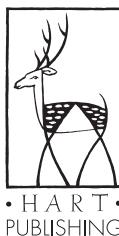


Ethical Rationalism and the Law

Edited by
Patrick Capps and Shaun D Pattinson



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1

The Past, Present and Future of Ethical Rationalism

PATRICK CAPPS AND SHAUN D PATTINSON

I. Introduction

What role does reason play in determining what, if anything, is morally right? What role does morality play in law? Perhaps the most controversial answer to these fundamental questions is that reason supports a supreme principle of both morality and legality. According to this view, reason can determine what is morally right (ethical rationalism) and requires us to identify what is legal by reference to what is morally right (legal idealism).

The strong form of ethical rationalism, attributable to Immanuel Kant and Alan Gewirth, attracts particular scepticism. This holds that reason can determine what is morally right (contrary to the moral relativist) *and* show the irrationality of the amoralist who denies that we have any moral obligations at all. Such a view has been the source of both deep inspiration and provocation for moral philosophers, yet discussion of how it might inform law has been neglected when considered against the extensive discussions of other approaches within legal philosophy. There are exceptions. Kant's legal theory was presented in his *Doctrine of Right*, which forms the first part of *The Metaphysics of Morals*, in 1797.¹ Moreover, in *Law as a Moral Judgment* (hereafter *LMJ*)² Deryck Beyleveld and Roger Brownsword defend an influential version of strong ethical rationalism and legal

¹ We refer to Kant's works as found in the Academy edition of the *Gesammelte Schriften*, and cite the volume and page number in square brackets. Translations are to I Kant, *Groundwork of the Metaphysics of Morals* (HJ Paton tr, *The Moral Law*, Hutchinson, 1972) [vol 4 in the Academy edition]; I Kant, *Critique of the Power of Judgment* (P Guyer and E Matthews tr, CUP, 2002) [vol 5 and, for 2nd edn, vol 20]; *The Metaphysics of Morals* (M Gregor tr, CUP, 1996) [vol 6]; and *Logic* (JM Young tr, *The Cambridge Edition of the Works of Immanuel Kant*, CUP, 1992, 527–88) [vol 9].

² D Beyleveld and R Brownsword, *Law as a Moral Judgment* (Sweet & Maxwell, 1986, reprinted by Sheffield Academic Press, 1994).

idealism, which Stanley Paulson suggests is ‘something akin to Kantian natural law theory’.³ Given continuing interest in Kant’s legal and moral philosophy, and as we reach the 30th anniversary of *LMJ*, we consider it appropriate to reflect on the influence and plausibility of ethical rationalism, and examine the insights it provides into the most pressing problems presented by contemporary legal philosophy and globalised society. That is the task of this collection.

II. The Strong Ethical Rationalism of Kant and Gewirth

Care must be taken with labels. Although morality and ethics are labels used by different people to capture divergent concepts, we are using the terms interchangeably. For our purposes, moral (or ethical) requirements refer to action-guiding imperatives that are both other-regarding and categorical. They are *other-regarding* or impartial in the sense that they require one to act in the interests of others and treat those interests as equal to one’s own. They are *categorical* in the sense that they override other demands and have force independent of one’s desires or inclinations. Strong ethical rationalism is the claim that acceptance of categorical other-regarding imperatives is a strict requirement of agential self-understanding. In our view, Immanuel Kant made this claim for the Categorical Imperative (CI) and Alan Gewirth made this claim for the Principle of Generic Consistency (PGC).

Kant declared that the ‘sole aim’ of his *Groundwork of the Metaphysic of Morals* was ‘to seek out and establish the supreme principle of morality’.⁴ Kant is often interpreted as seeking to show that anyone who accepts the ‘common idea’ of morality is logically required to accept the CI.⁵ Such an enterprise would involve defence of the CI from a moral point of view. It would seek to show only that agents who already accept that there are moral oughts must regard the CI as the supreme principle of those oughts. This is *weak ethical rationalism*. We, like many of the contributors of this book,⁶ understand Kant to have attempted something much more ambitious. Part 3 of the *Groundwork* sought to show that any ‘rational being with a will’, whatever that being’s views on morality, is rationally required to accept the CI. Kant sought to establish the CI ‘as a necessary law for all rational beings’ by showing that it is ‘connected (entirely *a priori*) with the concept of the

³ S Paulson, ‘Review of *Law as a Moral Judgment*’ (1994) 7 *Ratio Juris* 111.

⁴ [4: 392].

⁵ See, eg, RM Hare, *Moral Thinking: Its Levels, Method and Point* (Clarendon Press, 1981) 109, 162; D Gauthier, *Morals by Agreement* (Clarendon Press, 1986) 6–7; A Gewirth, ‘Foreword’ in D Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth’s Argument to the Principle of Generic Consistency* (University of Chicago Press, 1991) viii.

