acting from duty.) "Consequently man (even the best) is evil only in that he reverses the moral order of the incentives when he adopts them into his maxim. [...] he makes the incentive of self-love and its inclinations the condition of obedience to the moral law; whereas, on the contrary, the latter, as the *supreme condition* of the satisfaction of the former, ought to have been adopted into the universal maxim of the will as the sole incentive" (ibid.).

16 However, even the morally best can never be sure that this is really the maxim they act on (cf. VI 51). One of Kant's reasons for this *ignorabimus* lies in the fact that no one can know for certain what they would do if the hardships of acting lawfully became stronger than they have experienced so far. Thus, all we can *do* in order to act from duty is to try to acquire a steady disposition to act lawfully, which coheres nicely with Kant's point, outlined above, that we have to cultivate our moral character in order to act from duty.

17 Is this standard of moral value too high for human beings? After all, it seems to imply that the actions of someone who *sometimes* acts against the moral law *never* can have any moral value, because no such transgression seems to be consistent with the maxim of lawfulness. However, in the same work where Kant makes his commitment to this "rigorist" standard most explicit, the Religionsschrift, he also provides the conceptual means to limit its demands to the humanly possible. There Kant distinguishes between three levels of human "propensity to evil": "frailty", "impurity", and "viciousness" (VI 28 ff.). Only the second and third levels are incompatible with the maxim of lawfulness, while human frailty, or moral weakness, consists in acting morally wrong even though "I have incorporated the good (the law) in the maxim of my choice" (VI 29). Thus, if someone sometimes acts against the moral law out of weakness (and not because his motivation is "impure" or even vicious), this does not prevent her *lawful* actions from having moral value, as long as she sincerely tries to act on the maxim of lawfulness; cf. *Willaschek,* op. cit. fn. 13, 239 - 248.

the weak, because doing so is a case of his own maxim of lawfulness. Thus, the idea of duty connected with ethical laws as incentive is a *sufficient* motive only for the virtuous, because it presupposes the maxim of lawfulness. However, it is also a morally necessary motive which means that everybody *ought to* do their best in order to make the idea of duty motivationally sufficient for them. The ethical law prescribes that one "*strive with all one's might* that the thought of duty for its own sake is the sufficient incentive of every action conforming to duty" (VI 393). And since it is *possible* for every free and rational agent to act from duty (that's just what our freedom consists in)[18], the idea of duty, at least potentially, is a sufficient motive for everyone.

IV. The Incentive in Juridical Lawgiving, the Authorization to Use Coercion, and the Relation between Right and Morality

We shall now return to our main concern, the relation between right and morality, by asking what corresponds in juridical lawgiving to the idea of duty in ethical lawgiving and what role this specifically juridical incentive plays in Kant's concept of right.

"All lawgiving" has two elements: a law and an incentive. Without an incentive sufficient to motivate the addressees of the law to obey it, issuing general rules of action would not be a case of lawgiving, but something else (giving advice, perhaps, or just making empirical generalizations). Nevertheless, Kant has been understood as holding that juridical lawgiving differs from ethical simply by having no specifically juridical incentive at all[19]. And indeed, when Kant says that the "lawgiving which [...] admits an incentive other than the idea of duty itself is *juridical*" (VI 219), this sounds as if any old incentive is good enough for juridical lawgiving. But Kant continues: "It is clear that in the latter [juridical; M.W.] case this incentive [...] must be drawn from pathological determining grounds of choice (inclinations and aversions) and among these, from aversions; for it is a lawgiving, which should constrain, not an allurement which invites" (VI 219).

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[18] According to Kant, human autonomy, the normative validity of the moral law for human beings, and their ability to act from duty imply each other. On their interrelation, cf. *Willaschek*, op. cit. fn. 13, chs. 10-12, where I argue that the word "*Factum*" in the (in)famous phrase "*Factum der Vernunft*" has its original Latin meaning: the feeling of respect for the law is not something externally "given" (*datum*), but a product (*factum*) of reason itself. Since this feeling can motivate us to act morally even against all our contrary inclinations, it includes an "awareness of the freedom of will" (V 42) and, by virtue of the equivalence of freedom and moral law (V 29), an awareness of the binding force of the moral law. (Only because this "fact of reason" is a ("practical") motive and not ("theoretical") knowledge it does not, according to Kant, provide a theoretical proof of freedom and morality.) Therefore, we may assume that every autonomous agent is able to act from duty (to make duty a sufficient motive for acting).

