

# ON THE FOUNDATIONS AND NATURE OF MORALITY

ROBERT P. BURNS\*

## INTRODUCTION

Remarks on so vast a topic as the foundations and nature of morality must be focused by the subject with which the Symposium is concerned—namely, the relationship between law and morality. Insofar as half of “law and morality” is “morality,” the Symposium topic necessarily brings the foundations and the nature of morality into play. And insofar as the nature and foundations of morality have been debated against the background of more fundamental philosophical issues, the entire history of ideas is relevant to the Symposium. Present-day lawyers addressing the relationship of law and morality should have some of the humility that knowledge of this intellectual history requires. Discussion of this history should not lead to a relativistically induced silence on these subjects, but can occasion some modesty, care, and certainly, tolerance.

This Essay does not address a discrete contemporary issue or attempt to provide a theory concerning the relationship of law and morality. Instead, it offers some historical observations and important arguments relevant to the contemporary moral debate. Specifically, this Essay includes three sets of observations about morality’s foundations, and three shorter remarks about its nature.

### I. THREE HISTORICAL OBSERVATIONS ON THE FOUNDATIONS OF MORALITY

There has been a tectonic shift in the dominant philosophical terms over the course of Western intellectual history. This shift, along with important changes in Western social identity, has

---

\* Professor of Law, Northwestern University School of Law.

rendered unavailable to contemporary thinkers many of the premises that have underlain morality for most of Western history.<sup>1</sup> Similarly, the Hebrew-Christian religious tradition—which constantly surrounded, supported, and for many, directly informed moral inquiry—no longer has a hold on important segments of contemporary society.

The contemporary moralist inevitably stands in a historical tradition that defines the types of arguments from which he can draw and the appeals he can make. Awareness of what precedes him should therefore aid the moralist in making the most coherent and convincing case for his understanding of the relationship between law and morality.

#### A. *The Shift in Philosophical Terms*

The dominant selection<sup>2</sup> of philosophical terms has changed over the centuries. Philosophers have always sought to determine what the objects of their efforts are, to discover what it is possible and fruitful to know or think. The first of this Essay's six remarks tracks the shift in thought over the centuries about the proper starting point for philosophical and ethical inquiry. This shift has important implications for those attempting to explain morality.

##### 1. *The Metaphysical and Teleological Terminology of the Pre-Moderns*

Until the late modern age, great philosophers generally chose an ontological or metaphysical selection of terms. For example, Plato, Aristotle, St. Augustine, St. Thomas Aquinas, Baruch Spinoza, and G.W. Leibniz all in quite different ways sought to gain knowledge of the nature of things.<sup>3</sup> Within the

---

1. See generally CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

2. I borrow the term "selection" from American philosopher Richard McKeon. See David J. Depew, *Between Pragmatism and Realism: Richard McKeon's Philosophical Semantics*, in *PLURALISM IN THEORY AND PRACTICE: RICHARD MCKEON AND AMERICAN PHILOSOPHY* 29, 39 (Eugene Garver & Richard Buchanan eds., 2000).

3. See, e.g., PLATO, PHAEDO 97c6–97d1 (David Gallop trans., Clarendon Press 1975) ("[S]o if anyone wanted to find out the reason why each thing comes to be or perishes or exists, this is what he must find out about it: how is it best for that thing to exist, or to act or be acted upon in any way?"); THOMAS AQUINAS, ON TRUTH, Q. 10, art. 5 (1259), reprinted in *AN AQUINAS READER* 239 (Mary Clark ed.,

contexts of their philosophies, these thinkers sought the foundations of morality in the nature of man, his place in the cosmos, and his constitutive relationship with the divine. Acting morally meant realizing man's nature.<sup>4</sup> It made sense for Augustine to urge, "Become who you are,"<sup>5</sup> because the nature of any being could be fully understood teleologically. One's true nature was understood as the actualization of a potency that exists in the nature of things.

After the beginning of the Christian era, although the metaphysical understanding continued to reign, it was inevitable that its teleologies would be understood theologically. Man was still defined primarily by reference to the nature of things, but now with specific reference to the nature of the ultimate thing: God. As Dante Alighieri put it, faithful to the Thomistic synthesis that animated his great poem, "The glory of the One who moves all things permeates the universe but glows in one part more and in another less."<sup>6</sup> Dante defined the parts of the universe by how and to what degree God glowed in them.