⁶ See especially the chapter by Beyleveld.

will of a rational being as such.⁷ This puts him firmly within the tradition we call strong ethical rationalism.

Gewirth adopts what he terms the ‘dialectically necessary method’. His method is ‘dialectical’ in the sense it ‘begins from assumptions, opinions, statements, or claims made by protagonists or interlocutors and then proceeds to examine what these logically imply’.⁸ It is ‘necessary’ in the sense that all the steps of the argument follow logically from understanding premises that cannot be coherently denied within this perspective. According to Gewirth,

Two kinds of beginning points and hence two kinds of dialectical methods may be distinguished. The dialectically contingent method begins from singular or general statements or judgments that reflect the variable beliefs, interests, or ideals of some person or group. The dialectically necessary method begins from statements or judgments that are necessarily attributable to every agent because they derive from the generic features that constitute the necessary structure of action.⁹

Thus, while a ‘dialectically necessary’ method operates within strong ethical rationalism, a ‘dialectically contingent’ method operates within weak ethical rationalism.

The protagonists and interlocutors of the dialectical method, indeed of all practical discourse, are agents. Only beings able to act for voluntarily chosen purposes—Gewirthian agents or Kantian rational beings with a will—are meaningful addressees of practical precepts. We therefore share Beyleveld’s view that Kant in the third part of the *Groundwork* sought to show the CI to be dialectical necessity.¹⁰ In other words, Kant and Gewirth share an epistemological strategy in relation to their moral philosophy. They both seek to demonstrate that the supreme moral principle is a maxim that I (that is, any agent) must accept in order for me to understand what it is for me to be an agent.

III. The Dialectically Necessary Argument for the PGC

Gewirth’s moral epistemology is drawn on, by way of critique or application, by all contributors to this collection. We are among those convinced by his dialectically necessary argument, as restructured and defended by Deryck Beyleveld in *The Dialectical Necessity of Morality*.¹¹ The skeletal outline below

⁷ [4: 426].

⁸ A Gewirth, *Reason and Morality* (University of Chicago Press, 1978) 43.

⁹ *ibid*, 43–44.

¹⁰ See D Beyleveld, ‘Gewirth and Kant on Justifying the Supreme Principle of Morality’ in M Boylan (ed), *Gewirth: Critical Essays on Action, Rationality and Community* (Rowman and Littlefield, 1999) 97.

¹¹ D Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth’s Argument to the Principle of Generic Consistency* (University of Chicago Press, 1991).

follows Beyleveld's division of the argument into three stages and his refinement of the relevant terminology.¹²

Stage I

In claiming to be an agent I must (by definition) accept that

- (1) 'I act (or intend to act) for a purpose that I have freely chosen'

which entails

- (2) 'My purpose is good'.

Since

- (3) 'There are generic conditions of agency',

I must accept

- (4) 'My having the generic conditions is good for my achieving my purpose *whatever* that purpose is', which is to say that 'My having the generic conditions is (categorically instrumentally) good'.

This entails

- (5) 'I (categorically instrumentally) ought to pursue and defend my having the generic conditions', which is to say that 'Unless I am willing to accept generic damage to my capacity to act, I categorically ought to pursue and defend my possession of the generic conditions of agency'.

Stage II

This entails

- (6) 'Other agents categorically ought not to interfere with my having the generic conditions *against my will*, and ought to aid me to secure them when I cannot do so by my own unaided efforts *if I so wish*',

which is to say,

- (7) 'I have both negative and positive rights to have the generic conditions'. In short, 'I have the generic rights'.

¹² See D Beyleveld, 'The Principle of Generic Consistency as the Supreme Principle of Human Rights' (2012) 13 *Human Rights Review* 1. See also SD Pattinson, *Influencing Traits Before Birth* (Ashgate, 2002) ch 1 and SD Pattinson, *Medical Law and Ethics* 4th edn (Sweet & Maxwell, 2014) ch 16.

Stage III

This entails (as shown by the Argument from the Sufficiency of Agency)

- (8) ‘I have the generic rights *because* I am an agent’

which, by the logical principle of universalisability, entails

- (9) ‘Every agent has the generic rights *because* it is an agent.’

Thus,

- (10) ‘All agents have the generic rights’.

Thus, by the logical principle of universalisability,

- (11) It is dialectically necessary *for every agent* to accept that *all* agents have the generic rights. This is the PGC.

A crucial step in this outline is the Argument from the Sufficiency of Agency (ASA), seminally presented by Gewirth on a single page of *Reason and Morality*.¹³ The ASA takes the form of a *reductio ad absurdum*. It seeks to show that an agent who denies that it is dialectically necessary for her to claim that she has the generic rights *because* she is an agent, denies that it is dialectically necessary for her to claim that she has the generic rights. This is because denying that she has the generic rights for the sufficient reason that she is an agent requires that she assert that she has the generic right because she has a property that is not necessarily possessed by all agents. However, this implies that if she lacked this property she would not have the generic rights, which contradicts the previously established statement, made on the basis of her claim to be an agent, that she has the generic rights. Thus, denying (8) contradicts (7). It follows that it is dialectically necessary for an agent to claim that she has the generic rights *because* she is an agent.

