

A Moral Underpinning for Legal Ethics

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Abstract

This paper explores the ideal basis, qua moral theory, for legal ethics. It favours David Luban's interpretation of Fuller's theory of natural law. Luban's theory offers a pragmatic moral standard that is flexible in nature, with the primary aim being the protection of human dignity. The advantages of Luban's theory are fleshed out by contrasting it with those of Kant and Mill. An examination of Kant's Categorical Imperative, and Mill's Utilitarianism illuminates the need for a less rigid moral underpinning of legal ethics. Luban's theory serves as a more convincing moral compass as opposed to a strictly prescribed principle. It allows for subjective moral values, autonomy, and personal judgement in its overarching pursuit of safeguarding human dignity. If there is to be a moral theory as the foundation for legal ethics, it must be one that is practical and attainable, whilst allowing for the revision and evolution of laws. Luban's theory does precisely this.

Introduction

In *Legal Ethics and Human Dignity*, David Luban addresses the perennial question of the place of morality in the legal sphere.¹ He posits a unique interpretation of Fuller's theory of natural law in order to establish the groundwork for legal ethics. By setting a more practical moral standard than those posited by Mill and Kant, Luban's theory proves to offer a superior basis for legal ethics. The advantages of Luban's theory are illuminated when

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¹ David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press 2007)

contrasted with the inadequacies of John Stuart Mill's Utilitarianism and Immanuel Kant's Categorical Imperative. Criticisms of the utilitarian and Kantian moral frameworks have highlighted the need for a less rigid moral underpinning for legal ethics, such as that offered by Luban.

Utilitarianism

Utilitarianism is a consequentialist moral theory that measures the morality of actions based on their utility and ability to bring about the greatest 'good'. Mill defines the 'good' in a hedonistic sense by referring to 'pleasures' that lead to 'happiness'. He claims that 'happiness is a good: that each person's happiness is a good to that person, and the general happiness, therefore, a good to the aggregate of all persons'.² In establishing happiness as the ultimate good to be achieved, he formulates the utilitarian principle that 'actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness'.³ He further develops the objective of happiness by distinguishing between higher and lower forms of pleasure. He suggests that forms which involve the exercise of intellect are superior to those that derive from sensory pleasures. Utilitarianism is a good moral theory *prima facie* since it directs focus towards the consequences of our actions and requires the moral agent to consider the welfare of society. However upon further scrutiny, this paper finds rather significant problems with this theory that render it untenable, both as a general moral theory and

² John Stuart Mill, 'Utilitarianism' in A Ryan (ed), *Utilitarianism and Other Essays, John Stuart Mill and Jeremy Bentham* (Penguin Books Ltd 1987) 308.

³ *ibid* 278.

as a basis for legal ethics. One obstacle for utilitarianism pertains to the calculation of 'happiness'. This theory is predicated on the assumption that happiness is in fact quantifiable. While it is conceivable that there are varying degrees of happiness, the experience of happiness is inherently subjective and therefore difficult to measure. Furthermore, this method requires that the moral agent be able to accurately predict the outcome of their actions, which is not something that one can do with sufficient precision. This presents an obvious challenge to the utilitarian principle as it frustrates the method by which it is to be applied. In order to conduct a calculation of how to act so as to maximise the greatest amount of happiness, one would first need to be able to accurately measure the options prior to weighing them out. This aspect of Mill's theory would need to be further developed in order for it to be properly applied.

Another significant problem with this model is the fact that, as a consequentialist theory, it is only concerned with outcomes. Therefore, it is possible that one can act in ways that one would consider blatantly immoral so long as they achieve an outcome of maximised happiness. According to this theory, if the majority is made happier by the action then the action is held to be moral. For example, someone could steal from a rich person in order to give to several poor people and by the utilitarian standard this act would not merely be acceptable, but moral. A more extreme example to consider is that of 'torture television' where a hypothetical society might enjoy reality TV shows that involve torturing innocent people as a means of entertainment.⁴

⁴ This criticism was mentioned by Dr Eleanor Curran in her Legal Ethics lecture, 5 October 2012.

Here the majority takes pleasure in the televised acts of torture and so the principle of utilitarianism is committed to allowing (or even encouraging) it in order to promote the maximisation of overall happiness. Thus, while utilitarianism is intended to serve as a yardstick to guide moral actions, absurdity follows from the logic of this principle where, theoretically, happiness can be maximised by acts that are intuitively immoral per se. This *reductio ad absurdum* indicates how utilitarianism is therefore inadequate as a moral framework as it permits (and may even require) immoral acts to maximise the greater 'good'.

