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John M. Finnis

Notre Dame Law School, john.m.finnis.1@nd.edu

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LEGAL ENFORCEMENT OF "DUTIES TO ONESELF": KANT v. NEO-KANTIANS

J.M. Finnis*

I.

My duty towards myself cannot be treated juridically; the law touches only our relations with other men; I have no legal obligations towards myself; and whatever I do to myself I do to a consenting party¹

So Kant's students understood him to say in his lectures on ethics in 1780–81. At about the same time, the *Critique of Pure Reason* proclaimed that legislation should be guided by the Idea of "a constitution allowing the greatest possible human freedom in accordance with laws by which the freedom of each is made to be consistent with that of all others."² And there are sentences in his own later writings which might seem to confirm the apparent meaning and interrelation of those assertions. For example:

[The concept of Right] [*der Begriff des Rechts*] . . . applies only to the external and—what is more—practical relationship of one person to another in which their actions can in fact exert an influence on each other (directly or indirectly).³

. . . .
If, therefore, my action or my condition in general can co-exist with the freedom of everyone in accordance with a universal law, then anyone who hinders me in performing the action or in maintaining the condition does me an injustice⁴

Passages such as these may seem to ally Kant with those among our contemporaries who are willing or even keen to label Kantian their political theory that (i) the state (government, the law) should be neutral amongst competing conceptions of what is good or right for individuals (the *neutrality principle*), and/or (ii) the state has no right to use coercion directly or indirectly to discourage conduct not harmful to persons other than those who consent to engage in it (the *harm principle*).

If Kant did consider that his ethical and legal theory required, or was consistent with, either the neutrality principle or the harm princi-

* Fellow, University College, Oxford University.

1. I. Kant, *Duties to Oneself*, in *Lectures on Ethics* 117 (L. Infield trans. 1978 [1930]).

2. I. Kant, *Critique of Pure Reason* *A316/B373 (N. Smith trans. 1965 [1933]) [hereinafter *Critique of Pure Reason*] (emphasis in original).

3. I. Kant, *The Metaphysical Elements of Justice* *230 (*Rechtslehre*) (J. Ladd trans. 1965) [hereinafter *Metaphysical Elements of Justice*]. Ladd reads *Recht* here as "justice," which is not necessarily a sheer mistake. See *infra* note 81 and accompanying text.

4. *Id.*; see also *id.* at *237 (*on the right to "innate equality, that is, independence from being bound by others to do more than one can also reciprocally bind them to do"*).

ple, that would be ground to doubt his theory. For our contemporaries' efforts to defend one or other, or both, of those two principles are notably unsuccessful. In Part II of this Paper, I examine the attempts of John Rawls and Ronald Dworkin; in Part III, I examine an attempt by D.A.J. Richards, who more explicitly claims the patronage of Kant's general theory of freedom and autonomy.

As the critique of Richards' theses will suggest, however, Kant's critical writings adhere neither to the neutrality nor to the harm principle. Rather, as I argue in Part IV, they repudiate those principles. (One who, like Kant, rejects the harm principle will reject the neutrality principle, though many who reject the neutrality principle uphold the harm principle.) Kant seems to me broadly correct in many of his practical conclusions,⁵ but his defense of them is weakened, as I argue in Part V, by well-known structural weaknesses in his ethical theory.

II.

Rawls does not argue for the neutrality principle and the harm principle as such, but for a principle which, so far as its content can be specified at all,⁶ seems almost identical in its force and practical implications: that "everyone should have the greatest equal liberty consistent with a similar liberty for others."⁷ "[J]ustice as fairness requires us to show that modes of conduct interfere with the basic liberties of others or else violate some obligation or natural duty before they can be restricted."⁸

What, then, are Rawls' arguments against the rival view, which he calls "perfectionist"? This is the view that the state has the responsibility and right to foster the good, the well-being, flourishing, and excellence, of all its citizens and to discourage them, even coercively, from at least some of the actions and dispositions which would injure, degrade, or despoil them, even some actions and dispositions which as such are "self-regarding." Rawls expressly admits that:

[T]he freedom and well-being of individuals, when measured by the excellence of their activities and works, is vastly different in value. . . . Comparisons of intrinsic value can obviously be made; and . . . judgments of value have an important place

5. But not all—not, e.g., his condonation of infanticide of illegitimate children. *Id.* at *336. Still, *pace* Richards, this paper is not concerned to discuss which of Kant's practical conclusions are sound, and which unsound.

6. For serious doubts raised about the intelligibility and specifiability of this "principle" see H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 *U. Chi. L. Rev.* 534-55 (1973), reprinted in *Reading Rawls* 230-52 (N. Daniels ed. 1975).

7. J. Rawls, *A Theory of Justice* 327-28 (1971); cf. Kant's sentence quoted *supra* note 2 and accompanying text.

8. J. Rawls, *supra* note 7, at 331. In Rawls' terminology, all obligations are obligations of fairness and all natural duties are duties owed to others. *Id.* at 112, 115. On the interpretation of this passage, see H.L.A. Hart, *supra* note 6, at 541-42, reprinted in *Reading Rawls*, *supra* note 6, at 238.

in human affairs. They are not necessarily so vague that they must fail as a workable basis for assigning rights.⁹

Having conceded this, he offers two arguments against perfectionism. The first, and primary, is that perfectionist principles would not be chosen in the Original Position, in which principles to regulate social life in a well-ordered society are chosen by persons ignorant of what will be their own personal interests, beliefs, and highest ends. And perfectionist principles would not be chosen because:

To acknowledge any such standard would be, in effect, to accept a principle that might lead to a lesser religious or other liberty They [persons in the Original Position] cannot *risk their freedom* by authorizing a standard of value to define what is to be maximized by a teleological principle of justice.¹⁰

For:

They cannot *take chances with their liberty* by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. . . . [T]o gamble in this way would show that one did not take one's religious or moral convictions seriously¹¹

The supporting consideration advanced in the sentence last quoted suggests the fragility of the whole argument. For, in times when certain religious and moral convictions precisely were taken with great seriousness, rational people were indeed willing to admit the perfectionist principle and thereby "gamble" that the *right* (from their own point of view) religious and moral beliefs would be enforced. When beliefs wrong from their point of view were enforced, they did not complain that that was unfair in principle—but only that it was unjust in fact, because the beliefs were erroneous—and they sought whatever means of resistance or reform promised an opportunity to enforce correct ones. So: Rawls' argument must do without its final supporting flourish.

And without that flourish it fares badly. Its premise is simply that, for reasons of sheer prudent self-interest (quite independent of morality or fairness), perfectionism would not be chosen in the Original Position. Its conclusion is that perfectionism is not a just principle. The non sequitur is obvious enough. (But it centrally flaws Rawls' entire construction in *A Theory of Justice*.) The conditions of the Original Position do secure that the principles which would be chosen in it would be fair, inasmuch as those conditions systematically exclude the sources of inter-personal bias (favoritism) and thus guarantee impartiality.¹² But

9. J. Rawls, *supra* note 7, at 328.

10. *Id.* at 327–28 (emphasis added).

11. *Id.* at 207 (emphasis added).

12. But the Rawlsian construction does not escape bias as between conceptions of the good and thus also as between *conceptions* of the person. See J. Raz, *The Morality of Freedom* 117–33 (1986); Nagel, *Rawls on Justice*, in *Reading Rawls*, *supra* note 6, at 8–10.

nothing in logic or in Rawls' argument, anywhere in the book, entitles him to conclude that a principle which would *not* be chosen in the Original Position cannot be a principle of justice in the real world.

Perfectionist principles were rejected by Rawls, not as unfair, but as inimical to the self-interest of anyone whose views or desires might conflict with some application of those principles—and to that self-interest *as conceived in ignorance of moral principles and other standards of excellence*. Rawls' argument is thus helpless against claims that applying "perfectionist" principle(s) will be in the best interests, truly conceived, of everyone, even of those who have to be coercively prevented from damaging their own best interests.

