CHAPTER 7

Morality, Legality, and Luck

Ralf M. Bader

7.1 Introduction

Kant is often read as being committed to the idea that morality is within our control, which leads him to develop an ethical theory in which there is no room for moral luck.[1] Luck is supposedly excluded by focusing on the maxims of our actions rather than on their consequences. Whereas consequences are subject to luck and depend on factors that are beyond our control, our maxims are considered to be entirely up to us. Kant's political and legal philosophy, by contrast, is taken to be concerned with external actions, in particular with their effects on the freedom of others, and thus seems to be far from immune to luck.

From this perspective a significant chasm opens up between ethics and right. The former seems to be an internal domain that is immune to luck due to focusing on the agent's maxims. The latter seems to be an external domain that is susceptible to luck due to focusing on consequences.[2] If ethics and right were to differ in this way, then it would be hard to

Thanks to Christopher Benzenberg, Luke Davies and audiences at Göttingen, Fribourg and Bern as well as the editors of this volume. Special thanks to Marie Newhouse for her helpful comments at the 'Law and Morality in Kant' conference. Translations of Kant's works are my own.

[1] For the locus classicus cf. Bernard Williams, 'Moral Luck', *Proceedings of the Aristotelian Society*, supplementary volume 50 (1976), 115–35 and Thomas Nagel, 'Moral Luck', *Proceedings of the Aristotelian Society*, supplementary volume 50 (1976), 137–52. Nagel helpfully distinguishes moral luck into different types, three of which are relevant to our discussion: (1) resultant luck concerns the consequences of one's actions, (2) circumstantial luck concerns the circumstances in which one acts, and (3) constitutive luck concerns the agent's constitution, such as his desires, abilities, and dispositions.

[2] A striking statement of this view has been put forward by David Heyd: 'While the agreement of the action with the law is always contingent upon external circumstances, the agreement of the incentive to obey the law with the action is independent of any such contingent factors, since the action is "internal". Kant's strategy for securing the necessity and hence the absolute supremacy of the moral is by restricting "the ground determining the will of the agent" to a pure inner sphere of the person, hermetically isolated from any contaminating occurrences in the world. This leaves the moral realm completely immune to chance or luck.' David Heyd, 'Moral and Legal Luck: Kant's Reconciliation with Practical Contingency', *Jahrbuch für Recht und Ethik* 5 (1997), 27–42, at 27.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

see how right could be derived from ethics and how both of them could be integrated into a unified theory based on a single supreme principle. Moreover, it would be difficult to motivate such an asymmetric treatment of luck in these two domains, since the considerations that make susceptibility to luck problematic at the level of morality would seem to carry over to the level of legality. After all, it is rather strange to claim that moral luck needs to be rejected on the grounds that it is objectionable if an agent can be blamed for things that are outside his control, yet at the same time claim that legal luck is unobjectionable even though it implies that an agent can be coerced or punished for things that are not up to him.

This chapter argues that the role of luck in Kant's practical philosophy needs to be reconceived and that considerations of luck do not stand in the way of a unification of ethics and right. Section 7.2 argues that morality and legality do not differ in terms of resultant luck. Legality, like morality, is based on maxims, so that neither is susceptible to resultant luck. Otherwise, it would neither be possible to account for the way in which the good will ensures non-accidental rightness (Section 7.2.1), nor for the way in which legality can be ensured by means of legal sanctions (Section 7.2.2). Though imputation is subject to resultant luck, this applies equally to juridical and ethical imputation (Section 7.2.3). Section 7.3 argues that the moral worth of our actions is susceptible to constitutive and circumstantial luck (Section 7.3.1) and that a state that effectively enforces justice excludes morally worthy behaviour (Section 7.3.2). By demonstrating that there is no duty to act out of duty, it shows that this does not generate a conflict between ethics and right (Section 7.3.3). Finally, by establishing that a bad will can act out of duty, it shows that the moral worth of actions, unlike the moral worth of the agent, is merely derivative and does not add anything to the value of the world, so that this type of moral luck is innocuous (Section 7.3.4).

7.2 Maxims, Consequences, and Luck

The contrast between morality and legality is not a distinction between internal maxims and external actions. What is at issue in both cases is actions, where these are individuated and evaluated in terms of their maxims. The universal principle of right, like the categorical imperative, is concerned with maxims. It states that actions are right only if their maxims are such that 'the freedom of choice of each can coexist with

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

everyone's freedom according to a universal law' (RL 6:230).[3] The legality of an action is entirely a function of its maxim, not of its consequences. Accordingly, no gap opens up between the maxim and the legality of the action. Legality, like morality, is thus immune to resultant luck.

The difference between an action that is moral and a corresponding action that is merely legal lies, not in the form of their maxims (since they are both universalizable), but in the incentive that is motivating the agent to perform the action in question. Legality, in particular, is less demanding than morality since it abstracts from incentives and only requires universalizability of the maxim. The morality of an action, by contrast, requires the action to have respect for the law as its incentive.