[19] E.g. *Kersting*, op. cit. fn. 1, 131.

We can understand this if we remember the above distinction between sufficient and necessary incentives connected with laws. As we have seen, Kant assigns two different roles to the "idea of duty" as ethical incentive: On the one hand, duty is said to be a morally necessary (i.e. obligatory) motive for acting rightfully; on the other hand, duty is supposed to function as one of the two "elements" present in "*all* lawgiving", namely the incentive connected with the law sufficient to bring about rightful behavior. Defining the juridical incentive by way of contrast with the idea of duty in the way Kant does thus leads to an ambiguity: When Kant writes that juridical lawgiving "*admits* an incentive other than the idea of duty" (VI 219), this contrasts with the (morally) *necessary* role of duty (– there is no specific motivation *required* by juridical laws). But when he sets the juridical incentive in "pathological determining grounds of choice", what he means is a (causally) *sufficient* motive connected with juridical laws.

This latter reading still allows for a wide range of incentives to be connected with juridical laws; the obvious restrictions being that their employment must not violate other juridical (or moral) laws and that they are effective in bringing about lawful behavior. Thus, while mere threats will often be enough to motivate people to respect juridical laws, in extreme cases it must be possible to enforce the laws by *physical* means (e.g. detainment and other compulsory measures).

According to Kant, what is specific about the realm of right, as opposed to ethics, primarily depends on the concept of a juridical incentive: the "doctrine of right and the doctrine of virtue are [...] distinguished not so much by their different duties as by the difference in their lawgiving, which connects one incentive or the other with the law" (VI 220). Thus, we may expect a close connection between Kant's notion of right and his account of the juridical incentive. And in fact, the only time in the *Metaphysics of Morals* that Kant explicitly names the incentive connected with juridical laws, he calls it "external coercion" (*äußerer Zwang*)[20]. Now, according to the "Introduction to the Doctrine of Right", someone's right is conceptually linked with an authorization to use coercion (*Befugnis zu zwingen*): Since an action is "right" if it is "consistent with freedom in accordance with universal laws", any coercion is right which is "a *hindering of a hindrance to freedom* [...]. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it" (VI 231)[21]. This authorization to use (external) coercion is just an authorization to employ the incentive sufficient to enforce juridical laws, the incentive "juridical lawgiving connects with

[20] „All that ethics teaches is that if the incentive which juridical lawgiving connects with that duty, namely external coercion [*nämlich der äußere Zwang*], were absent, the idea of duty by itself would be sufficient as an incentive" (VI 220).

[21] It is important to notice, however, that according to Kant's concept of right there nevertheless could be a community of people under juridical laws who do not have to take recourse to coercion. That we have to use coercion in order to establish right among humans is a merely empirical ("anthropological") fact. It is only the *authorization* to use coercion which is implied by the concept of right.

its laws". Thus, it is the concept of (external) coercion that ties Kant's distinction between legality and morality in the "Introduction to the Metaphysics of Morals" to his explication of the concept of right in the "Introduction to the Doctrine of Right".[22]

Since the juridical incentive is supposed to be precisely what is characteristic of the juridical sphere, we may assume that the authorization to use coercion is not just an accidental feature connected with the concept of right, but rather its very "essence". And in fact, Kant goes as far as claiming that "right should not be conceived as made up of two elements, namely an obligation in accordance with a law and an authorization of him who by his choice puts another under obligation to coerce him to fulfill it. Instead, one can locate the concept of right directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone" (VI 232). If right is thus closely connected with an authorization to use coercion, we may now return to our original question of how right and morality are related by asking whether this authorization is *moral* or *juridical* (whether the use of coercion in the juridical domain is justified on generally moral or on specifically juridical grounds). Since the authorization is supposed to have a normative quality, but cannot be ethical in the sense defined in the *Metaphysics of Morals,* there are only these two possibilities: Either it is a *moral* authorization in a general sense which precedes the right-ethics-distinction in the *Metaphysics of Morals* and is derived from the moral law – or it is a genuinely *juridical* authorization (which would imply that the rightful use of coercion is morally justified, but only *because* there is an *independent* juridical authorization).