## 2. *Immanuel Kant and the Shift to Epistemology*

The "Copernican revolution" effected by the critical philosophy of Immanuel Kant changed the focus of basic philosophical inquiry from the nature of things to the characteristics of the human mind.<sup>7</sup> The world as we experience it can be under-

---

Fordham Univ. Press 1972) ("Human intellectual knowledge is directed, first, to material things according to their form . . .").

4. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 54 (2d ed. 1984) (stating that the Enlightenment-era thinkers' "project of finding a basis for morality had to fail" because they "[a]ll rejected any teleological view of human nature, any view of man as having an essence which defines his true end").

5. St. Augustine is alleged to have said these words to those he baptized. See JEFFREY VANDERWILT, *A CHURCH WITHOUT BORDERS: THE EUCHARIST AND THE CHURCH IN ECUMENICAL PERSPECTIVE* 123 (1998).

6. DANTE ALIGHIERI, *PARADISO*, canto I, lines 1–3 (Allen Mandelbaum trans., Univ. of Cal. Press 1982) (1321).

7. Kant likened his own innovations regarding metaphysics to Copernicus's discovery that the Earth revolved around the Sun and not vice-versa:

Up to now it has been assumed that all our cognition must conform to the objects . . . [L]et us once try whether we do not get farther with the problems of metaphysics by assuming that the objects must conform to our cognition. . . . This would be just like the first thoughts of Copernicus, who, when he did not make good progress in the explanation of the celestial motions if he assumed that the entire celestial host revolves

stood philosophically, Kant argued, only when we understand the ways in which its basic structure is rooted in the conditions of the possibility of all knowledge imposed by our minds. Knowledge begins not with metaphysics or teleology but with epistemology. We do not know the things themselves; we know the world only as finite or “receptive” knowers can see it.<sup>8</sup> We can *know* only what appears to common sense and empirical science, neither of which gives access to the things themselves. We cannot *know* supersensible objects—objects transcending all sensory experience—including, most importantly, the human soul and God (though we inevitably *think* these concepts for purely practical purposes).<sup>9</sup>

Even within this epistemological selection of philosophical terms, however, Kant resisted the conclusion that moral notions are merely the expression of the contingent characteristics of the human mind, characteristics that empirical science could exhaustively explain.<sup>10</sup> Indeed, he would balk at the theories of some schools of sociobiology.<sup>11</sup> Although Kant’s philosophy saw our perception of the world as dependent on the contingent characteristics of our cognitional equipment, he insisted on the importance of moral concepts being rooted in something *fundamental*, something transcending the finite world that we can know through common sense or science. He did so out of necessity. He wanted moral concepts that could bind, that would have the power that Plato tried to identify in his *Phaedo*: the power to create the kind of obligation that would demand

---

around the observer, tried to see if he might not have greater success if he made the observer revolve and left the stars at rest.

IMMANUEL KANT, *CRITIQUE OF PURE REASON* 110 (Paul Guyer & Allen W. Wood eds. & trans., Cambridge Univ. Press 1998) (1781).

8. We are “receptive” knowers, dependent on sense perception, because we are finite. Unlike God, we do not create the objects of our worldly knowledge.

9. For a summary of Kant’s epistemology, see *AN IMMANUEL KANT READER* 15–20 (Raymond B. Blakney ed. & trans., 1960). Blakney summarizes the first great work of Kant’s critical period, *CRITIQUE OF PURE REASON* (1781).

10. For a summary of Kant’s absolute morality—his “categorical imperative”—see *KANT READER*, *supra* note 9, at 182–86.

11. See, e.g., LAURENCE R. TANCREDI, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* 73–77 (2005) (arguing that modern neuroscience has revealed that decisions in moral contexts traditionally thought to be the result of rational deliberation are in fact determined primarily by physical influences on the brain).

that a soldier stay and defend his position in the face of certain death, just to slow the advance of the enemy, for the benefit of the rest of the army and the city.<sup>12</sup> Kant realized that if moral principles were entirely contingent, they would not bind categorically. For him, it was essential that morality yield *categorical* imperatives, not simply instrumental *hypothetical* imperatives that bind only once one chooses to pursue some more or less arbitrary end.