Here, then, we come to Rawls' second argument, extractable from an uneasily shifting paragraph which begins by conceding that it is indeed not easy to argue against moderate perfectionism. "Moderate perfectionism" relies not on a single conception of the good life, to secure which all other lives must be subordinated, but on claims about the excellent and the degrading which are balanced "intuitionistically" against liberty and equality. Rawls' uneasy argument asserts first that "criteria of excellence are imprecise as political principles," and that "their application to public questions is bound to be unsettled and idiosyncratic."¹³ It then shifts abruptly to an assertion even more obviously questionable and contingent: that appeals to perfectionist criteria are made "in an ad hoc manner," and made *because* other criteria of political choice, consistent with (in effect) the harm principle, fail to justify proposed restrictions on conduct. But this assertion is in turn immediately qualified; it is not always but only "often" or "likely" true.¹⁴ His conclusion is appropriately weak: "[I]t seems best to rely entirely on the [i.e., his] principles of justice which have a more definite structure."¹⁵

But plainly it will "seem best" only to those who are content with the peculiar "modern conditions" of chaotic disagreement about good and evil; these are the conditions for which, alone, Rawls seeks to identify principles of justice.¹⁶ Manifestly, the whole argument, even if ac-

13. J. Rawls, *supra* note 7, at 330.

14. *Id.* at 331.

15. *Id.*

16. See Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. Phil.* 515, 518 (1980) [hereinafter Rawls, *Kantian Constructivism*] ("[W]e are not trying to find a conception of justice suitable for all societies regardless of their particular social or historical circumstances. We want to settle a fundamental disagreement over the just form of basic institutions within a democratic society under modern conditions."); *id.* at 539 ("[J]ustice as fairness assumes that deep and pervasive differences of religious, philosophical, and ethical doctrine remain."); Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *Phil. & Pub. Aff.* 223, 225, 230-31 (1985) [hereinafter Rawls, *Justice as Fairness*]. Note Rawls' conclusion in *Kantian Constructivism*: "[F]or all that I have said it is still open to the rational intuitionist to reply that I have not shown that rational intuitionism is false or that it is not a possible basis for the necessary agreement in our

cepted, is quite incapable of showing that it is always *unjust* to use state power in violation of the neutrality and harm principles.

Efforts, then, have been made to supply what Rawls so clearly failed to supply: an argument that the neutrality principle and/or the harm principle are principles required by justice. Ronald Dworkin's well-known effort was in fact, I think, first advanced as a fundamental reinterpretation of Rawls' basic construction:

The original position . . . as a device for testing . . . competing arguments . . . supposes, reasonably, that political arrangements that do not display equal concern and respect are those that are established and administered by powerful men and women who, whether they recognize it or not, have more concern and respect for members of a particular class, or people with particular talents *or ideals*, than they have for others.¹⁷

As Dworkin later said, on his own behalf: "Government must not only treat people with concern and respect, but with equal concern and respect. . . . It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's."¹⁸ I shall not delay on this claim that legislative protection of morals manifests official or majority contempt for those whose preferred conduct is proscribed or impeded. I think Dworkin has tacitly conceded its untenability. Briefly: it fails because such legislation *may* manifest, not contempt, but rather a sense of the equal worth and human dignity of those people whose conduct is outlawed precisely on the ground that it expresses a serious misconception of, and actually degrades, human worth and dignity, and thus degrades their own personal worth and dignity, along with that of others who may be induced to share in or emulate their degradation.¹⁹ To judge persons mistaken, and to act on that judgment, is not to be equated, in any field of human discourse or practice, with despising those persons or preferring oneself.

So Dworkin has now offered a revised version of his argument. The new version relies instead on the idea of a hypothetical loss of, or

judgments of justice. It has been my intention to describe constructivism by contrast and not to defend it, much less to argue that rational intuitionism is mistaken." Rawls, *Kantian Constructivism*, *supra*, at 570.

17. R. Dworkin, *Taking Rights Seriously* 181 (1977) (emphasis added). Dworkin continues:

Men who have no idea of their own conception of the good cannot act to favor those who hold one ideal over those who hold another. The original position is well designed to enforce the abstract right to equal concern and respect, which must be understood to be the fundamental concept of Rawls' deep theory.

Id. For Rawls' tempered denial of this, see Rawls, *Justice as Fairness*, *supra* note 16, at 236 n.19. Dworkin later ascribed a similar view to J.S. Mill. See R. Dworkin, *supra*, at 263.

18. R. Dworkin, *supra* note 17, at 272-73.

19. For another way of showing that the claim is untenable, see J. Finnis, *Natural Law and Natural Rights* 221-23 (1980).

incompatibility with, *self-respect* (one's own sense of one's equal worth):

[L]iberalism based on equality . . . insists that government . . . must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of his equal worth. . . . [N]o self-respecting person who believes that a particular way to live is most valuable for him can accept that this way of life is base or degrading. . . . So liberalism as based on equality justifies the traditional liberal principle that government should not enforce private morality²⁰

But this argument is as impotent as its forerunners. To forbid people's preferred conduct does not require them to "accept an argument." And if they did accept the argument on which the law is based, they would be accepting that their former preferences were indeed unworthy of them (or, if they had always recognized that, but had retained their preferences nonetheless, it would amount to an acknowledgment that they had been unconscientious). The phenomenon of conversion or, less dramatically, of regret and reform, shows that one must not identify persons (and their worth as human beings) with their current conception(s) of human good. In sum: either those whose preferred conduct is legally proscribed come to accept the concept of human worth on which the law is based, or they do not. If they do, there is no injury to their self-respect; they realize that they were in error, and may be glad of the assistance which compulsion lent to reform. (Does this sound unreal? Think of drug addicts.) And if they do not come to accept the law's view, the law leaves their self-respect unaffected; they will regard the law, rightly or wrongly, as pitifully (and damagingly) mistaken in its conception of what is good for them. They may profoundly resent the law. What they cannot accurately think is that the law does not treat them as an equal; for the justifying concern of this law, as an effort to uphold morality, is (we can here suppose) a concern for the good, the worth and the dignity of everyone without exception.²¹

III.

Before turning directly to Kant's own account of these matters, it

20. R. Dworkin, *A Matter of Principle* 205-06 (1985).

21. Sometimes Dworkin distinguishes between the worth of people and the worth of their preferences. See, e.g., R. Dworkin, *supra* note 20, at 360. Usually, however, he thinks that (to use the old jargon) to condemn the sin is to manifest contempt for the sinner—a mistake encouraged by his ambiguous phrase "people of bad character." *Id.* at 357. He thus overlooks one of the important aspects of what I have called "transparency." See J. Finnis, *Fundamentals of Ethics* 70-74, 140-42 (1983). What is transparent for me, viz. the quality of *my* choices for the quality of *my* character, is not transparent when I am making judgments about other people, their choices and their character. Since I do not know the deepest grounds of their choices, I can condemn those choices without condemning (the character of) those who made them. *Id.*

will be helpful to observe the use to which certain words taken from that account are put by a current defender of the neutrality and harm principles, David Richards. Richards offers to derive principles of public and constitutional morality from a concept of human rights explicated "in terms of an autonomy-based interpretation of treating persons as equals":²²

Crucially, the idea of "human rights" respects this capacity of persons for²³ rational autonomy—their capacity to be, in Kant's memorable phrase, free and rational sovereigns in the kingdom of ends [citation to *Grundlegung* *433–34]. Kant characterized this ultimate normative respect for²⁴ the revisable choice of ends as the dignity of autonomy [citation to *Grundlegung* *434–35], in contrast to the heteronomous, lower-order ends (pleasure, talent) among which the person may choose. Kant thus expressed the fundamental liberal imperative of moral *neutrality with regard to the many disparate visions of the good life*: the concern embodied in the idea of human rights is not with maximizing the agent's pursuit of any particular lower-order ends, but rather with respecting the higher-order *capacity* of the agent to exercise rational autonomy in choosing and revising his ends, *whatever they are*.²⁵

With the neutrality principle which he announces in that passage, Richards links a principle tantamount to the harm principle:

Consistent with the autonomy-based interpretation of treating persons as equals, the principles underlying a just criminal law require forms of action and forbearance from action that express, on terms fair to all, basic respect for the *capacity* of persons responsibly to pursue their ends, *whatever they are*. Such principles impose this constraint: only those forms of action and forbearance that violate rights of the person to forms of respect defined by the underlying principles of obligation and duty may properly be criminalized.²⁶

In his initial discussion of autonomy, Richards does refer to the relevance of "principles of conduct and canons of ethics to which [those exercising autonomy] have given their rational assent," and of "the capacity to use normative principles, including, *inter alia*, principles of rational choice, to decide which among several ends may be most

22. D. Richards, *Sex, Drugs, Death, and the Law* 8 (1982).

23. But on the adjacent page, Richards describes the capacities (which he there lists) as "capacities that constitute autonomy." *Id.* at 8 (emphasis added); see Richards, *Rights and Autonomy*, 92 *Ethics* 3, 7 (1981).