In the final chapter of this book, Beyleveld presents yet further refinements to the dialectically necessary argument. He argues that it requires acceptance of only three propositions:

- (a) The Principle of Hypothetical Imperatives (*PHI*) is dialectically necessary. That is, in order for me (that is, any agent) to understand what it is for me to be an agent, I must accept that: ‘if I wish to pursue a chosen purpose and having X, or doing Y, is necessary to achieve that purpose, then I ought to pursue/defend having X, or doing Y, or give up pursuing that purpose’.
- (b) There are generic conditions of agency.
- (c) Dialectically necessary commitments are not merely *distributively universal*, but also *collectively universal*. This is explained in the summary of Beyleveld’s chapter below.

¹³ See Gewirth, n 8, 110.

Beyleveld has elsewhere devised dialectically contingent arguments for the PGC, whereby the PGC is shown to follow from contingent premises that happen to attract widespread support.¹⁴ The most recent of these argues that the PGC follows from acceptance of Stage 1 of the dialectically necessary argument with the contingent assumption that others are worthy of equal concern and respect. This argument combines the least controversial stage of the dialectically necessary argument with an assumption made or implied by all human rights instruments and accepted by all theories committed to moral impartiality, including utilitarianism and all variants of weak moral rationalism.

IV. Applying the PGC

Gewirth's argument for the PGC incorporates or implies various dialectically necessary meta-principles for its application. The generic rights shown to be dialectically necessary are rights to whatever an agent needs to act or act successfully, regardless of that agent's specific purpose. These generic needs vary in degree.¹⁵ To act at all, an agent has basic needs, such as her life. To act successfully, she has nonsubtractive needs to those things required for her to maintain her current level of purpose-fulfilment and additive needs to those things required to increase her current level of purpose-fulfilment. A hierarchy of generic need and harm can therefore be measured by what Gewirth originally referred to as the 'criterion of degrees of necessity for action' and then later, in response to a critic's quibbles about necessity not varying in degree, referred to as the 'criterion of degree of needfulness for action'.¹⁶ Accordingly, *basic* generic rights take priority over *nonsubtractive* generic rights, which in turn take priority over *additive* generic rights.

The dialectically necessary argument requires agents to accept that all agents have both negative *and positive generic rights*. The positive rights are limited by two provisos.¹⁷ First, since dialectically necessary rights-claims derive from the agent's categorically instrumental need for the generic conditions, and the assistance of another agent is not so needed where she can achieve her purposes without assistance, it follows that she only has positive generic rights where she is unable to secure her possession of the generic conditions by her own unaided effort. This may be referred to as the 'own unaided effort' proviso.¹⁸ Secondly, since an agent

¹⁴ See D Beyleveld, 'Legal Theory and Dialectically Contingent Justifications for the Principle of Generic Consistency' (1996) 9 *Ratio Juris* 15 and D Beyleveld, 'The Principle of Generic Consistency as the Supreme Principle of Human Rights' (2012) 13 *Human Rights Review* 1.

¹⁵ See Gewirth, n 8, 53–63.

¹⁶ See *ibid*, 53–58 and A Gewirth, *The Community of Rights* (Chicago University Press, 1996) 45–46.

¹⁷ See Gewirth, n 8, 217–30.

¹⁸ Pattinson, *Influencing Traits Before Birth*, n 12, 35.

must first recognise the dialectical necessity of her own generic rights before recognising the dialectical necessity of other agents' equal generic rights, she has a duty to aid other agents to secure their generic conditions only when doing so does not deprive her of equivalent possession of the generic conditions, as measured by the degree of needfulness for action. This may be referred to as the 'comparable cost' proviso.¹⁹

In *Reason and Morality*, Gewirth argues that the 'Principle of Proportionality' operates to grant proportional generic rights to various groups who are 'excluded from the class of prospective purposive agents', such as young children, the mentally deficient, fetuses and non-human animals.²⁰ Gewirth's reasoning on this has been criticised by some of those who are convinced by the dialectically necessary argument to the PGC.²¹ As argued in a 2000 paper, the principle of proportionality cannot operate within the dialectically necessary argument to effect proportional generic rights for non-agents, because (a) the duties correlative to the generic rights are waivable by the rights-holder and only agents can meaningfully waive duties; (b) the subjects of the generic rights are also objects of corrective duties and only agents can meaningfully have duties to any degree, and (c) the Principle of Proportionality is a quantitative manipulator so can alter the quantity of a variable, but cannot, by itself, alter the quality of a variable.²² It does not, however, follow that the groups identified by Gewirth as non-agents are excluded from the remit of dialectically necessary moral duties. Deryck Beyleveld, with one of us, has argued that Gewirth made a further mistake when he assumed that those who appear to be non-agents are non-agents.²³ The categorical nature of the PGC renders the Principle of Precaution dialectically necessary, so that (i) those who appear to be agents must be treated as agents with the generic rights and (ii) those who appear to be only partial agents must be granted duties of protection tracking their presumed (but not exercisable) generic rights. Only when there is a single-variable conflict between the duties owed to two such beings may the Principle of Proportionality be invoked to give effect to the Principle of Avoidance of More Probable Harm.²⁴