7.2.1 Non-accidental Rightness

The fact that legality is based on maxims rather than consequences and thus not susceptible to resultant luck makes it possible for a good will to ensure non-accidental rightness. Having a good will, which consists in adopting a fundamental maxim that subordinates self-love to duty, ensures that only universalizable maxims will be adopted and that impermissible maxims put forward by instrumental reasoning will be rejected, since the adoption of the maxims on which one acts proceeds on the basis of one's fundamental maxim (cf. RGV 6:36). The actions of an agent who has a good will are thereby guaranteed to be right, namely to accord with duty.[4]

[3] Newhouse has objected that this claim ignores the first part of the universal principle of right, which is not concerned with maxims. On her two-standard interpretation, only formal wrongs are understood in terms of maxims, whereas material wrongs are understood in terms of physical incompatibilities. Cf. Marie Newhouse, 'Two Types of Legal Wrongdoing', *Legal Theory* 22 (2016), 59–75. If her interpretation were correct, then the account given here would be restricted to formal wrongs. Luck could then come in at the level of material wrongs, most notably in the case of mere faults (cf. RL 6:224), thereby threatening the unification of right and ethics. Fully addressing this challenge would require an account of the normative importance of imperfect epistemic access to the facts, which includes both false information and limited information. The arguments of Sections 7.2.1 and 7.2.2 will show that if a two-standard interpretation were correct, then (i) a good will would not be able to ensure non-accidental rightness, since it cannot rule out physical incompatibilities, and (ii) compliance with the requirements of right could not be coerced via sanctions, since epistemic problems, unlike compliance problems, cannot be resolved by providing incentives, which renders the state unable to provide assurance by guaranteeing that rights are respected. Moreover, conceiving of material wrongs as transgressions of duties is in tension with restricting the universal law of right to formal wrongs (cf. ibid. 72–3).

[4] Non-accidental rightness is explained at the level of the *Gesinnung* (= fundamental maxim), that is, in terms of a good will, not at the level of the maxim, nor the incentive. What is at issue is whether the agent would still have done the right thing, that is, whether he would still have acted according to duty, even if his inclinations or the circumstances had been different (not whether he would have performed the very same action, nor whether that action would still have been right, but whether he

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

The legality of the actions of a person with a bad will, by contrast, is a matter of constitutive and circumstantial luck.[5] Conformity with duty is then accidental. This is not to be understood in terms of one and the same action being legal or illegal depending on luck, but rather in terms of a bad person performing a legal action or an illegal action depending on luck.

Whether a person with a bad will acts in conformity with duty or not depends on circumstances beyond his control. This is because free choice applies in the first place to the agent's *Gesinnung*. One freely chooses one's fundamental maxim. Non-fundamental maxims are then adopted on the basis of this *Gesinnung*. Non-fundamental maxims cannot be arbitrarily made up and are not selected at will but are a function of the agent's fundamental maxim and the context in which the agent finds himself.[6] This allows luck to come in at the level of the adoption of non-fundamental maxims.

When holding the bad will fixed but varying the context, one can end up with permissible as well as impermissible actions. Two people who do not differ in terms of having a bad will can nevertheless differ insofar as the actions of the one are permissible while those of the other are impermissible. This difference is not due to those agents having made different choices at the level of their fundamental maxims, given that both of them have a bad will, but due to factors that can be a matter of luck, such as the circumstances in which the agents find themselves, which can in part determine the non-fundamental maxims that instrumental reasoning will put forward and that will be adopted in accordance with their fundamental maxim independently of their permissibility.[7]

would have performed an action that was right). Acting according to duty has to be non-accidental, which is guaranteed by the good will. The fact that someone acts out of duty, by contrast, does not guarantee rightness, since someone who has a bad will can act out of duty, yet does so only accidentally (cf. Section 7.3.4). While moral worth excludes luck, since moral worth presupposes a good *Gesinnung*, it is the moral worth of the agent and not the moral worth of the action that is responsible for excluding luck. In short, neither motivation nor maxim but *Gesinnung* ensures non-accidentality.

[5] Kant cautioned against having a self-congratulatory assessment of oneself on the basis of one's compliance with the requirements of morality, pointing out that such behaviour may well be the result of circumstantial and constitutive luck, most notably luck relating to temperament, abilities, and circumstances of time and place, rather than the result of a good will, cf. 8:329–30 and RGV 6:38.

[6] Cf. Ralf M. Bader, 'Kant on Freedom and Practical Irrationality', in Dai Heide and Evan Tiffany (eds.), *The Idea of Freedom: New Essays on the Kantian Theory of Freedom*, Oxford: Oxford University Press, 2023, 198–216.