In ethics, Kant remained a Platonist, though without claiming to know the teleological structure of the universe. When we act ethically in Kant's world, we are still citizens in the "kingdom of ends," which are ultimate and unconditioned by our contingent modes of knowing.<sup>13</sup> Deeply at odds with his otherwise very modern philosophy, Kant maintained that experiencing moral obligation gives us what we might call "participant observer"<sup>14</sup> understanding of aspects of the intelligible world.<sup>15</sup> Ethics was exceptional, because in it we could overcome, though only practically, the epistemological limitations that denied us a vision of reality in the theoretical or scientific deployment of our reason. Friedrich Nietzsche would later taunt that this disconnect between Kant's more traditional moral philosophy and his otherwise distinctively modern conceptions of knowledge made Kant the "great delayer"<sup>16</sup> of the "onslaught of modernity" that Nietzsche foresaw.<sup>17</sup>

---

12. PLATO, *supra* note 3.

13. See KANT READER, *supra* note 9, at 190–95.

14. I mean "participant observer" consciousness in the sense that one who is normally limited to the role of observer in most of Kant's philosophy can, in ethics, truly "participate" in the "moral reality" in which he is a member. For an example of this meaning of "participate," see R. E. Allen, *Participation and Predication in Plato's Middle Dialogues*, 69 PHIL. REV. 147 (1960). I do not mean to make any reference to "participant observation" theories of research. See, e.g., Morris S. Schwartz & Charlotte Green Schwartz, *Problems in Participant Observation*, 60 AM. J. SOC. 343 (1955).

15. This is one of the reasons he (rather oddly) seeks moral laws that are applicable to all rational creatures, not only to human beings. See KANT READER, *supra* note 9, at 185–86.

16. GEORGE P. GRANT, ENGLISH-SPEAKING JUSTICE 79 (House of Anansi Press 1985) (1974).

17. See HANNAH ARENDT, ON REVOLUTION 196 (1963).

### 3. *The Twentieth Century: Language and Action as Basic Terms*

In the twentieth century, after the general decline of Kant's systematic philosophy (aspects of which lived on for a time as Neo-Kantianism),<sup>18</sup> the dominant selection of philosophical terms came to focus on language and action, both thought to be more accessible than either metaphysical knowledge or the structure of the mind. The major thinkers of the age each used these new idioms. John Dewey's form of pragmatism largely rejected conceptions of morality and law rooted in preexisting entities, metaphysical or epistemological. Instead, he thought that moral and legal questions should be determined by an evaluation of consequences. Even his religious thought was decidedly practical and anti-metaphysical.<sup>19</sup> Similarly, Ludwig Wittgenstein's later philosophy identified his "ultimates"—the most fundamental concepts to which one can appeal—as modes of *acting*, perhaps related to even more basic "form[s] of life," themselves simply complex forms of practice.<sup>20</sup> And Martin Heidegger tried to show the primacy of the practical, at a level more basic than scientific or theoretical knowledge, in the very constitution of the human world.<sup>21</sup>

Although the evolution from ontological to epistemological to linguistic and practical was not absolute,<sup>22</sup> there was clearly a colossal shift in the dominant idiom over the centuries. This shift was not merely a matter of fashion. The largely theoretical

---

18. The Neo-Kantians struggled in the late nineteenth century "to eliminate the metaphysical elements from Kant's philosophy and to provide a fully post-metaphysical account of human determinacy and human politics." CHRIS THORNHILL, *GERMAN POLITICAL PHILOSOPHY: THE METAPHYSICS OF LAW* 239 (2007). Neo-Kantians include Friedrich Adolf Trendelenburg and Karl David August Röder. *Id.*

19. See JOHN DEWEY, *A COMMON FAITH* 2 (1934) ("I shall develop another conception of the nature of the religious phase of experience, one that separates it from the supernatural and the things that have grown up about it."); see also STEVEN C. ROCKEFELLER, *JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM* (1991).

20. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 88e, para. 241 (G.E.M. Anscombe trans., 2d ed. 1997) (1953).