In *LMJ*, Deryck Beyleveld and Roger Brownsword direct their minds to the implications of the dialectically necessary argument for legal theory. They argue that if we understand law as being concerned with the enterprise of subjecting

¹⁹ ibid, 35.

²⁰ Gewirth, n 8, 121–24, 140–45.

²¹ See J Hill, 'Are Marginal Agents "Our Recipients"?' in E Regis (ed), *Gewirth's Ethical Rationalism: Critical Essays with a Reply by Gewirth* (Chicago University Press, 1984) 180 and EB Pluhar, *Beyond Prejudice: The Moral Significance of Human and Nonhuman Animals* (Duke University Press, 1995) ch 5.

²² D Beyleveld and SD Pattinson, 'Precautionary Reasoning as a Link to Moral Action' in M Boylan (ed), *Medical Ethics* (Prentice Hall, 2000) 39, 46–47.

²³ See ibid and D Beyleveld and SD Pattinson, 'Defending Moral Precaution as a Solution to the Problem of Other Minds: A Reply to Holm and Coggon' (2010) 23 *Ratio Juris* 258. See also Pattinson, *Influencing Traits Before Birth*, n 12, ch 2.

²⁴ See further the chapter by Pattinson in this collection.

human conduct to rules,²⁵ then it is dialectically necessary to regard the PGC as the supreme principle of legality. Thus, we must side with *legal idealism*, which claims a necessary conceptual connection between law and morality, over *legal positivism*, which holds that law may be conceptually identified independently of morality.

V. Further Thoughts on the Relationship Between Kant and Gewirth

Kant's claims about agency and the supreme principle of morality ('What should I do?') inform his, often incomplete, answers to his other questions of humanity ('What can I know?' 'What may I hope?' 'What is Man?').²⁶ Given the connections between Kant and Gewirth set out above, some ethical rationalists have sought to revisit Kant's questions of humanity from a Gewirthian perspective. Thus, there is now a lively debate within ethical rationalism on human history and futures, free will, aesthetics and theism. These questions are likely to frame future debates within ethical rationalism and significant early steps towards answering these questions are to be found in some of the contributions to this collection.²⁷

As already mentioned, Stanley Paulson recognised long ago the connections between Kant's legal theory in *The Doctrine of Right* and the Gewirthian legal idealism offered by Beyleveld and Brownsword in *LMJ*.²⁸ However, beyond Paulson's work, the relationship between these two texts is not well discussed in the literature. We would suggest that this is partly because *The Doctrine of Right* is a very difficult text, even by Kant's standards, and also because Kant is sometimes seen as a legal positivist.²⁹ If this view of Kant is correct, it means that while Kant's and Gewirth's moral philosophies are similar for the reasons set out above, there is opposition between the legal theories found in *The Doctrine of Right* and *LMJ*. But while Kant's legal philosophy raises serious interpretative issues, it is far from settled that Kant is a legal positivist. For instance, Patrick Capps, in this collection, argues that conformity to the perfect duties and rights³⁰ that are implied by a

²⁵ See *LMJ*, 120, citing L Fuller, *The Morality of Law* (Yale University Press, 1969). For a summary and further discussion of this point, see Patrick Capps's chapter in this collection.

²⁶ [9: 25].

²⁷ See, eg, the chapters by Düring and Düwell, Westphal, Toddington and Beyleveld.

²⁸ See Paulson, n 3.

²⁹ See, eg, J Waldron, 'Kant's Legal Positivism' (1996) 109 *Harvard Law Review* 1535; and T Pöggie, 'Is Kant's Rechtslehre Comprehensive?' (1997) 36 *Southern Journal of Philosophy* 161.

³⁰ Kant considered the CI to give rise to both perfect and imperfect duties: see HJ Paton, *The Categorical Imperative: A Study in Kant's Moral Philosophy* (Harper and Row, 1965) esp 171. He considered perfect duties to be categorical, whereas imperfect duties admit exceptions and permit moral discretion ('playroom ... for free choice': [6: 390]). Examples of imperfect duties are charity, self-preservation, health and individual perfection. In contrast, the generic rights prescribed by the PGC are correlative to perfect duties only, in that they are owed unconditionally/categorically.

supreme principle of morality is a necessary condition for legal authority to arise in both *The Doctrine of Right* and *LMJ*.³¹

VI. Summary of Chapters

We have placed the chapters in this collection into two groups: ‘Philosophical Reflections’ and ‘Reflections on the Law’. These categories are somewhat rough and ready, because all the chapters advance philosophical reflections on or in response to ethical rationalism and thereby in some sense speak to the title of this book. Some, however, focus more on analysing central aspects of strong ethical rationalism and others focus on the implications of strong ethical rationalism for aspects of positive law or legal theory generally.