[7] Though it is a matter of luck whether an agent with a bad will acts permissibly, it is up to the agent whether to adopt a bad will and thereby open himself up to this type of moral luck. Indeed, one has to adopt a good will precisely in order to avoid opening oneself up to luck. One is not allowed to leave it up to luck whether one complies with duty but has to exercise one's freedom in a way that

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

The non-accidental rightness that results from a good will goes hand in hand with the accidental rightness that results from a bad will. Moral luck in the form of accidental rightness in the case of a bad will is a corollary of the absence of moral luck due to the non-accidental rightness in the case of a good will. This means that a form of moral luck is at the centre of Kant's ethical theory.

7.2.2 Coercing Legality

The fact that legality is based on maxims is required to make it possible to enforce legality coercively. Legality can be ensured by external coercion. This is particularly clear in the case of juridical duties, where it is not only possible but also permissible to use coercion to ensure compliance with the law. When the state reliably threatens sufficiently severe punishment, the incentive for complying with juridical laws will be sufficiently strong to outweigh other incentives of self-love. Morality, by contrast, cannot be coerced. This difference arises because legality is compatible with acting on a heteronomous principle and allows for sensible incentives that can be provided by coercion, whereas morality presupposes acting on an autonomous principle and has to be based on the incentive of respect.

Coercion can affect the agent's choice of maxim. By suitably changing the incentive structure that the agent is facing, one can determine which action will be prudentially optimal and will be supported by instrumental reasoning.[8] This enables legal sanctions to ensure legality. The threat of sufficient punishment makes it the case that duty and self-interest align. In particular, it ensures that the omission of illegal actions will be prudentially rational. An agent who acts on the basis of self-love will perform the very same action that a person motivated by duty would choose. Such agents perform the same action but are motivated by different incentives. In this way coercion can ensure compliance with the law: no matter whether one has a good will or a bad will, one will act in conformity with

renders one immune to luck and ensures that one's actions are non-accidentally right. This type of moral luck, accordingly, is avoidable and hence does not contradict the idea that what ultimately matters, namely having a good will, is within everyone's reach.

[8] Coercion is here understood in terms of the threat of sanctions, not in terms of the actual use of force, and hence does not circumvent choice/agency but affects the prudential evaluation of options. Put differently, it is to be understood in terms of *vis compulsiva* rather than *vis absoluta*. (For a discussion of the latter, cf. Philipp-Alexander Hirsch's contribution to this volume (Chapter 5).)

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

the law. One is thus guaranteed to act according to duty even if one might not do so out of duty.[9]

One can only coerce actions but not consequences. One can coerce someone to act one way rather than another way, in particular to act in a way that conforms to the laws rather than in a way that contravenes them.[10] However, coercion cannot ensure consequences, since there is a gap between actions and consequences where luck can intervene. Which consequences follow from coerced actions is a matter of luck just as much as which consequences follow from non-coerced actions. Since legality can be coerced and since coercion can only ensure that someone acts in a certain way, not that they bring about certain effects (given that there is a luck-susceptible gap between action and effect), legality only consists in the agent acting in conformity with the law, not in terms of the agent bringing about certain effects. Legality is thus a matter not of consequences but of actions and is hence immune to resultant luck. Accordingly, there is no difference between morality and legality with regard to resultant luck.

7.2.3 Imputation

Though consequences do not affect the legality of an action, they are nevertheless important for juridical imputation. Since actual, as opposed to intended or expected, consequences are imputed there is room for resultant luck.[11] Luck can affect which consequences result from an action and can accordingly affect which effects can be imputed to an agent. While the details of Kant's theory of imputation are intricate and interesting, two points are important for the topic at hand.[12]

[9] The claim that coercion ensures that someone lacking a good will performs the same action as someone with a good will concerns the performance of obligatory actions as well as the omission of impermissible actions. It does not extend to the choice of permissible actions, which depend on the agent's desires, abilities, and circumstances and in terms of which there can be variation amongst agents having a good will.

[10] Only legality but not illegality can be coerced. By means of coercion one can effect an alignment of prudence and duty, thereby ensuring legality. Since one cannot exclude the possibility of respect for the law overriding prudence, one cannot coerce illegality.

[11] Since one can impute not only consequences but also actions, juridical imputation can also encompass the intended or expected consequences of actions even when these did not in fact eventuate.

[12] For a helpful discussion of imputation see Joachim Hruschka, *Kant und der Rechtsstaat und andere Essays zu Kants Rechtslehre und Ethik*, Freiburg: Karl Alber, 2015, ch. 6. For recent discussions of the way in which Kant's account of imputation makes room for moral luck see Samuel Kahn, 'Kant's Philosophy of Moral Luck', *Sophia* 60 (2021), 365–87 and Robert J. Hartman, 'Kant Does Not Deny Resultant Moral Luck', *Midwest Studies in Philosophy* 43 (2019), 136–50.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

First, imputation is not restricted to juridical imputation but also encompasses ethical imputation (cf. V-Mo/Collins, 27:290). Both domains allow for imputation of consequences that is susceptible to resultant luck. In the same way that there can be resultant luck in the case of juridical imputation, there can likewise be resultant luck in the case of ethical imputation. This implies that there are no differences between ethics and right as regards the possibility of resultant luck at the level of imputation.