24. Why Richards supposes that *respect for* the revisable choice of ends can intelligibly be described as the *dignity* of something remains unelucidated by anything that Richards (or, of course, Kant) says.

25. D. Richards, *supra* note 22, at 9 (emphasis and footnotes added). In the version of this paragraph in *Rights and Autonomy*, there is a citation for the "liberal imperative of moral neutrality," to Dworkin, *Liberalism, in Public and Private Morality* 113–43 (S. Hampshire ed. 1978). Richards, *supra* note 23, at 7.

26. D. Richards, *supra* note 22, at 17 (emphasis added).

effectively and coherently realized."²⁷ But "effectiveness" and "coherence" already sound rather different from Kant, and the differences broaden and deepen as Richards discloses his own authorial understanding of the two not-unambiguous paragraphs which I have just quoted from him. For his working interpretation of Kant's conception of autonomy soon drops all reference to norms of choice:

In [Kant's] central statements of ethical theory, moral personality is described in terms of autonomous independence—the capacity to order and choose one's ends as a free and rational being.²⁸

. . . [T]he autonomy-based concept of treating persons as equals rests on respect for the individual's ability to determine, evaluate, and revise the meaning of his or her own life.²⁹

The focal weight . . . give[n] to the freedom and rationality of the individual as the creator of his own life is the ideal fundamental to the autonomy-based interpretation of treating persons as equals, the basis of the human rights perspective in politics and law.³⁰

The "fundamental right" which Richards derives from these considerations is the right of persons "to determine the meaning of their own lives."³¹

It is hard to find a more inexact rendering of Kant's conceptions of autonomy, rationality, dignity, and the kingdom of ends.

We might begin with the "memorable phrase" which introduces Kant as sponsor of *Sex, Drugs, Death and the Law*: "free and rational sovereigns in the kingdom of ends." The phrase does not, of course, occur in Kant, either at the pages from which Richards claims to have memorized it, or anywhere else. For on the pages to which Richards refers us, Kant states not only that the kingdom of ends is "certainly only an ideal," but also, and more importantly, that even a rational legislator in a kingdom of ends would not be sovereign unless he were "a completely independent being, without needs and with an unlimited power adequate to his will"³²—a godlike, not a human being. As if already vexed by Richards' misreading, Kant wrote a few years later, in the *Critique of Practical Reason*:

We are indeed legislative members of a moral realm which is

27. *Id.* at 8.

28. *Id.* at 109. Identical statement, *id.* at 177.

29. *Id.* at 172.

30. *Id.* at 274 (emphasis in original). Richards ascribes this view to "the Pico [Della Mirandola]-Sartre tradition," but refers back also to Kant as one of the greatest philosophers of human rights and an upholder (though with tensions and inconsistencies in practice) of "the moral ideal of autonomy." *Id.*

31. *Id.*

32. I. Kant, *Groundwork of the Metaphysic of Morals* *433-34 (*Grundlegung*) (H. Paton trans. 1956) [hereinafter *Groundwork of Metaphysic of Morals*].

possible through freedom and which is presented to us as an object of respect by practical reason; yet *we are* at the same time *subjects in it, not sovereigns*, and to mistake our inferior position as creatures and to deny, from self-conceit, respect to the holy law is, in spirit, a defection from it [the moral law] even if its letter be fulfilled.³³

But already in the *Grundlegung*, on the two pages following those cited by Richards, Kant had made pellucidly clear how different from Richards' is his understanding of the "dignity of autonomy." What has "intrinsic worth [*Werth*], i.e., dignity [*Wuerde*]" has only the worth "determined for it by the [moral] law."³⁴ "Therefore morality, and humanity so far as it is capable of morality, is the only thing which has dignity."³⁵ The capacities mentioned by Richards (some of which are here specifically mentioned by Kant)³⁶ have a "market value [*Marktpreis*]" and/or an "affective [or: fancy] price [*Affektionspreis*]" (another merely relative value), but morally upright actions (such as fidelity in promises and benevolence on principle) have intrinsic "worth [*Wuerde*]." Morally good dispositions can lay claim to dignity, just because they and only they afford to rational creatures participation in giving universal laws and thus *fit* such creatures to be members and legislators in a possible kingdom of ends. The maxims of rational choosers (i.e., their rationales for their choices) have dignity only when those maxims could harmonize with a possible kingdom of ends, by treating not only other persons but also each of the choosers themselves (i.e., their own rational nature) as no mere means but also an end. "Autonomy is *therefore* the ground of the dignity [*Wuerde*] of human nature and of every rational nature."³⁷

In short, one has autonomy just in so far as one does in fact make one's choices, not on the basis of one's interests, but out of respect for the demands of morality.³⁸ And: "[A]ll claims of self-esteem which

33. I. Kant, *Critique of Practical Reason*, *82–83 (L. Beck trans. 1976) [hereinafter *Critique of Practical Reason*] (emphasis added).

34. *Groundwork of Metaphysics of Morals*, supra note 32, at *435–36. Contrast Richards, supra note 22, at 20 ("the only thing Kant claimed to be of unconditional worth, personal dignity" (citing *Groundwork of Metaphysics of Morals*, supra note 32, at *434–35)).

35. *Groundwork of Metaphysics of Morals*, supra note 32, at *435.

36. These capacities, just as such, Kant in fact regards as *talents*, which fit one to pursue "any kind of ends" (cf. Richards' references to one's ends "whatever they are"), and which at best are worthy only of a respect which is no more than analogous to the respect due to the worth of the moral law and choice in conformity with that law. *Critique of Practical Reason*, supra note 33, at *41, *77–78; cf. infra note 88.

37. *Groundwork of Metaphysics of Morals*, supra note 32, at *436 (emphasis added). On Kant's attribution of dignity to (i) humanity, (ii) rational nature, (iii) morality, (iv) persons, (v) those who conform to duty, and (vi) dispositions to do one's duty for duty's sake, see Hill, *Humanity as an End in Itself*, 91 *Ethics* 84, 91–92 (1980).

38. See *Groundwork of Metaphysics of Morals*, supra note 32, at *433, where "autonomy" is first introduced. Consider also Kant's concept of the *state's* autonomy as its formation and maintenance of itself "in accordance with the laws of freedom [*nach*

precede conformity to the moral law are null and void. For the certainty of a disposition which agrees with this law is the first *condition of any worth [Werth] of the person . . .*, and any presumption [to worth] prior to this is false"³⁹

It might, indeed, have been better to begin these summary comments on Richards where Kant begins his ethical teaching—with the concept of intrinsic human *worth (Wuerde)*. We can overhear him in his lectures of 1780–81:

The supreme created good is the most perfect world, that is, a world in which all rational beings are happy *and are worthy of happiness*. The ancients realized that mere happiness could not be the one highest good. For if all men were to obtain this happiness without distinction of just and unjust, the highest good would not be realized, because though happiness would indeed exist, worthiness of it would not. . . . Man can hope of being happy only in so far as he *makes himself worthy* to be happy, for this is the condition of happiness which reason itself proposes.⁴⁰

Or we can look at the opening gambit in the Moral Catechism which Kant proposed in his most mature published reflections on ethics—the decisive first move by which teachers are to dislodge pupils from their exclusive concern with happiness. Supposing you had power to dispense happiness at no cost to yourself:

[W]ould you see to it that the drunkard is never short of wine and whatever else he needs to get drunk? . . .

No, I would not.