Philosophical Reflections

Both Stuart Toddington and Kenneth Westphal examine how Beyleveld’s reconstruction of Gewirth’s argument for the PGC is connected to the moral philosophies developed by Kant and Hegel.

Stuart Toddington argues that while Gewirth’s moral philosophy is generally associated with Kantian ethical rationalism, it also has much in common with the Hegelian concept of Recognition (*Anerkennung*).³² For Hegel, actual freedom can occur only when the subjective claims to possession emerging from potential or ‘abstract’ freedom are recognised as valid by another ‘free being’. Toddington’s view is that potentially free-beings must indeed mutually recognise as valid the subjective rights claims to whatever is necessary to actualise or externalise one’s ‘abstract’ potential for freedom, but this is because such claims are necessarily grounded dialectically and *monologically* from the standpoint of each individual agent. The account of dialectical necessity *prior* to the dialogue of mutual recognition is overlooked by Hegel because the very purpose of Hegel’s ethical critique is to reject the allegedly individualist consequences of Kant’s model of the isolated, self-validating monological subject. Toddington argues that Hegelians and Gewirthians arrive at an identical description of the purposive agent whereby the plight of actualisation can indeed be ‘recognised’, but for this term to operate in an ethically transformative way as the ground of mutual *duty*, more argument is required. In Gewirth, this supplement appears as the ASA (now re-articulated by

³¹ See also KR Westphal, *How Hume and Kant Reconstruct Natural Law: Justifying Strict Objectivity without Debating Moral Realism* (Clarendon, 2016).

³² In GWF Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* (Nicolai, 1821); GWF Hegel, *Hegel’s Philosophy of Right* (TM Knox tr, Clarendon Press, 1978).

Beyleveld); in *The Philosophy of Right*, we see instead the headlong leap into the allegedly self-substantiating claims to property right. According to Toddington, the fact that forms of property right can be derived from an account of the mutual obligations arising from a Gewirthian analysis of the sufficiency of agency, and that this argument is entirely compatible with Hegel's account of 'Abstract Right', suggest that its incorporation can but strengthen the undoubtedly important notion of Recognition in Hegel.

Kenneth Westphal assesses Beyleveld's refinements of Gewirth's argument for the PGC. Following Gewirth's intentions, Westphal's first part casts the argument for the PGC as a defence of moral duties against rational egoist objections. The specific objection is: if I (any agent) take a rational egoist position, I would accept that I should be opposed to unwilling interference with my access to and use of the generic conditions of agency, in view of my unique purposes, though because I value my unique purposes, not because I recognise that I am an agent. The counterargument is Gewirth's ASA, variously reformulated by Beyleveld. As mentioned above, this argument purports to show that the basis of my ought-claim to the generic conditions of my agency is my understanding of myself as an agent, which is dialectically necessary for me. For Gewirth and Beyleveld this argument is critical if the self-referring ought claim made at Stage 2 of Gewirth's argument is to be universalisable at Stage 3. Westphal endorses Beyleveld's response to the rational egoist, but does not fully support Gewirth and Beyleveld's subsequent universalisation of the claims that I must make about the generic conditions of agency. Instead, he argues that justifying the PGC requires assertoric, rather than dialectical, argument. Westphal argues that I must accept that I can only exercise my agency if I have the generic conditions of agency, but this acceptance implies that I accept that my capacity to freely pursue my purposes can only be actualised in a social system in which other agents act in accordance with my generic conditions of agency. Further, I must likewise afford the same freedom to others: if this arises as a valid (and unavoidable) claim for me because I am agent, then 'no one can justify rationally ... arrogat[ing] to him- or herself generic entitlements s/he denies to anyone else'. Hence, Westphal argues, such a social system is, assertorically, a precondition for possession and exercise of the generic rights. Deryck Beyleveld responds in the concluding chapter of this collection.