Second, although there is room for resultant luck, it is possible for the agent to avoid the imputation of bad consequences. Since it is only in the case of impermissible actions that bad consequences can be imputed to the agent (cf. RL 6:228), it is possible for the agent to render himself immune to bad luck, given that it is always possible for the agent to act permissibly. The agent can avoid being in a situation in which something that is not under his control can have a negative effect on what can be imputed to him. More generally, if luck comes in, then it is because the agent has acted in such a way as to make himself susceptible to luck. Since no imputation takes place either in the case of obligatory actions or in the case of merely permissible actions, it is completely within the agent's control whether to make room for luck or not.

7.3 Moral Worth and Luck

There is no room for moral luck at the level of the good will. Since the good will is unconditionally good, it is good independently of which effects it brings about. This implies that its goodness is immune to resultant luck. Moreover, the choice whether to have a good will by giving priority to duty over self-love, or a bad will by adopting the inverted priority ordering, is a transcendentally free choice that is not in any way determined or influenced by empirical factors.[13] This choice is, accordingly, immune to constitutive and circumstantial luck. The agent's *Gesinnung*, which makes up his worth, is entirely up to that agent.

7.3.1 Accidental Moral Worth

Whereas the moral worth of the agent is immune to luck, the moral worth of actions is susceptible to luck, even when one has a good will. Someone

[13] Free choice is independent of the empirical not only in terms of not being determined by empirical facts. It is also independent of empirical content. A transcendentally free choice is not about the empirical circumstances, insofar as the choice between a good and a bad *Gesinnung* is not a choice between empirically characterized options.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

who has a good will is guaranteed to act according to duty. Such a person, however, is not guaranteed to act out of duty. Whether someone with a good will acts out of duty is a matter of luck. Having a good will, though necessary, is not sufficient for our actions to have moral worth. Non-accidental legality goes together with accidental morality. The moral worth of our actions is susceptible to circumstantial and constitutive luck. Instead of morality being immune to luck and legality being susceptible to luck, the opposite is true.

A good will guarantees legality by only adopting universalizable maxims. Morality, however, cannot be guaranteed in this way, since morality, unlike legality, is not determined solely by maxims. Maxims by themselves do not suffice for morality. Something more is needed in order for the action to have moral worth, namely an ethical incentive in the form of respect for the law that is incorporated into the maxim.[14] One needs to act on a universalizable maxim out of respect for the law in order for the action to have moral worth.

Whether this ethical incentive is available for incorporation in a given situation, however, is a matter of luck. This is because one can act out of respect for the law only when the maxim put forward by instrumental reasoning is impermissible. Moral rules are practical rules of exception.[15] Morality only comes in when rejecting or limiting impermissible maxims put forward by instrumental reasoning. As long as instrumental reasoning puts forward permissible maxims, morality does not even come in. Accordingly, one can act out of duty only in case of a conflict between morality and prudence, given that only then is there a practical rule of exception that can incorporate respect for the law as an ethical incentive.

When acting permissibly and even when acting in a way that is obligatory, it is not the case that there is one practical rule into which one can either incorporate the incentive of duty or the incentive of self-love. Although duty and self-love can enjoin the same action, practical rules of exception have a different logical form from their corresponding practical rules of commission and omission. For instance, whereas prudence would

[14] The incentive is not part of the maxim but is that which makes a practical rule the maxim of the agent. One adopts a practical rule and makes it one's maxim, namely the principle of one's action, by joining it with an incentive. The incentive is what motivates one to act on that maxim and thus cannot itself be part of the maxim. Since the motivating reason for the action is not contained in the maxim, the maxim by itself does not tell us whether the agent does the right thing for the right reason but only whether he does the right thing.

[15] Cf. Ralf M. Bader, 'Kant and the Categories of Freedom', *British Journal for the History of Philosophy* 17 (2009), 799–820, at 809–11.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

tell one to do *phi*, morality would require one to omit non-*phi*. Respect for the law can only be incorporated into practical rules of exception and such rules are available for adoption only when the practical rules proposed by prudence are impermissible such that exceptions need to be made. This means that in the absence of a conflict between morality and prudence it is not only the case that the moral incentive is not available, since respect requires morality to strike down self-conceit, but also that the relevant practical rule of exception that is generated by limiting or rejecting an impermissible practical rule will not be available.

Whether there is a conflict between morality and prudence in a given situation depends on factors that are beyond the agent's control, thus rendering it a matter of luck whether the agent can act in a way that has moral worth. Which maxims are put forward by instrumental reasoning is not entirely up to the agent. Whereas the agent's fundamental maxim is freely chosen and immune to luck, the adoption of non-fundamental maxims is susceptible to circumstantial and constitutive luck. Which maxims are put forward depends on the inclinations and abilities of the agent and the circumstances in which he is acting. These factors together determine which maxims will be proposed by instrumental reasoning and will then be adopted or rejected in light of the agent's fundamental maxim. Since the agent's inclinations and abilities are partly a function of luck and since the circumstances in which the agent finds himself are likewise partly a function of luck, the moral worth of actions is susceptible to both constitutive and circumstantial luck.