You see, then, that if you had all happiness in your hands and, along with it, the best will, you still would . . . first try to find out to what extent each [person] is *worthy [wuerdig]* of happiness.⁴¹

Kant admonishes teachers to exalt “above everything else in actions” the “dignity [*Wuerde*]” of *virtue*. For otherwise the concept of duty dissolves and “man’s consciousness of his own nobility then disappears

Freiheitsgesetzen.” *Metaphysical Elements of Justice*, supra note 3, at *318. Richards is aware that Kant’s conception of autonomy has something (to say the least) to do with acting from moral duty. See Richards, supra note 23, at 15. But Richards persists in his reductive presentation; autonomy, he says, is a matter of the “separateness of persons.” *Id.*

39. *Critique of Practical Reason*, supra note 33, at *73 (emphasis added); see also *id.* at 147.

40. I. Kant, *The Ethical Systems of the Ancients*, in *Lectures on Ethics*, supra note 1, at 6 (emphasis added); see also I. Kant, *The Ultimate Destiny of the Human Race*, in *id.* at 252 (recorded in the concluding moments of the lectures); *Critique of Practical Reason*, supra note 33, at *110 (“[V]irtue (as the worthiness [*Wuerdigkeit*] to be happy) is the supreme condition of whatever appears to us to be desirable and thus of all our pursuit of happiness and, consequently, . . . is the supreme good.”).

41. I. Kant, *The Doctrine of Virtue* *480 (M. Gregor trans. 1964) [hereinafter *The Doctrine of Virtue*] (emphasis in original).

and he is for sale and can be bought for a price [*Preis*] that the seductive inclinations offer him."⁴²

Richards is in another world. He thinks, for example, that Kantian autonomy involves "sovereignty over the qualities of one's experience."⁴³ Many young heroin users in the United States enjoy such sovereignty, he says, by choosing to allow their drug use a "psychological centrality" which "may, from the perspective of their own circumstances, not unreasonably organize their lives and ends,"⁴⁴ because that use of heroin and the like "generates its own social tasks and standards of successful achievement, its own forms of status and respect, and its own larger meaning centering on the perceived qualities that the drug brings to the users' personal experiences, such as relief of anxiety and, sometimes, euphoric peace."⁴⁵ Let us here ignore everything Kant ever said about drunkards and the use of euphoric opiates (and about any other particular question of duty to oneself). It remains clear that Richards has nothing but equivocation, mere punning, upon which to ground his claim that Kant's conception of *autonomous freedom* inherently involves such choices as the choice to become "psychologically devoted" to heroin—to sell oneself, as Kant would say, to the seductions of the inclinations (perhaps very seductive "from the perspective of one's own circumstances"). And the point here is not simply that such a choice entrains (*pace* Richards) enslavement, but more importantly that such "determining and revising the meaning of one's life" (*a fortiori* choosing to find that "meaning" in "personal experiences")⁴⁶ is utterly remote from Kant's autonomy; the rational identification of, and respectful submission to, the moral law which, *precisely as universal*, imposes on each one of us duties to oneself.⁴⁷

42. *Id.* at *483.

43. D. Richards, *supra* note 22, at 177.

44. *Id.* at 176.

45. *Id.* at 175.

46. Cf. Richards, *supra* note 23, at 16 ("Kantian principles can be shown to justify a fundamental right to autonomy in deciding whom and how to love *in order to preserve underlying values of personal emotional integrity and self-expression* in intimate relations." (emphasis added)). Equally distant from Kant is the concern with "self-definition" (by choices of, e.g., "the form and nature of . . . intensely personal bonds"—involving, e.g., homosexual sodomy) which is foundational to the dissent in *Bowers v. Hardwick*, 106 S. Ct. 2841, 2851–52 (1986) (Blackmun, J., dissenting).

47. R. Wolff, *The Autonomy of Reason* 178 (1973) [hereinafter R. Wolff, *The Autonomy of Reason*], frankly concedes that in talking of autonomy, "Kant turns out *not* to be saying what I [Wolff] want him to say." For Wolff, autonomy means that rational agents are bound to substantive policies and principles because and only because they have freely chosen them; "the substance or content of moral principles derives from collective commitments to freely chosen ends." *Id.* at 181. But as Wolff rightly stresses, this belief is "incompatible" with the belief "that there are objective, substantive, categorical moral principles which all rational agents, insofar as they are rational, acknowledge and obey," *id.*—and the latter is a belief which Kant certainly held, and wished to explain by the notion of "*disinterestedness*" central to what he called autonomy. *Id.* at 179. Autonomy Wolff-style (or, similarly, Richards-style) has "the most far-reaching conse-

But what about Kant's conception of freedom? I shall have more to say about Kantian freedoms in the next section. But I should say something about the conception of freedom that is, for Kant, the conception relevant to, and on the same plane as, his ethical conception of autonomy. The main thing to be said is that this freedom—freedom in the strictest sense—is known only through our consciousness of the moral law.⁴⁸ And “the human will by virtue of its freedom is directly determined by the moral law”;⁴⁹ man “is the subject of the moral law which is holy, because of the autonomy of his freedom.”⁵⁰ To be conscious of freedom indeed precisely is to be conscious of the moral law.⁵¹ If the will is not determined by the moral law, it is not free, for it is determined either by that law or by inclinations⁵²—but to be determined by inclinations is precisely to be subject to heteronomy, i.e., to lack autonomy.⁵³ Thus “the *autonomy* of the will is the sole principle”—not merely the presupposition—“of all moral laws and of the duties conforming to them.”⁵⁴

But, of course, individuals are conscious of their own freedom not only through their awareness of being able to resist the seduction of the inclinations, but also through their experience of being able to reject the categorical imperatives of morality. In a strategic paragraph of his lectures on ethics, Kant holds before his hearers the double significance of freedom. First, freedom is “the inner value of the world.” For: “The inherent value of the world, the *summum bonum*, is freedom in accordance with a will which is not necessitated to action.”⁵⁵ “But on the

quences for politics as well as for ethics,” *id.* at 178—for example, anarchism, as he defends it in R. Wolff, *In Defense of Anarchism* (1970)—but autonomy of *this* sort is simply “not at all what Kant had in mind.” R. Wolff, *The Autonomy of Reason*, *supra*, at 178. Wolff finds it “unsettling” that Kant thus uses the word “autonomy.” *Id.* at 179. But his explanation of Kant's meaning seems to set aside what is perhaps the key: that one's will is autonomous or self-legislative just insofar as nothing determines it save one's conception of the will's (i.e., practical reason's) own *worth*. See W. Jones, *Morality and Freedom in the Philosophy of Immanuel Kant* 102–12 (1940). However, in stressing that Kant's concept of giving law to oneself has nothing to do with Richards' concept of “meaning giving,” I do not wish to suggest that Kant's conception of self-legislation is any more coherent than his conception of the self. See, e.g., K. Ward, *The Development of Kant's View of Ethics* 166–74 (1972).

48. *Critique of Practical Reason*, *supra* note 33, at *29, *30, *31, *47, *70; see *Metaphysical Elements of Justice*, *supra* note 3, at *225, *226.

49. *Critique of Practical Reason*, *supra* note 33, at *38.

50. *Id.* at *87.

51. See *id.* at *46; *Groundwork of Metaphysic of Morals*, *supra* note 32, at *447 (“[A] free will and a will under moral laws are one and the same.”); *id.* at *450; cf. *Duties to Oneself*, *in Lectures on Ethics*, *supra* note 1, at 29 (“The more he can be morally compelled, the freer a man is.”).

52. See *Critique of Practical Reason*, *supra* note 33, at *72.

53. See *Groundwork of Metaphysic of Morals*, *supra* note 32, at *433.

54. *Critique of Practical Reason*, *supra* note 33, at *33; see *id.* at *39; *Groundwork of Metaphysic of Morals*, *supra* note 32, at *452–53.

55. *Duties to Oneself*, *in Lectures on Ethics*, *supra* note 1, at 122.

other hand," he goes on,

freedom unrestrained by rules of its conditional employment is the most terrible of all things. . . . If the freedom of man were not kept within bounds by objective rules, the result would be the completest savage disorder. There could then be no certainty that man might not use his powers to destroy himself, his fellows, and the whole of nature.⁵⁶

Sophisticates may smile at Kant's references here and elsewhere⁵⁷ to savage disorder, wild lawless freedom, and so forth. Anarchy, one may feel, belongs to the past, or to other peoples. But Kant is here⁵⁸ thinking on principle, not primarily predictively or prudentially,⁵⁹ let alone pictorially. His "savage disorder" can be exemplified not only by the eighties gay-bar/bathhouse, in which lust courts even homicide and self-destruction, but also by the coolly unprincipled national choice to treat North Atlantic democracy as exempt from the moral law against murder by preparations and readiness to carry out a vast holocaust of innocents (and even of "the whole of nature") in the face of defeat.⁶⁰

At all events, Kant's precise purpose in holding before his students the Janus faces of freedom was, by inducing in them a sense of freedom's grandeur and facility for degradation, to persuade them of the (moral) *necessity* of respecting humanity (rationality, the source of all worth) *in oneself*, as the precondition for respecting it in the person of others. In that very paragraph he proceeds to identify and condemn certain "victimless" or "self-regarding" moral evils which excite

56. *Id.*; see *id.* at 123, 125, 151.