Dascha Düring and Marcus Düwell take up the challenge of revisiting Kant's questions of humanity from a Beyleveldian perspective. In the *Critique of the Power of Judgment*, Kant explores the possibility of harmonising practical reason (which requires agents to accept the moral law) and theoretical reason (which requires agents to accept the law of nature) as dimensions of (self)understanding that reason in first instance requires us to distinguish.³³ Beyleveld contends that the postulates that Kant connects *a priori* with the idea of the moral law (free will, God, immortality and the *summum bonum*) should be seen *not* as objects of faith,

³³ I Kant, *Critique of the Power of Judgment* (P Guyer and E Matthews tr, CUP, 2002).

but as objects of *rationally required hope*.³⁴ Düring and Düwell build on Beyleveld's ideas on the *summum bonum* (the idea of the highest good) as an object of hope and fear in the attempt to secularise Kant's speculations regarding the possible unity of reason. They endorse the view that hope and fear are to be understood in a way that does not reduce to belief or faith, 'but is rather characterised by a radical epistemic openness towards the possible future'. This leads them to concur with Beyleveld's conclusion that the capacity to hope and fear is a necessary precondition for the possibility of agential self-understanding as such. They proceed to develop the capacity for hope and fear in light of the faculty of *feeling* that Kant introduces as a distinct phenomenological sense in the *Critique of the Power of Judgment*.³⁵ This entails an understanding of hope and fear that considers them as *aesthetically structured* forms of experience and judgement. Düring and Düwell then develop this line of understanding to provide an alternative to the 'Standard Account' of hope, as involving desiring and estimating a probability.³⁶

Michael Boylan begins with Beyleveld and Brownsword's analysis of consent in medical ethics and law.³⁷ He argues that Beyleveld and Brownsword's view is to be contrasted with the social contractarian tradition, because their view holds that legal obligation arises from conformity to the PGC, rather than from consent to the establishment of state institutions. Boylan compares his reconstruction of Beyleveld and Brownsword's view to contractarian moral and political philosophers such as Charles Beitz and John Rawls.³⁸ He argues that contractarian grounds for legal obligation can produce 'bad' outcomes, not against one's prudential valuation of well-being, but against moral principle. A better approach, Boylan contends, is one that grounds the fundamental justification of the law in morality, such as a 'naturalistic moral theory', which he considers to be epitomised by the PGC.

Reflections on the Law

The remaining chapters focus on the relevance of ethical rationalism to law, either in terms of interpreting positive law or legal theory more generally. The contributors thereby take the debate beyond the traditional concerns of legal theory into areas such as the relationship between morality and international law, and the impact of ethically controversial developments or practices on legal understanding.

³⁴ See D Beyleveld and P Ziche, 'Towards a Kantian Phenomenology of Hope' (2015) 18 *Ethical Theory and Moral Practice* 927, esp 929. See also D Beyleveld, 'Hope and Belief' in RJ Jenkins and E Sullivan (eds), *Philosophy of Mind* (Nova Science Publishers, 2012) 1.

³⁵ [20: 206].

³⁶ Associated with RS Downie 'Hope' (1963) 24(2) *Philosophy and Phenomenological Research* 248 and JP Day, 'Hope' (1969) 6(2) *American Philosophical Quarterly* 89.

³⁷ D Beyleveld and R Brownsword, *Consent in the Law* (Hart, 2007).

³⁸ C Beitz, *The Idea of Human Rights* (OUP, 2011) and J Rawls, *The Law of Peoples* (Harvard University Press, 2001).

Shaun Pattinson analyses two challenges to advance refusals of life-sustaining treatment. The first challenge is determining whether an advance refusal sufficiently represents the now incompetent patient's will on what should happen in the situation in which she now finds herself. The second challenge, which is the particular focus to Pattinson's chapter, is the 'personal identity objection' to giving effect to a now incompetent's patient's prior will. According to this objection, the process that renders the individual incompetent will often destroy the conditions necessary for continuity of personal identity and thereby remove the moral authority of the advance refusal.³⁹ Pattinson argues that English law's rejection of the personal identity objection is supported by the PGC, because the objection invokes and applies criteria for identifying personal identity that are not required to give effect to the generic rights of agents and requires more assumptions to accept than to reject.

Roger Brownsword, the co-author of *LMJ*, revisits its central claims by way of an analysis of the regulatory implications of 'technological management'. Technological management seeks to design or automate products, places or processes to preclude certain conduct or behaviour. A modern example is digital rights management, whereby restrictions are embedded in digital products to protect the provider's intellectual property rights. Technological challenging of behaviour in this way has a long history. Other examples include the use of high fences to keep out trespassers and the deduction of income tax at source to prevent employees from evading tax on their wages.⁴⁰ Technological management, Brownsword argues, is regulatory in the sense of seeking to channel behaviour, but it does this by means other than the imposition of rules on human conduct. Regulation of technological management remains an enterprise of practical reason and agency, and thus governed by the PGC as the supreme principle of practical reason, but additional challenges are raised beyond those considered in *LMJ*. Brownsword argues that revising our understanding of the 'regulatory environment' requires that we consider not only the effectiveness and efficiency benefits of technological management, but also the dangers it presents to the conditions for moral community and autonomy.

Thom Brooks and Diana Sankey engage in a sustained analysis of the ethical rationalist project in legal theory. Their first criticism is that ethical rationalism devalues important emotions that are vital to a proper understanding of the relationship between law and morality. The correct moral response to dilemmas faced by real human beings is, in part, shaped by their emotional responses as well as their abstract, rational concern for others as right-bearing agents. Their second criticism develops and illustrates their first. They argue that the purported

³⁹ See, eg, A Buchanan, 'Advance Directives and the Personal Identity Problem' (1988) 17 *Philosophy and Public Affairs* 277.