The required conflict between morality and prudence does not imply that there cannot be concurrent inclinations when acting out of duty. An agent can do something from duty while at the same time having a desire to perform that action. There is no need to have an aversion to the action in question. What is required instead is that the practical rule put forward by instrumental reasoning is not universalizable, since only then does pure practical reason kick in and become operative. For that to be the case, the concurrent inclinations need to be outweighed by other inclinations that suggest a different course of action. Instead of an aversion to the action that is performed out of duty, one needs a prudential preference for an impermissible alternative. The action needs to be rejected comparatively rather than absolutely. One can enjoy doing the action that one performs out of duty as long as one would have enjoyed even more an impermissible alternative that one is setting aside due to one's commitment to morality. The conflict between prudence and morality is to be

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

found at the level of maxims: one can have concurrent inclinations but not concurrent maxims.[16]

7.3.2 *Justice Excludes Virtue*

Performing an action that has moral worth is only possible when instrumental reasoning puts forward a non-universalizable maxim that can then be rejected by pure practical reason. Whether instrumental reasoning does put forward such a maxim depends on the context in which the agent finds himself. This means that external circumstances can render virtuous behaviour impossible, that is, they can render it impossible to act out of duty. Interestingly, the mechanism by means of which the state can coerce legality is such as to exclude virtuous behaviour. The state precludes morality when it successfully coerces legality by using coercion to ensure that self-interest and duty align.

If the threatened punishment in case of violations of the law is both sufficiently strong and sufficiently assured, then instrumental reasoning will only put forward permissible maxims. Violating the laws will then never be in the agent's own interest. No conflict will arise between the maxims suggested by self-love and the demands of pure practical reason. A conflict, however, is necessary for acting in a way that has moral worth, since this requires rejecting or limiting impermissible maxims. When all maxims that are put forward by instrumental reasoning are permissible, then no exceptions need to be made, such that the possibility of acting out of duty does not even arise. When acting contrary to duty is not an option for prudence, then it is not possible to act against prudence and choose something over it. The agent's actions, accordingly, will always be in conformity with duty but will lack moral worth due to being motivated by self-love rather than by the motive of duty.

A state guaranteeing complete assurance through sufficiently severe and likely punishment will, accordingly, preclude morality with respect to all

[16] Accordingly, Schiller's famous objection is misguided (cf. Friedrich Schiller, *Sämtliche Werke*, vol. 1, Munich: Carl Hanser Verlag, 1962, at 299–300). It mistakenly assumes that moral worth requires opposed inclinations, when all that is required for moral worth is a conflict at the level of maxims. (Additionally, it assumes that moral worth is something that we are supposed to bring about, whereas it is nothing but a form of signatory value, cf. Sections 7.3.3 and 7.3.4.) The required conflict is to be understood in a weak sense such that the prudential maxim can permit an action contrary to duty without requiring such an action. This means that one can act out of duty in cases involving disjunctive maxims where prudence is indifferent between two actions, one of which is impermissible – in particular, one can refrain from performing the impermissible action, despite the fact that the prudential maxim does not require the performance of an impermissible action.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

juridical duties. There is thus an important sense in which justice excludes virtuous behaviour. The effective enforcement of rights that is constitutive of justice excludes the manifestation of virtue by ruling out actions that have moral worth. Since juridical duties are a subset of duties, there is still room for the manifestation of virtue in a just state, namely with respect to non-enforceable duties (most notably imperfect duties, such as the duty of beneficence, but also perfect duties to oneself), yet compliance with juridical laws will in all cases lack moral worth.

The claim that justice excludes virtuous behaviour holds not only for worldly justice but also for divine justice, which establishes a necessary connection between virtue and happiness. If one were to know that God exists, then one would never be able to act out of duty (cf. KpV 5:146–8).[17] Since actions contrary to the law would be punished, all maxims proposed by instrumental reasoning would then accord with duty. The problem here is not that the inclination to avoid divine punishment is too strong for morality to outweigh it, but rather that morality never comes in when prudence is guaranteed to result in legality. Divine punishment (and reward) would make conformity with duty the only instrumentally rational course of action. Morality would then not have to limit instrumental reasoning. All limitations would already be internalized at the level of prudence. Pure practical reason would play no role in shaping the agent's maxims, given that no proposals put forward by prudence would have to be rejected or limited. This would preclude pure practical reason from ever striking down self-conceit and requiring one to make exceptions to prudential reasoning. Respect for the law would never be operative as an incentive.