57. See, e.g., *Metaphysical Elements of Justice*, *supra* note 3, at *316.

58. Of course, there is elsewhere a strain of inadequately grounded progressivism (taking hope for destiny) in Kant's view of the future course of history. See, e.g., I. Kant, *Idea for a Universal History*, in *Kant on History* 21 (L. Beck ed. 1975) [hereinafter *Idea for a Universal History*].

59. Kant carefully denies that in pointing to the abyss of lawless freedom he is advancing a prudential (or, as we would now say, a consequentialist) argument. *Duties to Oneself*, in *Lectures on Ethics*, *supra* note 1, at 125.

60. See J. Finnis, J. Boyle & G. Grisez, *Nuclear Deterrence, Morality, and Realism* (1987). Richards, at text accompanying note 49 of his comment to this Paper, says the text sentence is my "picture of homosexuality"—a claim false to the text and to my discussion of choices to engage in homosexual acts in the "esoteric" writings which, oddly enough, I freely cite, where relevant, in my "exoteric" works. The rest of Richards' agitated response to the text sentence fails to attend to the only fact I there asserted, *viz.* the fact witnessed to by, among others, Denis Altman (an Australian university teacher and well-known pro-homosexual writer), in his *AIDS and the New Puritanism* 155 (1986) ("My own observations during the course of writing this book suggested that while quite major shifts in behavior have taken place, surprising numbers of people continue to use the baths in the same way as before the epidemic.") (published in the United States as *AIDS in the Mind of America*). I have to add that Richards, at note 53 of his comment, is as inaccurate as his other interpretations, when he asserts that, in the article there cited, I stated that homosexual acts are only "usually" wrong; in fact I said that they are only usually *promiscuous*, but on a moral analysis are always objectively wrong, like other essentially masturbatory sexual acts. For the reasoning, partly burlesqued and mostly ignored by Richards, see the article.

Richards' broadly approving concern: drug use, sodomy, and suicide. And the same paragraph states the principle of Kant's condemnation:

The supreme rule is that in all actions which affect himself a man should so conduct himself that every exercise of his power[s] is compatible with the fullest employment of them. . . . The conditions under which alone the fullest use of freedom is possible, and can be in harmony with itself, are the essential ends of humanity. It must conform with these. The principle of all duties is that the use of freedom must be in keeping with the essential ends of humanity.⁶¹

And "[o]ur duties towards ourselves constitute the supreme condition and the principle of all morality; for moral worth is the worth of the person as such" ⁶² If one thought oneself justified in treating oneself as a mere means, what *reason* would one have not to consider oneself justified in treating other persons likewise?

IV.

It is time to consider more directly whether Kant thought that his ethical and political or legal theory required or was consistent with the "harm principle" which I identified and labelled in Part I. For besides the freedom with which Part III was concerned, there is, of course, another freedom: the political or natural-law liberty which Kant calls outer or external freedom. And: "Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law [*nach einem allgemeinen Gesetz*], is the one sole and original right that belongs to every human being by virtue of his humanity."⁶³ Like the passages from Kant which I quoted in Part I, this may seem to confirm that Kant thought it wrong for the law of a state to hinder one's violation of one's moral duties to oneself. That Kant did indeed thus subscribe to the harm principle is maintained by good commentators, such as Mary Gregor:

61. Duties to Oneself, in *Lectures on Ethics*, supra note 1, at 123-24. He expresses the same principle in the words used in his later moral writings: "actions must be in keeping with humanity itself." *Id.* at 125; see *id.* at 121.

62. *Id.* at 121. Having reached the end of this Part, readers will note that of the 45 passages from Kant which are cited in it against Richards' interpretation of Kant's conception of autonomy, only one involves Kant's "casuistry," i.e., his views on sex, drugs, killing, the harm principle, etc. For the whole section is concerned with his fundamental "philosophical vision," a vision in which it is simply false to say that moral reasonableness constrains only "interpersonal conduct" (as Richards continues to claim in, for example, his reply at text accompanying note 22 of his comment). Richards' main defense against my critique—viz. his assertion that my "interpretive approach puts a fundamental weight on Kant's casuistry" (etc., etc.)—will be found surprising not only by readers of this Part but also any who read Part IV, in which I do say something about Kant's casuistry, in its place. Whether Richards himself adheres to his sensible principles of interpretation when he turns to my own works, readers will easily judge.

63. *Metaphysical Elements of Justice*, supra note 3, at *237.

Law [*Recht*] has to do only with the relations of one person to another in so far as their actions, as physical events in time, can have an influx on one another. By this Kant excludes from the scope of Law all actions which affect only oneself, even though it is conceivable that some of these actions could be prevented by outer [e.g. state] legislation. Certain actions affecting only oneself are morally impossible, but the ground of their impossibility lies in man's obligation to moral integrity and virtue; and since virtue, as an interior attitude of will, lies beyond the scope of outer legislation, juridical laws ought not to prohibit actions of this sort. Though such violations of duty to oneself may involve external actions, juridical laws ought not to prohibit these actions except in so far as they might, at the same time, have injurious effects on other people.⁶⁴

I challenge this interpretation. (I have no *a priori* interest in claiming Kant as a supporter of my own view that neither the harm principle nor, *a fortiori*, the neutrality principle are entitled to a place in a sound general political philosophy. For Kant's ethical theory, and therefore his political theory too, seem to me deeply inadequate. So it would be no embarrassment to me if my challenge foundered and this conventional interpretation were vindicated. Still, I think the interpretation erroneous, and shall say why.)

The most obvious difficulty which the interpretation faces is that Kant displays no discomfort with criminal laws forbidding conduct which seems "self-regarding," i.e., not harmful to others. In the supplementary explanations he appended to the second edition of the *Rechtslehre*, Kant discusses the proper measure of punishment required by his principle of talion. His discussion touches on "crimes . . . called unnatural because they are committed against humanity itself": rape, pederasty, and bestiality.⁶⁵ The list suggests Kant's lack of interest in the harm principle; even if *Paederastie* be read (which it by no means need be) as restricted to perverted sexual acts with a child, and even if the child's consent is discounted and psychological and moral harm to the child is conceded, there remains Kant's reference to bestiality, conduct which in itself affects no other person. The appropriate punishment for bestiality, in Kant's view, is permanent expulsion from civil society, since "the criminal guilty of bestiality is unworthy of remaining in human society."⁶⁶ All this the conventional interpretation would

64. M. Gregor, *Laws of Freedom* 35 (1963) (Gregor gives no citations at this point, but seems to be commenting largely on *Rechtslehre* 229–30. See also, e.g., J. Murphy, *Kant: The Philosophy of Right* 94 (1970); H. Reiss, *Kant's Political Writings* 22 (1970); Fletcher, *Human Dignity as a Constitutional Value*, 22 *U.W. Ontario L. Rev.* 171, 175 (1984).

65. *Metaphysical Elements of Justice*, supra note 3, at *363. One aspect of the meaning of "against humanity itself" is shown by the phrase id. at *362–63 "the respect due the humanity in the person of the miscreant (that is, due the human species)"; cf. infra note 68.

66. *Metaphysical Elements of Justice*, supra note 3, at *366. The next sentence in

have to explain away as some sort of slip, or mere gross inconsistency (and hands might be waved in the direction of Kant's "pietistic up-bringing," and so forth).