One major requirement of the utilitarian principle of morality is the exercise of an extraordinary degree of impartiality. This aspect is problematic on two main accounts. Firstly, it imposes unrealistic demands on the individual to extract all emotions, influences and biases from the decision-making process. Secondly, it undermines autonomy by reducing the individual to a mere automaton. Mill's theory takes a purely pragmatic approach in moral decision-making so as not to let emotions cloud one's proper judgment. While this may have an initial appeal, it proves to be an extremely high standard to impose on humans who are naturally emotional beings with an array of preferences and inclinations. Jonathan Riley points out that:

[utilitarianism] is...overly demanding because it doesn't recognise ordinary moral options to choose suboptimal acts... it denies that individuals have any freedom to deviate from their [utilitarian] obligations. An agent is generally

obliged to sacrifice even his own life if by doing so he can promote the greater good of others.⁵

This standard could plausibly lead one to experience inner moral conflict if required to divorce one's emotions from one's decisions. Consider a catastrophic event (fire, flood, or earthquake) where there is a scarcity of resources. The principle of utilitarianism requires one to direct one's efforts to rescue as many people as possible, even if this means neglecting to rescue a loved one. In this case, the demand of impartiality required by utilitarianism defers to numbers of lives rather than any inclination or personal preference towards a loved one. Whilst it is noble to want to save as many lives as possible, it would be natural to give priority to rescuing a family member over several strangers. As Bernard Williams states, 'such things as deep attachments to other persons will express themselves in the world in ways which cannot at the same time embody the impartial view'.⁶ In these circumstances, to act according to utilitarianism would severely conflict with one's visceral reactions and natural inclinations. Ultimately, the degree of impartiality necessary to adhere to this principle is superhuman and imposes an unrealistic standard.

The second problem stemming from the impartiality requirement lies in its reduction of individuals to automatons and the resulting effect on one's quality of life. This criticism may be attributed to Williams, who asserts that a person's character hinges on her personal projects that help her to define

⁵ Jonathan Riley, 'Defending Rule Utilitarianism' in Brad Hooker, Elinor Mason and Dale E Miller (eds), *Morality, Rules, and Consequences* (Edinburgh University Press 2000) 41

⁶ Bernard Williams, *Ethical Theory 2: Theories About How We Should Live* (Oxford University Press 1998) 186

herself.⁷ Williams stresses the importance of projects stating that '[a person] wants these things, finds his life bound up with them, and...they propel him forward, and thus they give him a reason for living his life'.⁸ Therefore, it is crucial that individuals be partial to their personal projects that give substance to their life and provide a sense of self-worth. Notably, 'differences of character give substance to the idea that individuals are not intersubstitutable'.⁹ Williams best summarizes the problem by explaining that: a man who has such a ground project will be required by utilitarianism to give up in a given case just if that conflicts with what he is required to do as an impersonal utility-maximizer when all the causally relevant considerations are in. That is quite an absurd requirement.¹⁰

Samuel Scheffler agrees, pointing out that utilitarianism: requires the agent to allocate energy and attention to the projects and people he cares about most *in strict proportion* to the value from an impersonal standpoint...it is *this* feature...which may be thought to alienate the agent 'from his actions and the source of his action in his own convictions', and thereby to undermine his integrity.¹¹

This paper shares those views of Williams and Scheffler, finding that utilitarianism requires a degree of impartiality that is too costly for moral agents. The impartial standpoint it demands would be detrimental to one's

⁷ *ibid* 182

⁸ *ibid* 183

⁹ *ibid*

¹⁰ *ibid* 182

¹¹ Samuel Scheffler, *The Rejection of Consequentialism* (Oxford University Press 1982) 9

character, integrity, and overall quality of life.

The Categorical Imperative

In direct contrast to Mill's utilitarianism is the deontological moral theory of Immanuel Kant. Central to deontological theories are the notions of duty, autonomy, and the concept of acts being intrinsically right or wrong. Kant strives toward a more objective principle of morality based on what he calls the 'Categorical Imperative'. The Categorical Imperative requires that moral agents 'act only on that maxim through which you can at the same time will that it should become a universal law'.¹² For Kant moral judgments 'are governed by...a distinctively practical ideal...[where] the objective correctness of a moral judgment is a matter of its affirming a practical principle or maxim to which everyone could in some sense consent'.¹³ For example, it is morally wrong to make a false promise, as it cannot be willed to become a universal law. The idea is that if everyone were to make a false promise the convention of promise-making would collapse since no one would be able to trust any promisor. Crucial to Kant's theory is that individuals always be treated as ends in themselves and never as a 'mere means to an end'. He believes that it is 'good will' that binds our rational capacity and actions in the world. This pertains to another key component of his theory which is that of 'duty'. Kant argues that one is acting morally when one is acting according to duty, where one's acts are governed by rational thought. This notion is intended to

¹² Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. HJ Paton (Harper and Row Publishers 1964) 88

¹³ Alice Cray, *Beyond Moral Judgment* (Harvard University Press 2007) 14

counter one acting based on desires that inevitably lack the element of control provided by rational deliberation.