21. See MARK OKRENT, *HEIDEGGER'S PRAGMATISM* 39–44 (1988).

22. Alfred North Whitehead, for example, remained in the metaphysical tradition. So did the Neo-Thomist philosophers, such as Étienne Gilson and Jacques Maritain. See, e.g., ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* (1929); ÉTIENNE GILSON, *GOD AND PHILOSOPHY* (1941); and JACQUES MARITAIN, *EXISTENCE AND THE EXISTENT* (Lewis Galantieri & Gerald B. Phelan trans., 1948).

debate over the appropriate selection of basic philosophical terms was intertwined with other important intellectual and cultural developments in the modern world, such as meditations on the significance of the practical and theoretical successes of modern science, and the practical attraction of tolerance and pluralism that followed the carnage of the European religious wars. The link between philosophical terminology and broader intellectual developments leads to this Essay's second remark on the foundations of morality.

### B. *The Unavailability of Older Foundations*

If philosophical approaches to the foundations of morality have shifted over time, the next question is whether such shifts render the theories of previous ages unavailable. The answer to this question has important consequences for the relationship between law and morality, and certainly for the resources available to defend morality. One who wishes to defend morality based on premises now unavailable—by using, for example, the largely abandoned metaphysical selection of terms—must decide whether to adapt his moral theories to the temper of his age or attempt to recover and make available once again the disfavored premises.

#### 1. *Unavailability Because of Intellectual Developments*

Foundations can become unavailable for two different reasons. First, intellectual developments, such as new theories, can make old theories seem obsolete or inadequate. For example, Kant's critique effectively undermined rationalist theories of self-evident moral principles, on which earlier modern philosophers had built.<sup>23</sup> Similarly, by the twentieth century the selection of philosophical terms had so drastically departed from Aristotle's metaphysical idiom that even an admirer like Alasdair MacIntyre was forced to concede that Aristotle's moral philosophy must be separated from the "metaphysical biology" with which it was originally intertwined.<sup>24</sup>

---

23. See ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 243 (Fritz C.A. Koelln & James P. Pettegrove trans., 1955). Kant's *Critique of Pure Reason*, for example, has been called "the most thorough and devastating of all anti-metaphysical writings." W.H. WALSH, *METAPHYSICS* 38 (Gregg Revivals 1991) (1963).

24. MACINTYRE, *supra* note 4, at 162–63.

Hannah Arendt poignantly described such unavailability in an interchange with fellow émigré Hans Jonas in 1972. She identified the mid-twentieth century's absence of theories that provided secure ontological foundations for morality ("ultimates," in her terms):

[I]f our future should depend on [whether] . . . we will get an ultimate which from above will decide for us (and then the question is, of course, who is going to recognize this ultimate and which will be the rules for recognizing this ultimate—you really have an infinite regress here, but anyhow) I would be utterly pessimistic. If that is the case then we are lost. Because this actually demands that a new god will appear.

. . . [B]ecause this [God] had disappeared [after the Middle Ages] Western humanity was back in the situation in which it had been before it was saved . . . by the good news—since they didn't believe in it any longer. That was the actual situation. . . .

. . .

. . . I am perfectly sure that this whole totalitarian catastrophe would not have happened if people still had believed in God, or in hell rather—that is, if there were still ultimates. There were no ultimates. And you know as well as I do that there were no ultimates which one could with validity appeal to. One couldn't appeal to anybody.<sup>25</sup>

When Arendt said that "there were no ultimates which one could with validity appeal to," she meant more than simply that totalitarians such as the Nazis were not open to those appeals. She meant that many of those whom the totalitarians persecuted would not have believed *themselves* had they made such appeals. Intellectual developments had rendered "ultimates," or metaphysical foundations, unavailable not only to those who had strayed furthest from traditional morality, but also to typical members of society.

---

25. HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 313–14 (Melvyn A. Hill ed., 1979).

## 2. *Unavailability Because of Social Identity*

There is another way besides intellectual developments that understandings or theories become unavailable. Great philosophies are theoretical expressions of the deep structure, the “form[s] of life,” of an era.<sup>26</sup> Knowledge is, in a deep sense, social. Alasdair MacIntyre has argued that a technological society such as ours, whose structure is formed by a purely instrumental rationality, has no place for understandings of morality in any traditional sense.<sup>27</sup> Moral foundations are unavailable to us not merely because they fail to comport with the latest philosophical developments, but because they are inconsistent with the deepest structure of our social organization, which is in turn replicated in our individual self-understandings. Our only hope is to await “another . . . St. Benedict”<sup>28</sup> who can establish forms of community, discontinuous with the broader society, within which the moral life can flourish.