Almost equally obvious, and perhaps more telling, is the account of juridical duties to oneself, an account which Kant gives eight or nine pages after the passages in the *Rechtslehre* which are principally relied upon by the conventional interpretation. In the earlier passages, as will be recalled from section I above, Kant had stated:

[The concept of *Recht*] applies only to the external and—what is more—practical relationship of one person to another in which their actions can in fact exert an influence on each other (directly or indirectly). . . . *Recht* is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom.⁶⁷

I have been quoting from pages *230 and *237 of the *Rechtslehre*. On pages *239–40, however, Kant states bluntly that all duties are either juridical duties (*Rechtspflichten*) or duties of virtue [*Tugendpflichten*]; that for juridical duties, but not for duties of virtue, external legislation is possible; and that perfect *juridical* duties are of two classes: duties to others, corresponding to "the right of mankind [*Menschen*] in others," and *duties to oneself*, corresponding to "the right of humanity [*Menschheit*] in our own person."⁶⁸

Gregor has argued that Kant operates with two completely different conceptions of "juridical duty," one treating duties as juridical (rather than ethical) according to the type of legislation and/or constraint (in particular, external penalty) accompanying the law creating them, and the other treating duties as juridical (rather than ethical) according as they relate to actions themselves (rather than merely to the maxims of actions). She is thus enabled to maintain that while juridical

my text predicted the sort of response which, in the event, Richards has made.

67. *Id.* at *230.

68. *Id.* at *239–40. This distinction between the right of *Menschheit* in one's own person and the right of *Menschen* in the person of others is one of the reasons why I am unpersuaded by Fletcher's view that "the Kantian ideal is clearly communitarian, for our focus is not on our own selves, but on the vindication of the dignity of all human kind. . . . [S]olidarity [for Kant] is more important than the fulfillment of the private self." Fletcher, *supra* note 64, at 176, 177. As to the point made in my text, which is fundamental to my interpretation of Kant's views on legal enforcement of duties to (humanity in) oneself, I may record that in the "close parsing" to which note I4 of Richards' comment appeals for support, Douglas Dryer felt obliged to declare that the table in *Metaphysical Elements of Justice*, *supra* note 3, at 240 is false to Kant's "mature view" (published virtually simultaneously) not just in one but in two respects. He also asserted that the correct translation of "*Rechtspflichten*" is one not hitherto adopted in any of the published English translations ("duties for which there are correlative rights"). I do not say he was mistaken, though I find the proposed translation surprising. Anyway, Dryer's strong measures with Kant's text were of a piece with his willingness to junk Kant's still more mature statements about bestiality (and, probably, pederasty). *Id.* at *363.

duties in the first sense must relate to other men, juridical duties in the second sense can relate to uses of one's own person.⁶⁹ Thus she seeks to preserve her view that Kant restricted the proper field of state law to actions affecting others, and thus upheld something approximating the harm principle.

I think her attempt fails. All on the same two pages of the *Rechtslehre* to which I have referred, Kant lays it down explicitly that juridical duties may be enforced by external legislation and that juridical duties include duties to oneself (as distinct from duties to others). It is not credible that he has here passed from one sense of "juridical" to another quite different sense, without seeking to relate the one to the other, and quite unconscious of the confusion such a transition would create.

Moreover, Kant in fact takes care, then and there, to explain why duties which are not juridical but merely ethical are not proper subjects of external legislation. And his explanation has nothing to do with the right to freedom (still less with Richards' "autonomy" or Justice Brandeis' "right to be let alone"⁷⁰). It is simply that the subject-matter of ethical duties is an internal act of the mind—as he says elsewhere, "intentions and not actions only"⁷¹—that no external legislation can bring about.⁷² (He adds, however, that external legislation can command actions which would be *conducive to* that internal virtue and its end.⁷³) Thus Kant incorporates Gregor's proposed "different point of view" (her second sense of "juridical duty")⁷⁴ within his explanation of juridical duty in her first sense, and then moves promptly and smoothly to his flat denial that juridical duties must be duties to others.

Here, then, we have Kant's explicit theoretical framework for affirming the propriety, in principle, of external (e.g., state) laws proscribing and penalizing pederasty and bestiality (to go no further than Kant's own later examples).

But what are we to make of the passages which I quoted in Part I and have amplified in the last paragraph but one?

Observe, first, that in the many passages of the *Rechtslehre* which speak of one's will, freedom, action, or condition *coexisting* with the will, etc., of others, Kant always adds a further *necessary condition*: that the coexistence, consistency or compatibility of wills, etc., be "in accord-

69. M. Gregor, *supra* note 64, at 115–16.

70. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also *Bowers v. Hardwick*, 106 S. Ct. 2841, 2848 (1986) (Blackmun, J., dissenting) (statute prohibiting sodomy interferes with civilized man's "right to be let alone").

71. *Critique of Practical Reason*, *supra* note 33, at *71.

72. See *Metaphysical Elements of Justice*, *supra* note 3, at *239.

73. *Id.*; see *infra* notes 87–90 and accompanying text.

74. Which is indeed one sense in which Kant speaks of juridical (as opposed to ethical) duty: see the section title in his *The Doctrine of Virtue*: "Ethics does not give laws for *Actions* (*Ius* does that) but only for the *Maxims* of actions." *The Doctrine of Virtue*, *supra* note 41, at *388.

ance with a universal law."⁷⁵ Our contemporary neo-Kantians standardly omit this condition (as Kant himself had omitted it fifteen years earlier, in the *Critique of Pure Reason*, with a glancing and rhetorical reference to a constitution "of the greatest human freedom"). Other interpreters, e.g., Fletcher, do not overlook it, but read it down as requiring merely that the choices be compatible "as these choices are universalized across the legal system as a whole."⁷⁶ I suggest, however, that the phrase "in accordance with a universal law" was certainly meant to import Kant's own conception expounded in the three principal forms or formulations of the categorical imperative—(i) universalizability of form, (ii) respect of humanity as an end in itself, (iii) harmonization of individual maxims within a kingdom of ends—"fundamentally only so many formulas of the very same law."⁷⁷

Now, as Kant indicated in the *Grundlegung*, a genuine universal law contains the ground not only of duties to others but also of duties to oneself.⁷⁸ Hence, in insisting that, to be right, one's will must not only be compatible with others' wills but must be "in accordance with a universal law," Kant was indicating why certain acts and choices, fully compatible with the wills of others, are nonetheless violations of perfect juridical duties to oneself—duties which, being juridical, can in principle be legally enforced. As he says a little further on in the *Rechtslehre*, recalling the *Grundlegung*'s second formulation of the categorical imperative, one has a *juridical* duty "[t]o assert[] one's own worth as a human being in relation to others, and this duty is expressed in the proposition: 'Do not make yourself into a mere means for others, but be at the same time an end for them.'"⁷⁹ (Here one can recall Kant's view that the essence of the "carnal crimes against nature," and of sexual promiscuity in general, is that human beings do thereby make themselves mere objects of enjoyment for someone's sexual desire. Such conduct, even if it can coexist with the conduct of others, thus cannot do so "in accordance with a universal law."⁸⁰)

What, then, of the passage in which Kant states that the concept of *Recht* applies only to the external relationship of one person to another,

75. Notably *Metaphysical Elements of Justice*, supra note 3, at *230–31. The syntax is ambiguous, and it may well be right to prefer Abbott's translation: "Act externally so that the free use of thy elective will may not interfere with the freedom of any man so far as it agrees with universal law." Kant's *Theory of Ethics*, 231 (T. Abbott trans. 1883) (emphasis added).

76. Fletcher, supra note 64, at 175.

77. *Groundwork of Metaphysic of Morals*, supra note 32, at *436; see id. at *421.

78. Id. at *430.

79. *The Metaphysical Elements of Justice*, supra note 3, at *236. Kant adds: "This duty will be explained later as an obligation resulting from the right of humanity in our own person (*lex justii*)." Id.