A fundamental problem with Kant's theory is that there is no way to know precisely what is inherently wrong. It simply states that what is wrong is wrong in itself, and that one can determine how to act by employing the Categorical Imperative. Yet, it fails to take into account the differing views individuals inevitably have, neglecting the fact that 'people's tastes may be different'.¹⁴ The openness to interpretation may lead to the moral justification of morally despicable acts. According to the Categorical Imperative one may justify an act as moral so long as one can will the act to be 'universalisable'. This can be exemplified by the Jehovah's Witness who thinks it is entirely moral to deny a blood transfusion that would otherwise save the life of their young child. This controversial act may be morally repugnant to many, yet be deemed moral by adhering to the Categorical Imperative. Kant is committed to saying that the Jehovah's Witness is acting morally *qua* acting from 'duty', and acting in such a way that they would will to become a universal maxim. A more worrying example is that of the individual with a severely distorted moral conception of revenge. Consider a murderer who believes it moral to kill someone as a means of retribution. It is conceivable that this murderer believes such an act to be morally justifiable and might also will that it become a universal maxim. It seems that Kant cannot account for such situations where a person's deliberation and application of the Categorical Imperative leads them to conclude that a

¹⁴ Victor Grassian, *Moral Reasoning* (Prentice-Hall Inc 1981) 81

manifestly immoral act ought to be a universal maxim. By extending the application of the Categorical Imperative to those who may be guided by distorted beliefs about retribution, it is evident that this principle will not always yield moral actions or decisions. Moreover, it may conceivably have the reverse effect; rigid application of the Categorical Imperative to such hypothetical contexts reveals how absurd (*qua* palpably immoral) consequences may follow. Hence, this *reductio ad absurdum* discredits Kant's moral theory by depicting the possible grave repercussions that may derive from the vagueness of the Categorical Imperative.

Kant's theory faces another obstacle where it offers no insight when there is a conflict of moral duties. Consider a case where one is obligated to lie in order to keep a promise. In such a case the moral agent is forced to choose but the Categorical Imperative can offer no instruction here. This ethical dilemma stemming from a lack of clarity and direction leads to moral confusion and feelings of disorientation. Furthermore, in circumstances of conflicting moral duties it seems intuitive that one would base one's decision on the predicted outcome of one's actions. This appears to trigger a collapse into the consequentialist paradigm which deontology seeks to avoid.

Part of the confusion which one experiences in situations of conflicting duties relates to the rigid nature of deontological moral theories; acts are either immoral or moral in and of themselves, regardless of the outcome they bring about. This too is problematic where 'immoral' actions may be necessary to bring about a 'moral' outcome, for example, harbouring a fugitive in order to give somebody refuge, knowing that if they were found

they would be killed. Kant would be committed to the endorsement of total honesty, maintaining that one cannot ever lie or acts of dishonesty would become a universal maxim. According to Kant, if it were the case that Nazi soldiers were to knock on the door of a household harbouring a Jewish family, it would be morally wrong for the person who answers the door to lie and say that no Jewish person is residing there. In situations such as these, it seems ridiculous to claim that lying to save lives is morally wrong. One's intuition in this case would be to lie in order to preserve the lives of the innocent who are potential victims of genocide. According to the Categorical Imperative, to lie in these circumstances would be to violate the moral code by lying and by treating the Nazi soldiers as other than an end in themselves. In deceiving the soldiers, one is transgressing their human right to choice and their freedom to make an informed decision to act rightly or wrongly. Despite knowing the general motives of the Nazi soldiers, Kant would argue that lying could not be justified based on the assumption that they might kill the Jewish family. With this example, it is clear that the Categorical Imperative, if followed strictly, results in unforgivable consequences that one would intuitively consider morally repugnant.

What is evident about the moral theories of Mill and Kant is that they take an opposite approach in establishing a yardstick for moral action. However, this paper suggests that these two theories share one commonality: neither of them offers a functional moral theory. That is not to suggest that they both ought to be entirely dismissed. One may find that 'for most of us the moral life is an uneasy balance between the utilitarian and Kantian moral

perspectives'.¹⁵ Nevertheless, a close analysis of these theories individually reveals that they are over-ambitious and set the moral standard too high to be followed. Their rigid nature makes them unrealistic and therefore untenable as moral frameworks, and consequently inadequate bases for legal ethics. In contrast, this paper will now reconstruct David Luban's theory and argue that it demonstrates merit precisely where those of Mill and Kant fall short.