Any answer to this question will depend on how to understand the relation between right and morality. Let me therefore first sketch out in a few lines what might be called the "*official view*" of the relation between right and morality in the *Metaphysics of Morals:* On this view, the realm of morality is defined by the moral law or the categorical imperative, respectively, which requires us to "act upon a maxim that can also hold as a universal law" and thus "affirms what obligation is" in the most general way (VI 225). Now this moral domain falls into two parts, the juridical (concerning the "external use of freedom") and the ethical (concerning the "internal use of freedom"). Therefore, on the official view, we should expect that the "Universal Principle of Right" ("Any action is *right* if it can coexist with

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22 This connection has often been overlooked. Thus Kersting complains: "Unverfugt stehen die das Rechtsproblem eigenständig entwickelnden 'Metaphysischen Anfangsgründe der Rechtslehre' und die 'Einleitung in die Metaphysik der Sitten' nebeneinander. Während die ersteren ohne Umschweife mit der Exposition des Rechtsbebriffs beginnen, erinnert letztere weitgehend in Form einer Aneinanderreihung von Begriffserklärungen an den Argumentationsgang der beiden zuvor erschienenen moralphilosophischen Schriften. Eine argumentative Einbettung dieser Begriffe in den Grundlegungsteil der Rechtlehre [...] fehlt jedoch völlig, so daß die Stellung der Rechtsphilosophie zur Moralphilosophie zweilichtig bleibt" (*Kersting,* op. cit. fn. 1, 115). While I agree with Kersting's conclusion, I think that the two "Introductions" are sufficiently linked by the role the concept of coercion plays both in the idea of juridical lawgiving and in Kant's concept of right.

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"; VI 230) can be derived by restricting the moral law to the specific conditions of the juridical sphere. And indeed Kant arrives at the principle of right by limiting the concept of right, in three steps, (1) to the relation between the "external" actions of different people, as far as (2) they exercise their free choice, considered (3) "formally", i.e. independently of their specific motivation and ends (VI 230). While the moral law thus is the most fundamental law of freedom, the principle of right applies that law to the exercise of external freedom (of action), just as the "Principle of the Doctrine of Virtue" (VI 395) applies it to the exercise of internal freedom (of motivation). On this view, duties of right are ultimately based on the moral law; the remaining, non-juridical duties flowing from the moral law all fall in the ethical domain.[23]

There can be no doubt that the "official view" plays an important role in the *Metaphysics of Morals.* Nevertheless, there are various aspects in Kant's text which are not easily reconciled with that view:

(1) Kant nowhere really says that the principle of right can be derived from, or is based on, the categorical imperative. The moral law and the categorical imperative are not even mentioned in §§ A-E of the "Introduction to the Doctrine of Right", where Kant introduces the principle of right.

(2) If the three steps distinguished by Kant in § B (VI 230) were meant as so many conditions restricting the categorical imperative to the juridical sphere, the third step would be empty since the categorical imperative itself is purely "formal" already.

(3) According to Kant, the "universal law of right" is "a postulate that is incapable of further proof [*keines Beweises weiter fähig*]" (VI 231). This would be astonishing if Kant held that this law was a special instance of a more general principle whose validity Kant, on his own count, had proven in the *Critique of Practical Reason.* On the official view, we should have expected Kant to justify the principle of right by appeal to the fact that it is based on, or can be derived from, the categorical imperative.

(4) In the "Introduction to the Metaphysics of Morals", Kant compares "these practical (moral) laws" (plural) to "mathematical postulates [which] are *incapable*

[23] Cf. for instance Kersting, who concludes: "Das Rechtsgesetz ist folglich eine auf die Begründung von Pflichten, denen Zwangsbefugnisse korrespondieren, spezialisierte Version des kategorischen Imperativs" (*Kersting,* op. cit. fn. 1, 128). – "Die Bestimmung des Juridischen weist auf keine besondere Gesetzgebungsleistung der reinen praktischen Vernunft hin [...] Das Rechtsgesetz ist ein auf den moralisch möglichen Zwang zugeschnittenes Pflichtprinzip" (ibid. 129). Ludwig, too, reads the "Introduction to the Doctrine of Right" as deriving the moral admissibility of right and coercion from the moral law (*Ludwig,* op. cit. fn. 1, 92 - 98; cf. *Bernd Ludwig,* "Kants Verabschiedung der Vertragstheorie – Konsequenzen für eine Theorie der Gerechtigkeit", in: Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics 1 (1993) 221 - 254; here 224 f.).