⁴⁰ Deduction at source has been a key feature of the British income tax system since 1803: <http://old.tax.org.uk/showarticle.pl?id=1622>.

devaluation of emotions at the heart of ethical rationalism raises concerns as a model for understanding properly the nature of sexual offences and the response of law to them. Inappropriately, they argue, there are, and have been, various important contrasts drawn between, on the one hand, rationality and autonomy, and, on the other, emotion in sexual offences law, especially in relation to the idea of consent in relation to the adjudication of the offence of rape. Beyleveld and Brownsword, they claim to show, advocate an abstract, subjectively insensitive and rationalist concept of consent that sidelines the complex relationship between emotions and decision-making within cultures. Deryck Beyleveld responds in the concluding chapter of this collection.

Benjamin Capps develops Deryck Beyleveld's 'co-operative model' of conflicts between privacy and medical interests into a more general model of the nature of public goods.⁴¹ Capps accepts Beyleveld's argument for a broad conception of privacy, which requires us to accept a co-operative model to recognise that the values protected by medical research both conflict with, and are supported by, the values protected by privacy. Capps then expands Beyleveld's idea that public goods are co-operative rather than conflictual into a general discussion of public interests and the public good. He pits two such conceptions against each other: the 'commodity model' and the 'welfarist model'. The commodity model, based upon a libertarian conception of freedom and choice, considers public goods to be really only 'collective consumption goods'. The welfarist model holds that public goods secure universal access to rights to the generic conditions of agency. The difference between the two models is that while the commodity model does not treat the right to obtain the generic conditions of agency (in the Gewirthian sense) any differently from the right to obtain any other commodities, the welfarist model affords special moral status to the generic conditions of agency. This particular feature of the welfarist model of public goods makes it better suited to protecting rights under the PGC. He then worries that the commodification of areas of modern life (such as personal data) is much closer to the commodity model than the welfare model. Capps then argues that social arrangements such as markets, public-private partnerships, private ownership and the like should be organised along the lines of the welfare model. This reorientation towards the welfare model does not preclude social arrangements such as these just mentioned, but rather requires that they be directed towards particular ends: that is, the balancing of fundamental rights to the generic conditions of agency in a co-operative and not conflictual way, thus amplifying Beyleveld's specific claim about the relationship between privacy and other values in medical research.

⁴¹ D Beyleveld, 'Conceptualising Privacy in Relation to Research Values' in SAM McLean (ed), *First Do No Harm* (Ashgate, 2006) 151; D Beyleveld, 'Data Protection and Genetics: Medical Research and the Public Good' (2007) 18 *King's Law Journal* 275. See also D Beyleveld and SD Pattinson, 'Moral Interests, Privacy and Medical Research' in M Boylan (ed), *International Public Health Policy and Ethics* (Springer, 2008) 45.

David Townend presents an analysis of the boundary between the individual and others by re-examining privacy and the idea of politeness. He explains that privacy is a 'contested concept', sub-divided by Allen into 'informational privacy', 'decisional privacy', 'physical privacy', and 'proprietary privacy'.⁴² The difficulty, he argues, is that what individuals identify as their privacy rights vary according to their own self-defined boundaries with others and the particular situations in which they find themselves. Therefore, according to Townend, the problem of privacy is the problem of addressing competing rights. Drawing inspiration from an article written by Beyleveld and Brownsword on applying the PGC in a community of rights,⁴³ Townend advances the seventeenth- and eighteenth century philosophy and practice of 'politeness' as a vehicle for addressing the difficulties presented by the move from abstract rights-based theory to modern-day regulatory problems. He then applies his idea of politeness to the problem of generating a governance or regulatory environment for medical research using biobanks and genetic information.

The next two chapters consider the relationship between ethical rationalism and international law. Thomas Franck has argued that international law is now in a post-ontological era,⁴⁴ which allows international lawyers to move past the question posed by Bentham and Austin as to whether it is really law. While the chapters by Patrick Capps and Henrik Palmer Olsen implicitly take this 'post-ontological' position, both are alive to the practical difficulties presented by attempts to establish authority in a world divided into states with positive sovereignty. Both of these chapters reflect on how legal theory rooted in strong ethical rationalism can answer questions on how authority may emerge genuinely within this new legal field.