Luban's Theory

Luban develops his theory by expanding upon that of natural law theorist, Lon Fuller. He interprets Fuller's theory as 'the professional ethics of lawmaking',¹⁶ blending morality into the legal profession by framing it in terms of the morality of law-making, as opposed to the morality of the law itself. Luban offers an intuitive and cogent argument for the integration of morality into the legal profession by referring to the practice of law as an aspiration. He asserts that 'our aspirations have a moral dimension whenever other people's well-being depends on them'.¹⁷ With this he endorses Fuller's theory, which he states is not making a conceptual claim about some integral relation between legal rules and morality; instead it is simply arguing that 'lawmaking is a profession with a distinctive professional ethics'.¹⁸ Luban describes the connection that 'purposive' and 'aspirational' concepts have with morality.

¹⁵ *ibid* 87

¹⁶ Luban (n 1) 117

¹⁷ *ibid* 106

¹⁸ *ibid* 104

According to his theory, 'legal institutions, although they are entirely human creations, have moral properties of their own...[ones] that are connected only indirectly to general morality'.¹⁹ At the heart of Luban's morality for legal ethics is the notion that 'what makes the practice of law worthwhile is upholding human dignity'.²⁰ By pairing the inherent morality of lawmaking with the aim of protecting human dignity, Luban formulates a more comprehensive and intuitively compelling moral basis for legal ethics than utilitarianism and the Categorical Imperative.

Luban's moral underpinning for legal ethics finds virtue in its realistic standard, which has broad enough parameters for one's subjective morals to inform a decision. According to his theory, morality is not some distant and objective concept. Rather it is woven into the fabric of our lives via our aspirations, which we naturally strive to excel in. The moral foundation for legal ethics is not some unattainable standard imposed on lawyers but is inherent in the very pursuit of the legal profession. Luban's theory gives the moral agent direction by asserting the overarching objective of all lawyers: preservation of human dignity. This requirement is sufficient to steer ethical decisions without being overbearing. It gives a sense of morality, without being completely prescriptive. Lawyers are granted enough moral breathing space so as to exercise their discretion in order to fulfil their duties whilst aiming to protect human dignity. Luban acknowledges the role of one's morals by submitting that 'official ethics rules forbid her from advising the

¹⁹ *ibid* 118

²⁰ *Ibid.* 66

client to break the law even when it is unjust, but ultimately the lawyer's own conscience must be the guide'.²¹ With this Luban avoids the dangers of traditional 'objective' moral theories such as '[the] moral danger inherent in insisting...that it must be possible to bring our lives into focus, and to act responsibly, in the absence of any refinements of our own sensibilities or modes of response to life'.²² The danger that emerges 'in adopting this tone of insistence...[causing us] to commit ourselves to preserving any prejudices that are direct functions of limitations of our sensibilities...[resulting in] a kind of moral arrogance'.²³

The flexibility of Luban's theory encourages lawyers to have an internal value system. It permits them to exercise their judgement as they see fit, as long as it aligns with the requirement of safeguarding human dignity. By allowing for subjective moral input, Luban preserves autonomy in a way that the theories of Mill and Kant do not. Rather than dictating how one must act according to some strict principle, Luban's theory serves as a moral compass. Importantly, the flexible nature of Luban's theory leaves room for the 'moral imagination' namely, 'an ability to imaginatively discern various possibilities for acting in a given situation and to envision the potential help and harm that are likely to result from a given action'.²⁴ Moral imagination is a crucial aspect within legal ethics. It is a fundamental mechanism used to break dogmatic patterns in order to explore new possibilities. This is precisely what spurs the

²¹ *ibid* 156

²² Crary (n 13) 48

²³ *ibid*

²⁴ Mark Johnson, *Moral Imagination* (University of Chicago Press 1993) 11

evolution of laws that are needed to preserve human dignity. One clear example of where the moral imagination has been applied and been successful is securing women's right to vote. It took a moral imagination to detach from the existing context, to envision a more equal society and then to reassess and change the oppressive laws that were in place.

Overall, Luban's theory finds virtue in being practical, by setting an attainable moral standard. The unique flexibility of Luban's theory permits subjective moral values to form the content of legal ethics. Notably, these values may encompass the use of one's moral imagination. Despite its broad scope allowing lawyers to insert their individual values, Luban makes clear the overarching aim towards preserving human dignity. This aim establishes a direction for lawyers *qua* moral agents by giving them a reasonable yardstick on which to base their moral decisions. This combination of features is what makes his theory the best moral basis for legal ethics. Perhaps the greatest feature of Luban's moral theory, however, is the added benefit of providing freedom from dogma and unquestioned tradition, affording greater scope for the evolution of laws.

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