of being proved and yet *apodictic*" (VI 225). Now if the whole domain of juridical and ethical obligations (including the principle of right, the principle of the doctrine of virtue, and the more specific laws based on them) could all be derived from the categorical imperative, why should Kant compare moral laws (plural) to mathematical postulates (and not to theorems)? After all, only those principles are called postulates which cannot be proved with the help of other, more basic principles. Thus, Kant's talk of moral laws being postulates suggests that there are moral principles which cannot be derived from the moral law, but must be "postulated" independently. This is confirmed by the fact that an integral part of the realm of right, viz. property right, is based on its own "postulate" (the "Postulate of Practical Reason with Regard to Rights" VI 246), which, according to Kant, cannot be derived from the concept of right and thus, *a fortiori,* cannot be derived from the moral law.

(5) On the official view, we should expect Kant to distinguish between two kinds of "lawgiving" in the following way: There is the 'autonomous' lawgiving of pure practical reason, issuing the moral law (and its more specific versions, "natural" laws of right on the one hand and ethical laws on the other), and there is the 'heteronomous' lawgiving of a particular will, issuing "positive" laws of right. The observance of the laws of autonomy (the moral laws, *both* juridical and ethical) could then be regarded in two different ways, either with or without respect to the question whether they are observed from the motive of duty. As we have seen, this is not the distinction Kant draws in the *Metaphysics of Morals.* There he distinguishes between two kinds of *laws,* ethical and juridical, both of which are laws of *autonomy,* and consequently between two kinds of *autonomous* lawgiving. (More precisely, ethical lawgiving is purely autonomous, while juridical lawgiving is autonomous as far as it conforms to the principle of right.) But then the principle of right, even though it is an expression of human autonomy and a law of pure practical reason, cannot be understood as a specific version of the moral law, limited to the "external side" of interpersonal relations. Kant's talk of "two kinds of lawgiving", ethical and juridical, and of two kinds of laws, rather suggests that both the juridical and the ethical domains are irreducible expressions of human autonomy. They may share a common *form* with the moral law (which is shown in the requirement of the universalizability of a maxim), but they cannot be derived from the moral law.

(6) On the official view, the authorization to use coercion 'included' in the concept of right would have to be a *moral* authorization, based on the categorical imperative (since the categorical imperative would have to be the ultimate source of juridical rights and obligations).[24] Whether a particular use of coercion is morally

[24] Both *Kersting* (op. cit. fn. 1, 127 f.) and *Ludwig* (op. cit. fn. 1, 95 ff.) understand Kant as supplying a *moral* justification of the juridical use of coercion. Of course, this is not to say that the *concept* of coercion itself, as opposed to the *moral admissibility* of coercion, would have to be derivable from purely rational principles (as *Kersting* correctly observes, op. cit. fn. 1, 126).

authorized or not could then be tested by universalizing the corresponding maxim.[25] A plausible candidate would be the maxim to use coercion in order to keep other people from acting contrary to right.[26] In relying on the concept of right, however, this maxim presupposes just what is in question, namely that there is an authorization to use coercion which, according to Kant, follows from the concept of right "by the principle of contradiction" (VI 231), i.e., analytically. Thus, if we are to derive a genuinely moral authorization, the maxim will have to be formulated in such a way as to delimit the cases in which there is an authorization to use coercion without appeal to the concept of right. – But that just cannot be done. Maybe it is possible to derive from the categorical imperative a general authorization to use coercion in order to prevent other people from hindering me in doing my moral duty. But what about conflicting uses of "external freedom" between people who perform actions that are morally neither forbidden nor obligatory? Without presupposing the concept of right, it is impossible to distinguish, for instance, between my trying to be the first to climb a particular mountain (where no use of coercion is admissible in order to prevent someone else from being faster than I am) and my retrieving an object of which I am the rightful owner from someone who stole it from me. The only difference between the two cases is that in the latter I have a juridical right while in the former I don't.[27] On purely moral grounds, the relevant distinction cannot be made. Thus, an adequate moral justification for using coercion, if it is sufficiently wide to cover all rightful uses of coercion, must presuppose the notion of right and thus a juridical authorization to use coercion. Consequently, this authorization must be genuinely juridical and cannot be derived from, or reduced to, moral notions, in the way the official view requires.