## 3. *The Consequences of Unavailability for the Contemporary Moralist*

The potential unavailability of metaphysical foundations raises a question of how one who wishes to give an account of morality in our age should proceed. Must he first accept the end of the metaphysical era, the unavailability of the old foundations, and then start over, providing a new understanding of morals and politics either by refounding morality in the contemporary selection of terms or abandoning foundations altogether? Arendt and other post-metaphysical thinkers thought so.<sup>29</sup> Alternatively, is metaphysics, regardless of its current availability, indispensable to morality? Is morality, even understood strictly as a matter of reason and not faith, unavoidably intertwined with metaphysical perspectives and dependent upon metaphysical foundations? Rather than give up on the discarded language of metaphysics, must the would-be moralist struggle to recover it?

---

26. WITTGENSTEIN, *supra* note 20, § 88e, para. 241.

27. MACINTYRE, *supra* note 4, at 51–61.

28. *Id.* at 263.

29. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 298–99 (1973).

C. *The Source of Moral Obligation: Reason or Revelation*

The third set of questions about the foundations of morality concerns the relationship between reason and revelation. This relationship is, I suspect, important to many lawyers and scholars interested in the topic of law and morality.

Until very recently, Western understandings of morality developed in a religious context that philosopher Alan Donagan called the “Hebrew-Christian” tradition.<sup>30</sup> The practical sources for moral thinking in this tradition were key texts of the Hebrew and Christian Scriptures, and moral obligation ultimately derived from God’s commands. Important segments of society, however, are no longer immersed in the Hebrew-Christian tradition and do not view Scripture as an authoritative source for their moral lives and decisions. Much as the metaphysical foundations of morality have become unavailable over time, the theological framework, within which traditional conceptions of morality developed, is rejected by many.<sup>31</sup>

Historically, there has been a spectrum of positions concerning the relationship of reason and revelation on moral matters. One central question is whether moral obligation stems from God’s revealed commands or from a source available to natural reason, some form of natural law. This question has been intertwined with issues of God’s omnipotence, and answers to it cover the gamut. Some thinkers, generally known as “voluntarists,” argued that God’s will expressed in His commands is as far as we can or need go. They feared that placing morality in the realm of natural reason might limit God’s power and authority.<sup>32</sup> Many Protestant thinkers were suspicious of the Catholic invocation of natural law, considering it an attempt to avoid the commands of the Gospel.<sup>33</sup> Occupying the doctrinal middle ground were other Christian moralists (“intellectual-

---

30. ALAN DONAGAN, *THE THEORY OF MORALITY* 27 (1977).

31. Indeed, questioning that framework provides grist for many widely read contemporary writers. *See, e.g.*, CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007); RICHARD DAWKINS, *THE GOD DELUSION* (2006); DANIEL C. DENNETT, *BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON* (2006); SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2004).

32. *See* 1 ERNST TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 328–30 (Olive Wyon trans., 1931).

33. *Id.*

ists”)—St. Thomas Aquinas not least among them—who went to great lengths to show that at least *some* of the commands in the Bible could be derived directly from the light of reason, as they thought St. Paul had suggested in his letter to the Romans.<sup>34</sup> In polar opposition to the theological voluntarists, some eighteenth-century thinkers argued that *any* ultimate appeal to scriptural commands violated the first principle of enlightenment, as expressed by the maxim “Dare to know!” in Kant’s famous essay.<sup>35</sup> To these thinkers, the enlightenment of man by liberation from his self-imposed tutelage,<sup>36</sup> and his achievement of autonomy, required him to seek the foundations of moral obligation in his own reason.<sup>37</sup> Reason was the ultimate touchstone, even regarding which parts of the scriptures to accept and which to reject.

Any exploration of morality must include a search for the source of moral obligation. Those with a commitment to revealed religion will feel the pressure of the question particularly acutely.