80. *Duties to Oneself*, supra note 1, at 124; I. Kant, *Duties Towards the Body in Respect of Sexual Impulse*, in *Lectures on Ethics*, supra note 1, at 163–66; I. Kant, *Crimina Carnis*, in *Lectures on Ethics*, supra note 1, at 170; *The Metaphysical Elements of Justice*, supra note 3, at *278.

in so far as the action of one person can directly or indirectly affect the other? I will say nothing here about the extent to which Kant's reference to indirect effects might erode the harm principle. Rather, I shall simply recall that Kant's whole treatment of the question "What is *Recht*?" remains within the conventional framework of Western thought, a framework which he here recalls by his use of the Latin, *quid sit iuris*, and his use of *justum* and *injustum* to translate *Recht* and *Unrecht*.⁸¹ In that traditional framework, justice and right are conceptually tied to relationships of one person to (an)other(s).⁸² Thomas Aquinas, for example, would have no difficulty in saying that an act of recreational use of heroin (or consensual homosexual intercourse) is not, or not necessarily, an act of injustice or a violation of anyone else's right. But he and the tradition would add that it does not follow that the *prohibition* of such acts is an act of injustice or a violation of right. Nor does such an act of prohibition fall outside Kant's conception of the sphere of *Recht*; it precisely satisfies the criterion of that conception: an act which applies to the "external and . . . practical relationship of one person [here: the lawgiver or the sovereign] to another" in which the action of the former can exert an influence on the actions of the latter.⁸³

In the last analysis, the conceptual framework articulated in Kant's paragraph on the concept of *Recht* does not seem in any way intended to settle disputed questions about the proper range of state law. At the very least, it offers no normative premises for a normative conclusion such as the harm principle.

There remains only the passage which I put at the head of this Paper: "My duty towards myself cannot be treated juridically; the law touches only our relations with other men . . ." It is a passage from the students' transcription of Kant's lectures of 1780-81, and as such it cannot stand against the clear statements, both general and particular, in the long-gestated *Rechtslehre*.⁸⁴ Moreover, there is a sense in which the passage remains true, even if one rejects the harm principle and concedes the propriety of punishing bestiality. The duty to treat oneself as an end, as honorable, and not as a mere means to gratifying

81. The *Metaphysical Elements of Justice*, supra note 3, at *229-30.

82. See J. Finnis, supra note 19, at 161-63. As Kant says elsewhere: "towards oneself one can never do an injustice [*unrecht*]." I. Kant, *On the Common Saying: "This May be True in Theory, But It Does Not Apply in Practice,"* in *Kant's Political Writings* 294-95 (H. Reiss ed. 1970).

83. *Metaphysical Elements of Justice*, supra note 3, at *230. Recall, too, that such prohibited or prohibitable actions, being in Kant's view incapable of being willed as universal law, violate the categorical imperative and are thus *illicit* and not the matter of "moral right as a warrant or title of action [*Befugnis*] (*facultas moralis*)." *Id.* at *222, *223-24.

84. Similarly, in I. Kant, *De Littera Legis*, in *Lectures on Ethics*, supra note 1, at 48, Kant is seen distinguishing the ethical from the legal by a series of indicia, by no means all of which are maintained in the *Rechtslehre*.

one's own or others' inclinations, is a duty which can only be truly and fully fulfilled by maintaining a certain intention/disposition (*Gesinnung*)—and there is a sense in which the state's law, as such, indeed cannot reach or "treat" dispositions. All that the law can do directly is authorize one man (the executive sovereign, Kant would say) to interfere with the *actions* of another, e.g., the pederast.

V.

But why interfere with those actions? Kant's claim—a matter of ethics—that such actions are immoral ("violations of duties to oneself") is inadequately argued. And he fails to offer any significant argumentation for his evident view—a matter of political theory—that the state can rightly punish such violations of duties to oneself, even when they violate no duty to others. I must say something about the roots of Kant's failure to supply the argumentation required for this theorem of his political theory. But I shall here say little or nothing about the just-mentioned deficiency in his ethical theory,⁸⁵ though my discussion of the weaknesses of Kant's political theory will hint at how I think his ethical theory might be enriched in ways that would allow the immorality of (i.e., the unreasonableness and self-mutilation inherent in) human actions of these types to be articulated and clarified.

The political-philosophical principle which Kant needs, and virtually lacks, is the principle that the point and justification of state law is the *common good*. As L.T. Hobhouse put it in his classic exposition of liberalism:

The common good includes the good of every member of the community, and the injury which a man inflicts upon himself is matter of common concern, even apart from any ulterior effect upon others. If we refrain from coercing a man for his own good, it is not because his good is indifferent to us, but because it cannot be furthered by coercion.⁸⁶

85. But see Finnis, *Personal Integrity, Sexual Morality and Responsible Parenthood*, *Anthropos: Rivista di Studi sulla Persona e la Famiglia*, no. 1, 1985, at 43–55. On the weaknesses of Kant's ethical theory, see J. Finnis, *supra* note 21, at 122–24. On the extent of the parallelism with a better moral theory, see J. Finnis, J. Boyle & G. Grisez, *supra* note 60, at ch. 10; G. Grisez, *Christian Moral Principles* 108–09 (1984); Boyle, *Aquinas, Kant, and Donagan on Moral Principles*, 58 *New Scholasticism* 391–408 (1984). In distinguishing ethical from political theory as I do in the text, I take for granted, with Kant and almost everybody, that "the claims of ethics" can and should be distinguished from "the [legally, coercively] enforceable claims of ethics"—as Richards' reply, at text accompanying notes 25–37 in his comment, manifestly fails to do.

86. L. Hobhouse, *Liberalism* 76 (1964) [1911]. Thus Hobhouse rejects Mill's distinction between self-regarding and other-regarding acts (and the principle Mill sought to found on it): "first because there are no actions which may not directly or indirectly affect others, secondly because even if there were they would not cease to be matter of concern to others." *Id.* But he goes on to argue, in rather Kantian fashion, that "[t]o try to form character by coercion is to destroy it in the making," or (weaker version) "it is

So far as I know, Kant's own publications scarcely discuss, in a political context, the question of fact which Hobhouse thus raises: can the good of a human person be advanced by coercion?⁸⁷ In an ethical context, Kant does advance a very weak argument against making the *perfection* of (an)other(s) one's responsibility. The *happiness* of others is among one's fundamental responsibilities, but not their perfection, for:

it is contradictory to say that I make another person's *perfection* my end and consider myself obligated to promote this. For the perfection of another man, as a person, consists precisely in *his own* power to adopt his end in accordance with his own concept of duty; and it is self-contradictory to demand that I do (make it my duty to do) what only the other person himself can do.⁸⁸

This will not do. We can agree that the necessary condition of human perfection is indeed authenticity: that one has adopted one's commitments in accordance with one's own conception of duty. But I deny that education, coercive deterrence, and coercive denial of opportunities can do nothing to assist persons to avoid choices which will degrade or in some other way harm them. And in several of his unpublished reflections, as we shall see, Kant admits that coercive measures can indeed be efficacious for this purpose.

It is important, at this point, to make a distinction. Coercing people to adopt or profess a religion is—if attempted for religious motives—self-stultifying in a way which could merit Kant's protean word "(self-)contradictory." For the good of adherence to the propositions of religious faith intrinsically involves that the propositions be adhered to as *true*, i.e., as disclosing a transcendent *reality* which is a *fit* object of adoration, petitionary prayer, and so forth. To the extent that the propositions are professed because their profession is convenient, both they and the professing of them obscure rather than disclose that reality.

But there is nothing analogously self-stultifying in coercing people to abstain from drug-taking or pederasty, whether by threatening them with criminal penalties, or by threatening those who would supply them with opportunities for indulgence in the vice, or merely by threatening

not possible to compel morality because morality is the act or character of a free agent."

Id. He admits exceptions:

[I]n the case of the drunkard—and I think the argument applies to all cases where overwhelming impulse is apt to master the will—it is a[n] . . . elementary duty to remove the sources of temptation, and to treat as anti-social in the highest degree every attempt to make profit out of human weakness, misery, and wrong-doing.

Id. at 81.

87. Unless one counts the statement noted *supra* note 73 and accompanying text.

88. The Doctrine of Virtue, *supra* note 41, at *385 (emphasis in original). There is no need to dwell here on the fact that Kant's conception of perfection is here, in Rawlsian terminology, a "thin theory." See *supra* note 36.

those who would corrupt them while young. Nor has it been demonstrated that this need render the persons coerced unfit to integrate their characters around other personal commitments, freely chosen by them from the vast range of diverse but upright forms of life.⁸⁹

Nor indeed has it been demonstrated that Western tradition was mistaken in holding, with Aristotle and Aquinas, that people who are prone to vice, and resistant to verbal persuasion, not only can be restrained by coercive threats from depraved actions but also can often be led—by an acculturation which those philosophers called habituation—to make, willingly (i.e., by their own authentic *free choice*), the very types of choices (to abstain from vice and to pursue worthwhile commitments) which, earlier, they made only “under coercion” and unwillingly.⁹⁰

And it is clear that Kant shared the factual judgment made by the tradition: “Man must be trained, so as to become domesticated and become virtuous later on. The coercion of government [*Regierungszwang*] and education make him supple, flexible and obedient to the laws; then reason will rule.”⁹¹ But Kant could not bring this factual premise into conjunction with a normative premise about the common good.