To this last consideration (6) against the official view, one might object that Kant may just have overlooked the difficulties connected with a moral justification of the juridical use of coercion. However, there is at least circumstantial evidence that Kant, when he wrote the *Metaphysics of Morals,* was aware of this problem. In 1793, four years earlier, Kant in fact seems to have believed that juridical coercion *can* be justified by appeal to the moral law in exactly the way we just con-

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25 Cf. *Kersting,* op. cit. fn. 1, 128.

26 That right implies an authorization to use coercion does not just mean that when someone has a "personal" or "subjective" right to something, she may use coercion in order to enforce it. It means that when an action or a state of affairs is not right (i.e. not compatible with "everyone's freedom in accordance with a universal law"), there is a standing authorization that anyone may use coercion "as a *hindering of a hindrance to freedom*".

27 The same is true in many other cases: Why am I allowed to coerce someone to keep one kind of "promise" (namely a legally binding contract), but not another kind of "promise" (e.g. the promise of a friend to proof-read a manuscript), although both promises are morally binding? A moral justification for all and only the juridical uses of coercion would rest on the false presupposition that all and only duties of right are narrow duties, since on moral grounds it would seem that either all or none of the narrow duties may be enforced by coercion.

sidered. He is reported to have taught in a lecture that "[...] the freedom from coercion, which is opposed to the rightful use of coercion, is determined as follows: act in such a way that your freedom can coexist with the freedom of everyone in accordance with universal laws. NB. This means: the maxim which underlies the use of your moral coercive act must be such that it qualifies as a universal law. E.g. I promised to deliver corn [at the market price on the day of delivery; M.W.]; on the presupposition of the high price I do not want to keep my unconditionally given word, since on delivery the price has fallen. The other person's right to use coercion agrees with the law of duty from a promise, and the fulfillment, which anyone may demand, agrees with universal freedom" (XXVII 524/5).[28] I do not believe that it is an accident that this idea is completely absent from the *Metaphysics of Morals.* Rather, it seems quite probable that Kant became aware of its weaknesses as soon as he gave closer attention to the foundation of property right.[29]

Now all these considerations cannot cast doubt on the fact that the whole structure of the *Metaphysics of Morals,* with its basic distinction between right and ethics, is build on the official view about the relation of morality and right. However, they do point in the direction of an *alternative* view, which also seems to be present in the *Metaphysics of Morals.* On this alternative view, the realm of right is based on a principle (the universal principle of right) which is not just a specific version of the moral law, but rather an independent, basic law of practical rationality. (Because of its formal analogy with the moral law, we may think of it as the equivalent of the moral law in the juridical sphere.) Like the moral law and the "Principle of the Doctrine of Virtue", it is a "postulate" of practical reason which is incapable of "further" proof, an original expression of rational autonomy. (This means that it gives expression to a fundamental feature of our understanding of ourselves as free and rational agents.) One reason why it must be considered as independent from the moral law lies in the fact that juridical rights imply an authorization to use coercion which cannot be based on the moral law. Rather, this

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[28] "[...] die Zwangsfreiheit, die dem Zwangsrecht entgegensteht, bestimmt sich darin: handle so, daß deine Freiheit mit der Freiheit von Jedermann nach den allgemeinen Gesetzen zusammen bestehen kann. NB. Dies heißt: die maxime, die bey dem Gebrauch deiner moralischen Zwangshandung zum Grunde liegt, muß so beschaffen seyn, daß sie zum allgemeinen Gesetz qualificirt ist. Z.E. ich habe Korn zu liefern versprochen; in der Voraussetzung des hohen Preises will ich, da bey der Lieferung der Preis gefallen, dem anderen mein unbedingt gegebenes Wort nicht halten. Das Zwangsrecht des anderen stimmt mit dem Pflichtgesetz aus einem Versprechen, und die Erfüllung die Jedermann fordern kann, mit der allgemeinen Freiheit überein" ("Metaphysik der Sitten – Vigilantius", XXVII 524/5).