Patrick Capps uses the model of authority found in *The Doctrine of Right* and *LMJ* to consider the vast number of international or transnational regulatory bodies that have emerged in the last two decades, which are usually described as global administration. He begins with a discussion of Llewellyn's and Hale's realism, and Fuller's *economics*,⁴⁵ to establish that forms of global administration can be said to be coercive bodies whilst being disconnected from state institutions. Questions as to the authority of global administration to coerce then arise. He uses examples such as GLOBALG.A.P., the European Systemic Risk Board, and the Security Council Sanctions Committee, to consider how global administration may ground its authority. Capps argues that political authority emerges in global

⁴² AL Allen, 'Genetic Privacy: Emerging Concepts and Values' in Rothstein (ed), *Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era* (Yale University Press, 1997) 31, 33.

⁴³ D Beyleveld and R Brownsword, 'Principle, Proceduralism, and Precaution in a Community of Rights' (2006) 19(2) *Ratio Juris* 141.

⁴⁴ T Franck, *Fairness in International and Institutions* (OUP, 1995).

⁴⁵ See K Llewellyn, 'What Price Contract? An Essay in Perspective' (1931) 40 *Yale Law Journal* 704; R Hale, 'Our Equivocal Constitutional Guarantees' (1939) 39 *Columbia Law Review* 563; L Fuller, *The Morality of Law* (Yale University Press, 1963, revised edn, 1969).

administration to the extent that it establishes the most important goods, or is reflective of the will, of those that it governs. Rather than constituting the authority of global administration, state consent describes one way in which political power can be harnessed to establish authoritative forms of global administration. Capps then uses Richard Stewart's notion of 'disregard'⁴⁶ to explain why much global administration fails to be authoritative in its attempt to coerce.

Henrik Palmer Olsen poses a problem for *LMJ* that arises from his work at the iCourts project at the University of Copenhagen. The iCourts project has shown that, in contrast to domestic tribunals, international courts rely heavily upon the goodwill of the states comprising their various jurisdictions and are thus more sensitive to political pressure. If this is the case, it may be prudent in certain circumstances for international courts to accede to pressure, and garner goodwill, even if it means issuing sub-optimal judgments from the perspective of the PGC. The implications of a court not being politically prudent may mean that its judgments are disregarded or even that the court is closed down, as shown by his example of the Southern African Development Community Tribunal. But the history of the European Court of Human Rights and Court of Justice of the European Union has shown that over a longer term international courts can be less careful about showing deference to states as they themselves gather political capital. So the possibility arises that by playing the 'long game' international courts could be able to offer more legally defensible judgments. This is a problem presented by making good moral judgements in the individual case where this carries the risk of both (a) undermining the longer term ability of courts to sustain a morally defensible rule of law within its jurisdiction and (b) leaving the individual good moral judgements unenforced by domestic governments. Should political prudence dictate that a short-term denial of justice be the cost of establishing autonomous international courts in the longer term? It would seem that it should, and thus, Palmer Olsen concludes, there can be no clear separation between law and politics, just as there can be no clear separation between law and morality.

Concluding Chapter

Deryck Beyleveld is the principal defender of Gewirth's foundational argument for the PGC and has spent over 30 years analysing, defending, criticising, reconstructing and applying Gewirthian theory. An important part of this reconstruction and re-articulation emerges in response to Westphal's careful examination of the logical scope of dialectically necessary commitments. Westphal accepts that such commitments are 'distributively universal'—which is to say that if it is dialectically necessary for A to claim X for herself, then it must also be dialectically

⁴⁶ R Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 *American Journal of International Law* 211.

necessary for B to claim X for himself—but expresses reservations about their collective universality. In a compelling analysis and re-statement of the argument, Beyleveld demonstrates why it is dialectically necessary for A (any specific agent) to act in accord with the dialectically necessary commitments of *all* agents.

VII. Conclusion

This collection presents chapters that have been developed and refined over a lengthy period. From an early stage, the authors of specific chapters were paired up for cross-review and draft versions of their chapters more widely distributed for comment some months in advance of the project conference in Durham in October 2015. This collection has an accompanying website, on which readers will find complete PDFs of three books written by contributors of this volume: www.dur.ac.uk/cells/erl.

The first of these is the book presenting Deryck Beyleveld and Roger Brownsword's seminal defence of legal idealism as an implication of Gewirth's strong ethical rationalism and referred to by many contributors to this collection: *LMJ*. Readers will also find Stuart Toddlington's *Social Action and Moral Judgment* and Shaun Pattinson's *Influencing Traits Before Birth*.⁴⁷

All that remains is for us to thank those who have supported the production of this book, and helped organise the conference upon which it is based. The University of Bristol Law School and Durham CELLS (Centre for Ethics in Law and in the Life Sciences), housed in Durham Law School, provided funding for the conference. We would also like to record our appreciation for those who helped to organise the conference, especially Marion Tait. Finally, though, we would like to thank those who contributed to this volume and, more generally, those who have otherwise inspired us to step beyond contemporary fashions in moral and legal scholarship and take seriously the claims of strong ethical rationalism.

⁴⁷ S Toddlington, *Rationality, Social Action and Moral Judgment* (Edinburgh UP, 1993) and Pattinson, *Influencing Traits Before Birth*, n 12.