Though virtue would not manifest itself and actions would not have moral worth, this does not imply that one cannot have a good will in such a situation. The fact that a person's actions lack moral worth does not mean that the person does not have a good will and that the person's will lacks moral worth. The good will can be latent and need not manifest itself in action in order to have its worth.[18] The unconditional goodness of the

[17] More generally, acting out of duty is impossible whenever one has a doxastic attitude that enters into instrumental reasoning and that asserts the existence of God. Accordingly, the postulate of pure practical reason not only has to fall short of theoretical knowledge but must not enter into instrumental reasoning, if it is not to exclude the possibility of morally worthy actions.

[18] At KpV 5:147 Kant suggests from the perspective of a developmental account that involves strengthening the will in conflict cases that there may be problems in acquiring a good will in this case. This suggestion, however, would seem to be an empirical story that is difficult to accommodate at the level of transcendental choice.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

good will is not only independent of the consequences that one brings about but also independent of whether it manifests itself.

An agent in such a situation could either have a good or a bad *Gesinnung*. This, however, would not lead to any differences at the level of the choice of non-fundamental maxims. The agent would act in the same way independently of whether he had a good will or a bad will, given that instrumental reasoning only puts forward permissible maxims.[19] The distinctive effects of a good will, namely that such an agent would omit impermissible actions and perform obligatory actions out of duty, would then not be found in the actual world but would be entirely counterfactual. Since one would be guaranteed to do one's duty independently of whether one had a good will or not, the good will would become dispensable as far as doing one's duty is concerned.

Correspondingly, excepting the choice of the fundamental maxim, such an agent would not be able to rise to the level of positive freedom. Indeed, in a sense even negative freedom would drop out, which is why Kant says that actions would become mechanical (cf. KpV 5:147). This is because the issue of acting contrary to inclinations would never arise, such that the agent would never have alternatives amongst which *Willkür* could choose.

7.3.3 Duty and Moral Worth

The enforcement of rights by a just state precludes prudence from coming into conflict with morality. It thereby makes it impossible for someone to act out of duty and perform morally worthy actions when fulfilling juridical duties. In a state that effectively enforces justice, no one will perform a juridical duty out of duty. Justice in this way excludes virtuous behaviour.

This might seem to generate a deep-seated conflict between ethics and right. Ethics seems to require virtuous behaviour, yet justice rules out such behaviour. If we are required, from the point of view of ethics, to engage in virtuous behaviour and perform actions having moral worth (as opposed to merely acting in accordance with duty), then ethics and right are in conflict. In that case, ethics requires that we act out of duty, yet right requires the establishment of a rightful condition in which fulfilling our juridical duties out of duty is not possible, given that the state makes it

[19] If this were not possible, then prudence would be self-undermining since acting on the basis of inclinations would then undermine the condition, namely having a good will, that has to be satisfied in order to avoid divine punishment and receive divine rewards.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

prudentially irrational to act contrary to these duties. Ethics then requires something that cannot be realized in a rightful condition.

This apparent conflict between ethics and right can be avoided, since there is no duty to act out of duty. It cannot be the case that acting out of duty is what one's duty consists in, that is, that one fails to do one's duty unless one acts out of duty. First, respect for the law motivates one to do what duty requires, so that what one's duty consists in has to be specified independently of the incentive that motivates one to act in this way. Second, if one's duty were to consist in acting out of duty, then this would imply that one would act contrary to duty if one were to act merely according to duty, which would be incompatible with the existence of both imperfect duties and actions that accord with duty without being performed out of duty.

Nor can there be a separate duty to act out of duty. First, if it were a perfect duty to act out of duty, then merely acting according to duty would be impossible, so that there would again be no permissible behaviour not motivated by duty, since one would be violating the second-order duty whenever one would be acting according to but not out of the first-order duty. Second, the very idea of it being a duty to act out of duty would seem to be confused, since it presupposes that the incorporation of incentives is itself an action that is based on maxims that are subject to the categorical imperative. This is misguided since incentives are incorporated on the basis of the *Gesinnung*, which has a different status from ordinary maxims.[20]

There is no need to act out of duty, except when doing so is necessary for acting according to duty.[21] Only when morality and prudence conflict, such that one has to set prudence aside and act on the basis of respect for

[20] The idea of a duty to act out of duty might also seem objectionable due to generating an infinite regress of actions, so that agency would never get off the ground. Or, as is sometimes suggested, that there would be an infinite regress of duties (cf. Michael Walschots, 'Kant and the Duty to Act from Duty', *History of Philosophy Quarterly* 39 (2022), 59–75, especially section 1). This is mistaken. If one complies with the second-order duty, that is, if one acts out of duty, then it follows that one does so out of duty. This is because one cannot act out of duty out of self-interest (i.e. one cannot genuinely act out of duty and do something on the basis of respect for the law when one is motivated by self-interest to do so), so that there is no room for a third-order duty to act out of the second-order duty when acting out of the first-order duty. Put differently, in the case of the first-order duty there is not only the question whether one complies with duty, but also the subsidiary question in case of compliance whether one complies out of duty or not. The second-order duty concerns precisely this issue, since it amounts to a duty to comply out of duty. Here the question is whether one complies with this second-order duty by acting out of duty. Since it is not possible for the agent to act out of duty out of self-interest, there is no corresponding subsidiary question that could be the object of a third-order duty.