[29] Since property right cannot be derived immediately from the principle of right, but requires an additional "postulate of practical reason" (VI 246), the use of coercion in order to protect one's property can *a fortiori* not be justified simply by appeal to the categorical imperative. Since Kant is reported by Schiller to have reworked his theory of property right in 1794 (cf. VI 517), one year after the quoted lecture, one may conjecture that Kant's rethinking of his conception of property right made him aware of the weaknesses of a moral justification for juridical coercion.

authorization must be understood as something specifically *juridical,* irreducible to moral rights and obligations.[30]

Among other things, the alternative view provides an answer to the question why Kant in the *Metaphysics of Morals* exchanged the distinction-of-laws between morality and legality for the earlier distinction-of-aspects. If this distinction is to underlie the distinction between ethics and right, it cannot consist only in a difference between two ways in which we regard the observance of the moral law since right does not require the observance of the *moral* law at all – neither "from duty" nor even "in conformity with duty". Therefore, if "legality" is to be the way of observation specific to juridical laws, the difference to "morality" (the morally valuable mode of observing moral laws) must not only concern the aspect under which the actions are considered, but the laws themselves. Moreover, only in this way can the distinction between legality and morality be the basis for a distinction between right and ethics (cf. VI 214), since only in this way is legality restricted to the juridical sphere. (According to the old distinction-of-aspects, it is possible to follow both juridical and "purely" moral principles in a merely "legal" way.)

Although there is strong evidence for the official view in the *Metaphysics of Morals,* there is also evidence for the alternative view. But both views are incompatible since they directly and indirectly contradict each other on several points. I do not want to rule out that it might be possible to incorporate the various features of the Kantian text speaking for the official and the alternative views into one coherent picture, making Kant come out as holding one consistent position. However, I do not see how this can be done. I therefore want to suggest that the *Metaphysics of Morals* embodies an unresolved conflict between the official and the alternative views. This conflict would then account for some of the inner tensions, inconsistencies and obscurities of that work.

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30 This "alternative view", which claims among other things that the principle of right is independent from the moral law, is not to be confused with the "Unabhängigkeitsthese" argued for by Ebbinghaus and Reich (and rightly criticized, among others, by Kersting and Ludwig), which says that the principle of right is independent from the concept of *autonomy.* On the "alternative view", the principle of right is an expression of human autonomy, although different from the moral law. – The alternative view seems to me to be akin to Hans Friedrich Fulda's insistence on the specifically *juridical* character of the command to leave the state of nature; cf. Fulda's contribution to the present volume. – A view to the effect that Kant locates the realm of right within a broader ("semantic") notion of morality which is different not only from ethics ("doctrine of virtue"), but also from the wider domain of duties based on the categorical imperative, has been advocated by Otfried Höffe (cf. *Höffe,* op. cit. fn. 1, 16-18, 126-149). Höffe, however, does not regard what he calls "categorical imperatives of right" (*kategorische Rechtsimperative*) as independent from the more specifically "moral" categorical imperative (of the realm he calls "normative ethics") and thus should not be regarded as advocating the alternative view. – That the realm of right is based on a form of non-positive validity akin to, but nevertheless distinct from, moral obligation has recently been argued, without recourse to Kant, by *Georg Mohr,* "Die Idee der Integrität einer Rechtskultur", in: Domenico Losurdo (Ed.): Geschichtsphilosophie und Ethik, Bern/Frankfurt a.M. 1997.

V. Conclusion

I started with the question of why Kant clings to the idea that right and ethics are exhaustive of the realm of moral duties, even though this idea makes his system of duties incoherent. The next question was why Kant substituted the "distinction-of-laws" between morality and legality for his former "distinction-of-aspects". I then focused on the role the concept of coercion plays in Kant's conception of right and asked how the juridical use of coercion is justified. This question led to the distinction between two views about the relation between morality and right: According to Kant's official view, the realm of right is a "special branch" of morality (the one concerned only with harmonizing people's *external* spheres of freedom), so that juridical laws, obligations, and rights are derivative from moral laws, obligations and rights. According to the alternative view, by contrast, juridical laws are independent expressions of the autonomy of pure practical reason, analogous to, but not derived from, the laws of morality. Now we find that the answers to our earlier questions point in opposite directions: While we can understand Kant's adherence to an exhaustive distinction between duties of right and duties of ethics as a consequence of his subscribing to the official view, the change in his distinction between morality and legality can best be understood as a change from the official view to the alternative view.

This situation suggests the following picture: When Kant, after more than thirty years of announcing a work of that title[31], finally wrote the *Metaphysics of Morals,* he did so according to a building plan that had long been ready in his mind. This plan was based on the official view, which in fact dates back at least to 1784 (cf. XXVII 1327). When Kant actually wrote the work, however, he encountered numerous difficulties (concerning, among other things, the relation between the moral law and the principle of right, the distinction between morality and legality, the juridical use of coercion, and the foundations of property right) which he could solve only by implicitly relying on the alternative view. That view, on the whole, seems to fit much better into Kant's moral theory, and to lead into less problems, than the official view.