For a workable conception of the common good requires that we reject several of the notorious Kantian dualisms. There is first the dualism of the phenomenal world (including human persons) subject to the reign of natural determinism and impulse *versus* the noumenal realm of “selves” or “subjects,” of free will and moral law. The second dualism

89. As Joseph Raz says (using “autonomy” not in the Kantian sense but in a normal modern sense rather like that which Richards had in mind): “[O]nly very rarely will the non-availability of morally repugnant options reduce a person’s choice sufficiently to affect his autonomy. . . . The ideal of autonomy requires only the availability of morally acceptable options.” J. Raz, *supra* note 12, at 381; see also *id.* at 412, 417. However, Raz contends, with notable abruptness, that *coercive* interference does violate autonomy because (i) it expresses an attitude of disrespect for the coerced individual, and (ii) its interference is “global and indiscriminate.” *Id.* at 418. These grounds seem fragile; Raz’s conception of the mechanisms of state coercion (and threats of coercion) is itself global and indiscriminate. Contrast his more discriminating discussion in Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, 7 *Midwest Stud. in Phil.* 89, 113 (1982). But his strictures may well apply to some of Kant’s views about the extent of punishment; permanent banishment, for example, seems too severe a penalty for homosexual intercourse.

90. See Aristotle, *Nicomachean Ethics* *1179b30–1180b28 (Bk. X: ch. 9); Aquinas, *Summa Theologiae*, 1a–2ae, q. 95, a.1.

91. G. Kelly, *Idealism, Politics and History* 145 (1969), translating 15 I. Kant, *Gesammelte Schriften*, *522–23 (Prussian Academy ed. 1923); see also *id.* at 170, translating, 19 I. Kant, *Gesammelte Schriften* 202 (Prussian Academy ed. 1934) (“Each man is by nature bad and becomes good only to the extent that he is subject to a power that obliges [*noethigt*] him to be good. But he has the capacity to become progressively better without coercion [*Zwang*] if the dispositions for good within him are progressively developed.”); Idea for a Universal History, *supra* note 58, at 23 (sixth thesis: man needs a master).

follows: of the human person's naturally determined impulse to *happiness*, understood by Kant as a self-love⁹² dominated by experienced satisfaction with one's own condition (with the assurance that that satisfaction will last)⁹³ versus the rationally determined will to a *perfection* consisting essentially only in conformity for duty's sake to a moral law whose intelligibility is found not in the prospect of human fulfillment for its own sake but simply in the universalizability of principles directing choice. These dualisms block off Kant's view of all *intelligible* intrinsic human goods other than the good of practical reasonableness as such.

Kant rightly sees in practical reasonableness an intelligible worth (intrinsic goodness) which cannot be exhaustively reduced to any determinate state(s) of affairs which could be a technical objective. (Hence his justified rejection of all forms of consequentialism.) But just as the Critical philosophy inconsistently denies those forms of *understanding* of *reality* which Kant admits in the particular case of understanding the reality of the understanding and choosing subject (himself, oneself),⁹⁴ so too Kant inconsistently denies that we can understand aspects of human personal flourishing (other than practical reasonableness itself) as having an intelligible worth which cannot be exhaustively reduced to determinate states of affairs or definite objectives, but which—as inexhaustible prospects of human fulfillment—provide *reasons* for considering many possible determinate states of affairs to be choiceworthy opportunities.⁹⁵ These basic aspects of human flourishing—basic human goods—include not only practical reasonableness but also human life itself (and its transmission), knowledge (and aesthetic appreciation), excellence in performance (whether in “work” or “play”), and the interpersonal harmony (involving both respect and favour) which we call friendship or love in its various forms.⁹⁶

Now in friendship—including concern for one's political community—the friends envisage a truly *common* good which transcends both self-love and mere altruism⁹⁷—and which also transcends Kant's dual-

92. See Critique of Practical Reason, *supra* note 33, at *22, *70, *73.

93. See The Doctrine of Virtue, *supra* note 41, at *386; see also I. Kant, Critique of Judgement *434 n.1 (J. Meredith trans. 1973) (“enjoyment”).

94. See the illuminating discussion in G. Grisez, Beyond the New Theism: A Philosophy of Religion 152–80, 155–56 (1975) (discussing Critique of Pure Reason, *supra* note 2, at *A546–7/B574–5).

95. See J. Finnis, J. Boyle & G. Grisez, *supra* note 60, at ch. 10.

96. On basic human goods, see J. Finnis, *supra* note 19, at 81–99; on their intelligibility, see J. Finnis, *supra* note 21, at 26–55. Not envisaging a multiplicity of basic aspects of human worth, Kant also did not steadily envisage the need for and possibility of requirements of practical reasonableness other than the requirement of consistency (universalizability) in choosing (which he eked out with a requirement of mastery over the animal inclinations). On the multiple requirements of right choosing, see J. Finnis, *supra* note 19, at 100–33; J. Finnis, *supra* note 21, at 66–79; J. Finnis, J. Boyle & G. Grisez, *supra* note 60, at chs. 10–11.

97. On friendship and the idea of common good, see J. Finnis, *supra* note 19, at

istic reduction of motives to the stark alternatives: self-love or sheer duty; desire for sensuous satisfactions or bare respect for one's rationality itself.

Given the more adequate concept of common good, there is no reason (and certainly nothing in Kant or our neo-Kantians which gives good grounds) to conclude that the justifying rationale of civil association and law is anything other than the good of all those who, by their cooperation, can reasonably hope to advance the common good of their community. Favouring the good of one's fellow-citizens can rightly involve the use of coercive measures, primarily to dissuade them from morally evil forms of life, and secondarily to punish them, *not* for violating "duties to themselves," but for willfully failing to cooperate in the community's effort of reducing those evils and of maintaining forms of life more conducive to authentic human flourishing.⁹⁸

A paper on Kant and neo-Kantians is certainly not the place to offer a full, and fully nuanced, justification and critique of laws proscribing and/or withholding juridical recognition and lawful status from drug-use, sodomy, assistance in suicide, and so forth.⁹⁹ I add just one or two remarks.

Certainly there is room for much caution—not the *a priori* risk-aversion of Rawls, but the sober Kantian reminder that, if man is an animal who needs a master, the masters, too, are just such animals.¹⁰⁰ Masters are prone to do evil not merely out of self-love or malice, but out of misguided zeal. And very common forms of misguided zeal include (i) mistaking the common good for some determinate end-state to which present individual lives are treated as mere means, and (ii) forgetting that the common good is instantiated in the good of each and every individual, that no individual has *a priori* a claim to a fuller share in the common good than any other individual, and that the individual good includes some aspects of practical reasonableness which Kant's dualism of sense versus reason led him to slide over: the inner integrity by which senses and inclinations are not merely mastered by but in partnership with reasonableness, and the outer authenticity by which one's bodily and social behavior do not merely simulate an imposed or opportunistically convenient pattern but actually manifest one's conscientious will.

141–44, 154–58, 210–18; on "altruism," see *id.* at 158.

98. Thus the West German Basic Law (1949), whose Kantian inspiration is often mentioned by commentators, rightly provides in Art. 11(1) that everyone has the right to the free flourishing of his personality provided that he does not violate the rights of others or the constitutional order "or the moral law [*das Sittengesetz*]." Thus the Basic Law is more Kantian than neo-Kantian.

99. See J. Finnis, *supra* note 19, at 221–23, 229–30; V. Haksar, *Equality, Liberty, and Perfectionism* 236–57 (1979); J. Raz, *supra* note 12, at 390–95, 400–17. The latter two books state strong reasons for rejecting the neutrality principle, and thus go far towards undermining the harm principle.

100. See *Idea for a Universal History*, *supra* note 58, at 23.