[21] Also cf. Philipp-Alexander Hirsch, *Freiheit und Staatlichkeit bei Kant: Die autonomietheoretische Begründung von Recht und Staat und das Widerstandsproblem*, Berlin: De Gruyter, 2017, 119.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

the law if one is to act permissibly, does one have to act out of duty. In that case merely acting according to duty is not an option. The only situations in which acting out of duty is possible, namely when there is a conflict between morality and prudence, are also the only situations in which acting out of duty is required. Yet even then one ought to act out of duty not because doing so has moral worth but because doing so is necessary for acting according to duty.[22]

The categorical imperative requires us to act on universalizable maxims, but it does not require that we do so out of duty. Our maxims have to be universalizable but they do not have to be motivated by respect for the law. We need to see to it that we do our duty, but there is no need to do our duty out of duty. A rightful condition in which compliance with laws is guaranteed by the threat of punishment and in which the fulfilment of juridical duties lacks moral worth is thus unproblematic from the perspective of morality.

7.3.4 Signatory Value

The moral worth of our actions is susceptible to luck. The possibility of performing an action that has moral worth is contingent on instrumental reason putting forward a non-universalizable maxim, which is in part a function of constitutive and circumstantial luck. This type of moral luck is relatively benign because the moral worth of our actions is a derivative kind of worth that results from the manifestation of a good will. Non-derivative moral worth is had by the good will and is immune to luck.

The fact that the worth of our actions derives from manifesting the worth of a good will can be brought out by considering someone who has a bad will yet nevertheless acts out of duty and is motivated by respect for the law. Having a bad will yet acting out of duty is possible since an agent

[22] If ensuring that our actions had moral worth were required of us, then this would have the troublesome consequence that we should create contexts in which instrumental reasoning puts forward impermissible maxims such that it becomes possible for the agent to act out of duty. This would imply not only that one should avoid a rightful condition, but also that one should engage in morally risky behaviour, such as making promises that are difficult to keep, cultivating troublesome inclinations (cf. Schiller: 'Decisum: Da ist kein anderer Rat, du mußt suchen, sie zu verachten, | Und mit Abscheu alsdann tun, wie die Pflicht dir gebeut'), or seeking out circumstances in which one's ends can only be achieved impermissibly. Relatedly, if one thinks that moral worth comes in degrees and is a function of the difficulty of resisting inclination and siding with duty (as seems to be suggested by some of Kant's remarks about merit), then one would have to bring about contexts in which acting out of duty is particularly praiseworthy, for example by cultivating recalcitrant inclinations that are difficult to overcome. If anything, the opposite is true due to the indirect duty to pursue one's happiness in order to avoid potential conflicts between prudence and morality.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

who has a bad will subordinates duty to self-interest. This means that he always pursues self-interest, except that he pursues duty when doing so is not detrimental to self-interest.[23] He will, consequently, act out of duty when doing so does not require him to make any sacrifices.[24]

When two alternatives are equally good from the perspective of self-interest, that is, when they are all things considered prudentially equivalent, instrumental reasoning puts forward a disjunctive practical rule requiring us to perform either of them. Whenever one disjunct is impermissible, pure practical reason will reject this disjunctive maxim and restrict the maxim to the permissible disjunct. An agent who has a bad will is going to be motivated by respect for the law to reject the disjunctive maxim that contains the impermissible disjunct and instead perform the permissible action. Neither self-interest nor duty could motivate him to act otherwise, since considerations of self-interest do not decide amongst the two alternatives and since considerations of duty favour the permissible action. The subordinated principle of duty, accordingly, determines how someone who has a bad will acts when two (undominated) options are tied in terms of self-interest but differ in terms of permissibility, since the fact that self-love does not care which of them is performed allows the subordinated principle of duty to come in.[25]

The possibility of acting out of duty while having a bad will is the analogue of the possibility of acting out of self-interest while having a good will. A good will and a bad will differ in terms of the ordering of duty and self-love. If various actions are morally permissible, that is, they are 'indifferent' from the point of view of morality, then someone who has a good will chooses amongst them on the basis of self-love, selecting the one that makes them most happy. By contrast, if various actions are prudentially

[23] A bad will, which prioritizes self-love over duty, is to be distinguished from a diabolical will that is actively opposed to morality and from a will that is completely indifferent to morality. A bad will treats duty as a tie-breaker, such that one chooses the right action conditional on it being prudentially permissible. A diabolical will, by contrast, acts wrongly even when the right action is prudentially permissible. A will that is indifferent to morality randomizes amongst prudentially permissible actions. Human beings are only capable of having either a good will or a bad will and cannot be opposed or indifferent to morality (cf. RGV 6:35).

[24] Accordingly, the three types of actions: (1) out of duty, (2) according to duty, (3) contrary to duty, and the two types of will: (1) good will, (2) bad will, combine to yield five possibilities. One can act out of duty both when having a good will and when having a bad will. Likewise, for acting according to duty. Yet one can act contrary to duty only when having a bad will.