Thus it seems that Kant would have done better if he had given up the official view altogether, not only because it contradicts his alternative view, but also because it forced him to adopt an inconsistent system of duties. On the alternative view, by contrast, duties of right would turn out to be different from moral duties, as far as the basis for their obligatory character is concerned. (Of course, both kinds of duties would partly overlap in content, i.e. in what actions they require.) Ethics and right would not form an alternative, either exhaustive or otherwise, within the moral domain. Rather, the fundamental distinction would be that between the juridical domain and the moral domain (including the ethical). In this

[31] Cf. *Natorp's* notes to his editions of the Critique of Practical Reason and the Metaphysics of Morals in the "Akademie-Ausgabe".

way, the inconsistencies in Kant's system of duties could be avoided, since moral duties would not have to be either juridical or ethical. Instead, there would be juridical duties on the one hand (which predominantly consist in perfect duties to others, but may also include perfect duties to oneself and imperfect duties to others), and moral duties on the other hand. The latter would be divided into perfect duties, both to others and to oneself, and imperfect (ethical) duties.

If we think of the *Metaphysics of Morals* as the work which systematically develops the duties flowing from the categorical imperative and thus builds the edifice for which the *Groundwork* and the second *Critique* had laid the foundations, it turns out that the *Doctrine of Right* does not belong into *Metaphysics of Morals.* At least that is what the (superior) alternative view suggests. Instead of a *Doctrine of Right,* the complement to the *Doctrine of Virtue* should have been a "Doctrine of Perfect (Moral) Duties". However, Kant based the plan for his last major work on the official view and therefore he did include the *Doctrine of Right* – luckily, since otherwise he hardly would have written a full-blown exposition of his philosophy of right at all. Nevertheless, his simultaneous adherence to both the official and the alternative views results in philosophical tensions and conflicts, in inconsistencies and outright contradictions. Maybe this result provides no significant insight for understanding the *Metaphysics of Morals.* But at least it would explain why an understanding of that work is so difficult to achieve.[32]

Zusammenfassung

Der Aufsatz behandelt den Zusammenhang zwischen Recht, Ethik (Tugendlehre) und Moral (Sittlichkeit) in der *MdS.* Ausgangspunkt ist der Befund, daß Kants System der Pflichten in der *MdS* weder konsistent noch vollständig ist, weil Rechts- und Tugendpflichten, entgegen Kants Annahme, den Bereich der moralischen Pflichten nicht erschöpfen (I). Kants System der Pflichten beruht auf den Unterscheidungen zwischen Recht und Ethik und zwischen Legalität und Moralität. Letztere konzipiert Kant in der *MdS* anders als in früheren Werken, indem er sie nun auf die beiden Arten der „Gesetzgebung" in Recht und Ethik und die daraus entspringenden Gesetze zurückführt (II). Im Zusammenhang mit der „ethischen" Gesetzgebung ergibt sich das Problem, wie es ethisch *geboten* sein kann, aus Pflicht zu handeln (III). Analog dazu stellt sich mit Blick auf die „juridische" Gesetzgebung die Frage, warum man befugt ist, andere zu rechtlichem Handeln zu *zwingen.* Handelt es sich um eine moralische oder eine spezifisch rechtliche Be-

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fugnis? Es zeigt sich, daß Kant zwei unvereinbare Auffassung miteinander verbindet: Aus seiner „offiziellen" Auffassung, wonach das Recht ein *Teil* der Moral ist, würde folgen, daß die Zwangsbefugnis im Recht moralisch gerechtfertigt werden kann. Tatsächlich ist eine solche Rechtfertigung aber nicht möglich, die „offizielle" Auffassung also unzureichend. Kant greift in der *MdS* aber auch mehrfach auf eine „alternative" Auffassung zurück, der zufolge das Recht als eine eigenständige Form autonomer Gesetzgebung *neben* der Moral steht (IV). Dieser alternativen Auffassung zufolge, die der „offiziellen" insgesamt überlegen ist, würde die „Rechtslehre" also gar nicht in die *Metaphysik der Sitten* gehören (sofern diese das System der Sittlichkeit enthält, das sich aus dem Sittengesetz ergibt) (V).