## II. THREE IMPORTANT ATTRIBUTES OF PHILOSOPHICAL PERSPECTIVES

This Essay now turns from the foundations of morality to its nature, identifying some attributes of moral systems relevant to the relationship between law and morality. Every conception of morality is determined substantially by the resolution of three issues. First, the relationship between moral theory and ordinary moral practice. Second, the form, either rule-based or nar-

---

34. *Romans* 2:14–15 (New King James) (“[F]or when Gentiles, who do not have the law, by nature do the things in the law, these, although not having the law, are a law to themselves, who show the work of the law written in their hearts . . .”). St. Thomas Aquinas cites these verses while setting forth his natural law theory. See THOMAS AQUINAS, *Summa Theologica* I–II, Q. 91, art. 2, *sed contra*, in *THE TREATISE ON LAW* (R.J. Henle ed. & trans., 1993).

35. IMMANUEL KANT, *What Is Enlightenment?*, in *FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT?*, at 85 (Lewis White Beck trans., Liberal Arts Press 1959) (1785) (“*Sapere aude!* [*Dare to know!*] ‘Have courage to use your own reason!’—that is the motto of enlightenment.”). The slogan was also adopted in 1736 by the Society of the Friends of Truth, an “important circle in the German Enlightenment.” *Id.* at 85 n.1.

36. *Id.* at 85 (“Enlightenment is man’s release from his self-incurred tutelage.”).

37. *Id.* (“Self-incurred is this tutelage when its cause lies not in lack of reason but in lack of resolution and courage to use it without direction from another.”).

rative-based, that a moral system's propositions take. Third, the range of application of moral norms—the spheres of human action in which a system of morality defines what is right.

A. *Morality—Theory, Practice, or Both?*

The first of these attributes is the relationship between morality and the actual practices of a given society. Any conception of the nature of morality will be determined in large part by the closeness of or the distance between theory and practice. Some thinkers understand morality as virtually identical to the practices (and the considered judgments supporting the practices) of a given society. These thinkers tend to be conservative and suspicious of the spirit of abstraction in moral and political matters. Think, for example, of the morality in F.H. Bradley's essay *My Station and Its Duties*,<sup>38</sup> in Michael Oakeshott's critical essay *Rationalism in Politics*,<sup>39</sup> and G.F. Hegel's rationalized Burkean criticism of the "empty" Kantian morality of high principle.<sup>40</sup> These thinkers argue that actual moral practices are normative for a number of reasons: they have passed the test of actuality, they are demonstrably capable of being integrated into a way of life with other practices to form an organic whole, they express the concrete wisdom of a society, they are deeply embedded in the very identity of the citizenry, and they are less likely to occasion social catastrophe.<sup>41</sup> This mode of thought does not place actual practice beyond criticism, but criticism tends to be internal, incremental, and based on concrete norms

---

38. In this essay, Bradley argues for a social conception of the self and of morality. See generally F.H. BRADLEY, *My Station and Its Duties*, in *ETHICAL STUDIES* (2d. ed. 1927) (1876).

39. In this essay, Oakeshott vigorously denounces the involvement in politics of "the Rationalist"—he for whom the ultimate merit of all political and social institutions is to be measured by his abstract intellectual standards rather than by tradition or any benchmark outside his own mind. See generally MICHAEL OAKESHOTT, *Rationalism in Politics*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* (1962).

40. HEGEL'S PHILOSOPHY OF RIGHT 89–90 (T.M. Knox trans., Clarendon Press 1952) (1821).

41. Edmund Burke, for example, famously predicted that the preference of the French revolutionaries for abstract theory over societal practices and traditions would end in the tragedy of dictatorship. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 54–55 (Frank M. Turner ed., Yale Univ. Press 2003) (1790).

already embedded in some other aspect of the society: arguments in this vein are “rhetorical.”

Others argue that morality comprises not our practices, but the principles by which we may criticize those practices.<sup>42</sup> These thinkers, who separate morality from the actual practices of societies, must search for an Archimedean point of view from which to criticize the often or even always flawed practices of society. We need a place to stand when attempting to step outside of and criticize our own culture. Thus, Jeremy Bentham, who began his career with a critique of Blackstone,<sup>43</sup> invokes a universal principle of utility that can serve to criticize the “nonsense upon stilts” encrusted in all the practices of the common law and common morality.<sup>44</sup> Kant, the early John Rawls, and Jürgen Habermas likewise demanded a perspective transcending actual practices. Alan Donagan invokes the example of the simple man and martyr Franz Jägerstätter who, during the Third Reich, was able to find a place to stand in the principles of morality to resist the practices embraced by almost all those around him.<sup>45</sup>

B. *The Form of Fundamental Moral Principles:  
Rules or Narratives?*

A second definitive attribute of any conception of morality is the form its fundamental principle takes. Moral principles have often been expressed as rules. The Golden Rule, for example, and the injunction to love one’s neighbor as one’s self, are rules.<sup>46</sup> So are Kantian formulations of the categorical impera-

---

42. See, e.g., DONAGAN, *supra* note 30, at 1–2.

43. See generally JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT* (J.H. Burns & H.L.A. Hart eds., Cambridge Univ. Press 1988) (1776).