[25] Put differently, any agent who is exclusively motivated by self-love when two alternatives are prudentially but not morally equivalent will be indifferent to morality. Since we are not indifferent to morality, but can at most subordinate morality, and since the only alternative for us to acting on the basis of self-love is acting on the basis of duty, it follows that we have no option but to act out of duty in such situations, even when we have a bad will.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

'permissible', so that they are indifferent from the point of view of prudence, then someone who has a bad will chooses amongst them on the basis of duty, selecting the one that is universalizable. The two cases are symmetrical (though the former scenario is much more likely to arise than the latter, since it can easily happen that multiple actions are permissible, yet not so easily happen that multiple undominated actions are prudentially indifferent).

Since respect for the law is playing an entirely subordinated role in the case of an action that is performed out of duty by someone who has a bad will, insofar as it merely functions as a tie-breaker that tips the scale in favour of the permissible action, it seems inappropriate to consider such an action to have moral worth. Though the correct incentive is operative, the agent has the incorrect *Gesinnung*, which means that the incentive is not assigned its proper role. The action, accordingly, fails to manifest the subordination of self-interest to morality that is to be found in the case of a good will and that gives morality its dignity.

The crucial issue is thus not acting out of duty but manifesting a good will. The latter involves the former. The former, however, does not imply the latter, since acting out of duty is not sufficient for moral worth. Moral worth pertains to the manifestation of a good will, which consists in the combination of having a good will and acting out of duty. An action has moral worth iff it is performed out of duty on the basis of a good will.[26] Both elements need to be combined. Having a good will is not by itself sufficient for an action to have moral worth, since someone who has a good will can out of self-interest perform actions that accord with duty and that lack moral worth.[27] And acting out of duty is not by itself sufficient, since an action performed out of duty by someone who has a bad will lacks moral worth.[28]

[26] Both commissions and omissions can have moral worth. Cf. Refl 7115: 'Doing good and omitting evil (the former without motives of self-love, the latter under motives of self-love) are both morally good, that is, equivalent in terms of morality; we can therefore regard omissions of the opposite as actions' (19:252).

[27] The good will is not sufficient in general for acting out of duty, but is only sufficient for acting out of duty when doing so is necessary for doing one's duty. If acting out of duty and having a good will were to go together, then not acting out of duty would imply not having a good will, from which it would follow, given rigorism (cf. RGV 6:22 fn.), that acting according to duty would imply having a bad will. Yet, since acting according to duty is permissible, there is no reason to think that it implies having a bad will.

[28] These cases also constitute exceptions to the claim that only those actions have moral worth that one would not have performed if one would have had a bad will. Since duty can be operative and motivate the same action even when subordinated, it follows that the good will need not make a difference in terms of whether an action is performed.

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press

The moral worth of an action is then to be understood as a form of signatory value that does not add anything to the value of the world. It is a derivative value that is due to manifesting the goodness of the good will. What is of ultimate significance is the moral worth of the good will and not the moral worth of our actions. What matters is virtue, not its manifestation in the form of virtuous behaviour. Put differently, the moral worth of an action does not add anything to but merely manifests the moral worth of the good will. Having a good will and acting out of duty is not better than having a good will and merely acting according to duty. To think otherwise would be to engage in double counting. Correspondingly, the unconditioned component of the highest good, namely the supreme good, is to be understood in terms of the having of a good will and not in terms of the manifestation of a good will. The unconditional goodness of the good will extends to the point where its goodness is independent even of its own manifestation. For the highest good to be realized, individuals need to have a good will, but they do not need to manifest their good will through virtuous behaviour.[29]

7.4 Conclusion

From the perspective of luck, no significant differences open up between morality and legality. In particular, the legality of an action is just as much immune to resultant luck as the morality of an action. This is because legality is a function, not of the consequences of our actions, but of the maxims on which we act. And while juridical imputation allows for resultant luck, ethical imputation does the same. Morality and legality are thus closer to each other than might initially seem to be the case, which raises the hopes for a unification of ethics and right.[30]

[29] Otherwise, it would be a matter of luck whether the highest good could be realized. Moreover, moral luck would have an effect on the extent to which different agents would be worthy of happiness.

[30] The legality vs morality contrast applies to all duties. All duties admit of the possibility of either acting out of duty or merely according to duty. A suitable restriction of the relevant actions focuses on juridical duties, most notably enforceable duties that concern the way in which actions affect the freedom of choice of others. (Difficulties arise in specifying the relevant restriction due to the duty of *honeste vive*, which is a non-enforceable duty to self yet nevertheless is classified as a duty of right. For a discussion of some of these complexities cf. Luke Davies, 'Whence "Honeste Vive"?', *European Journal of Philosophy* 29 (2021), 323–38.)

https://doi.org/10.1017/9781009292030.011 Published online by Cambridge University Press