44. Bentham first set forth his principle of utility in JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 11–12 (J.H. Burns & H.L.A. Hart eds., Methuen & Co. 1982) (1789). The famous phrase “nonsense upon stilts” comes from his essay *Anarchical Fallacies*, in *BENTHAMIANA: OR, SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM* 67 (John Hill Burton ed., Gaunt, Inc. 1998) (1824).

45. See DONAGAN, *supra* note 30, at 15–17. For a more detailed telling of the story of Jägerstätter, see GORDON C. ZAHN, *IN SOLITARY WITNESS: THE LIFE AND DEATH OF FRANZ JÄGERSTÄTTER* (1986).

46. In its Christian forms: “And just as you want men to do to you, you also do to them likewise,” *Luke* 6:31 (New King James), or “Therefore, whatever you want men to do to you, do also to them, for this is the Law and the Prophets,” *Matthew*

tive: "Act so that the maxim of your action may be willed as a universal rule!" and "Act so that you treat the humanity in your person or in another always as an end and not solely as a means!"<sup>47</sup> There are deep questions about the relationships between moral rules and actual moral norms that inform concrete decisions.

Not all thinkers understand the ultimate touchstone of morality to be rules. Some have suggested that what is most basic is not rules, but narratives.<sup>48</sup> Those can be, for example, the narratives of the Exodus, the Gospel, or the American Founding. The promulgation of rules may be part of those stories, but the stories themselves provide moral sources that go well beyond the rules. Among contemporary legal thinkers, Milner S. Ball seems to fall within this perspective.<sup>49</sup>

### C. *The Moral Realm—or is it Realms?*

Finally, and crucially for this Symposium, the nature of morality is also defined by how widely truly moral norms apply. We live our lives within a number of overlapping social spheres: we are members of a family, have friends, belong to a neighborhood and an occupation or a profession, may be members of a church, function as consumers and sellers, and act in various ways as citizens, as legal subjects, and as participants in a global economy. Do distinctively moral norms apply to our actions across all of these spheres, or only to those that take place in local, face-to-face communities? Do moral norms apply to the political and economic spheres, or are the norms internal to those spheres of action quite distinct from the norms we call moral?

Some conceive of morality narrowly, as a system of rules, excuses, and justifications applicable only to face-to-face relations. Others conceive of morality broadly, arguing that it ap-

---

7:12 (New King James). This rule was first set forth in the Hebrew Scriptures as part of the Ten Commandments. See *Leviticus* 19:18. It was later re-emphasized in the New Testament as particularly important. See *Matthew* 22:34–40.

47. These are paraphrases of some of the categorical imperatives that Kant describes in *The Foundations of the Metaphysics of Morals*. KANT, *supra* note 35, at 39, 47.

48. See e.g., MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* 16–28 (1981).

49. *Id.*

plies to all the spheres of human action, and usually arguing that it applies analogously across the different spheres.

That brings us to what are perhaps the central questions posed in this Symposium: Do moral norms operate in the sphere of the law? Does morality determine legal rules and practices? If so, how? How should legal rules and practices take account of and treat moral norms if the legal sphere is a realm apart from the others?

#### CONCLUSION

One discussing the relationship between law and morality does so within his own historical age, with its own philosophical terms and its own religious commitments (or lack thereof). Man cannot jump over his own shadow. Only some foundations are available to him in his time, but some may be necessary to the type of morality he proposes, regardless of whether the age in which he lives cares to hear them or not. Similarly, any conception of morality he seeks to advance or attack must resolve a small number of basic issues that are unavoidable.

Both parts of this Essay aimed to equip the student of morality more fully for these two challenges. It is my hope that, having read this short and rough "traveler's guide" to morality, the reader will begin his trip through this Symposium with a better understanding of the terrain of this old subject.