A Law Unto Oneself

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Abstract

We should understand the concept of self-legislation that is central to Kant's moral philosophy not in terms of the enactment of statute but in terms of the way in which judges make law, by setting down and refining precedent through particular judgments. This paper presents a descriptive model of agency based on self-legislation so understood and argues that we can read Kant's normative ethics as based on this view of agency. It is intended to contribute to contemporary debates in moral psychology and to exegetical discussion of Kant.

Autonomy is the central concept of Immanuel Kant's moral philosophy. One is truly autonomous, according to Kant, only when the maxims one legislates to govern one's own behaviour are accepted not because of one's inclinations but because one has reasoned that they are genuinely fit to make such law. This faces the objection that we simply cannot make sense of the idea of legislating for oneself, irrespectively of whether or not this legislation is wholly directed by reason. The problem is not resolved by a functional division of the self in which the 'acting self concedes to the thinking self its right to govern' (Korsgaard 1995, § 3.3.5). For this does not explain why the thinking self should be bound by its own previous dictates or why the acting self should not be able to withdraw its concession of power. The central question concerns how any decisions one makes can have the force of law over oneself. The aim of this paper is to argue that we can make sense of this idea. The source of the problem, I argue, is the assumption that the legislating involved must be analogous to the enactment of statute. We should instead see the agent as making law in the way that judges make law.

We will also see that self-legislation so understood is not primarily a normative concept, but rather a claim about the structure of human agency which then grounds the normative demand that the maxims of one's actions be fit to make universal law. This paper aims to present the basic structure of a descriptive model of agency in terms of self-legislation and to argue that we can read Kant's *Groundwork for the Metaphysics of Morals* in this way. Inevitably, this raises questions that cannot all be addressed. Further details of this picture of agency and a more complete defence of this reading of Kant must await further discussions. The first section of the paper clarifies the role of self-legislation in Kant's *Groundwork* and the problems it faces. The second outlines the model of self-legislation offered here. The third argues that this model requires us to reconsider what Kant means by 'maxim'. The fourth argues that a maxim is the structure of an

action. The fifth argues that rational agency essentially involves one's maxims being laid down as precedent and that Kant takes this to ground the universalizability principle. The sixth argues that this analogy between agential and judicial precedent is compatible with Kant's philosophy of law and with an important disanalogy between agency and legal judgment. The final section argues that we should accept empirical evidence that we are indeed such self-legislators and considers how this model of human agency should be assessed.

1. Self-Legislation and Autonomy

Kant views rational beings as self-governed in that their actions are not simply the effects of inclinations but are guided by decisions. Each action, moreover, embodies a maxim, and we should understand our actions as passing their maxims into law: 'people are bound only to act in conformity with a will that is their own but that is, according to nature's purpose, a will that gives universal law' (G 4:432).[1] For this very reason, we are bound by the moral law, which requires us to ensure that our maxims are indeed fit to become universal laws: 'every rational being [is] a being who must regard itself as making universal law by all the maxims of its will, and must judge itself and its maxims from this standpoint' (G 4:433). When we act out of respect for this law, when we actively obey the categorical imperative, we act autonomously. Otherwise, we act heteronomously: 'if the will seeks the law that is to determine it anywhere else than in the fitness of its maxims for its own giving of universal law', then 'the result is always heteronomy'

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[1] Citations use the pagination of the standard German edition of Kant's works, which usually appear in the margins on English translations, preceded by a letter indicating the work: G for *Groundwork for the Metaphysics of Morals*, MM for *The Metaphysics of Morals*, and LE for *Lectures on Ethics*. Quotations are from the editions listed in the bibliography.

(G 4:441). Autonomous action, which respects the moral law out of duty, is the only kind of action that deserves moral esteem (G 4:397-8, 4:401-2). Since the class of heteronomous actions is defined as the complement to this class, it includes actions whose maxims are fit to be laws but were not chosen for that reason as well as actions whose maxims are not fit to be laws. The former are morally permissible although not morally estimable; only the latter are morally wrong (see e.g. G 4:398).

Elizabeth Anscombe raised two brief but influential objections to the moral psychology at the heart of this theory in her celebrated paper 'Modern Moral Philosophy'. 'The concept of legislation requires a superior power in the legislator', she claimed, and anyway the account 'is useless without stipulations as to what shall count as the relevant description of an action with a view to constructing a maxim about it' (1958, 2). Each of these points is, if it is correct, alone sufficient to undermine Kant's moral psychology. The first denies that we can really be said to *legislate* for ourselves since no prescription can have the force of law over someone who retains the power to replace it at any moment; 'whatever you do "for yourself" may be admirable; but it is not legislating' (Anscombe 1958, 13). The use of the term 'stipulation' in the second implies that any set of constraints on which description of an action should count as the maxim will be arbitrary, so an action cannot be said to embody a determinate prescription.[2]

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[2] These objections can be understood as claiming that there cannot be moral laws unless these are prescribed by a divine lawgiver (see Anscombe 1958, 13-15) and that the universalizability principle cannot be criterial of permissibility since it does not sufficiently specify what we should take into consideration in moral assessment. I suspect Anscombe intended to press these points as well as to object to the very idea of self-legislation. My concern in this paper is with self-legislation itself, though we will return to the origin of the moral law in section 3.

We can add, moreover, the concern that this moral psychology seems implausible. It certainly does not seem, phenomenologically, as though every action of mine embodies a universal prescription concerning my future actions. So why should we accept that it does? Kant's own answer to this question lies in his transcendental idealism (see G 4:452-3), but it would seem a weakness of his moral philosophy that it rest on a metaphysical outlook that is not widely accepted by philosophers. Indeed, one might argue in the contrary direction that the implausibility of Kant's moral psychology shows that the transcendental idealism that entails it cannot be right.

One way in which Kantians respond to these worries about the notion of self-legislation is effectively to abandon that idea and emphasise instead the communal aspect of Kant's theory. We need not see moral rules as legislated by the individual for the individual, that is, but can instead see them as legislated by the community for the community. There are many forms of such contractualist and constructivist approaches to morality, which differ over what they mean by the claim that the community legislates the moral rules and over why such communal legislation should be binding on the individual. But they have in common the implication that we can retain much of what is valuable about Kant's moral philosophy while rejecting the idea that action itself lays down law binding the same agent's future action. If it is the community that decides which actions, under which descriptions, are proscribed, permitted, and required, and that enforces these rules, then we can describe this as a kind of legislation even if it is never formally agreed.

My aim in this paper, however, is to show that we do not need to take this route. For the criticisms of Kant's notion of self-legislation outlined above are rooted in a particular conception

of what it is to legislate, but we should construe self-legislation in terms of a rather different way in which law is made. My aim is not to attack the contractualisms and constructivisms of contemporary Kantian moral philosophy, but merely to show that the objections that Anscombe raised against the notion of self-legislation do not force us to render the Kantian notion of moral legislation into a social form. We can instead accept a view much closer to Kant's own, that the moral law is rooted in the rationality of the individual qua individual.

2. Ways of Law-Making

At the heart of these objections to self-legislation lies the tacit understanding of legislation as the enactment of statute. This activity, which defines its performer as a legislature, involves the universal prescription that certain kinds of actions, specified to some degree of detail, are proscribed, permissible, or obligatory. This requires the legislature to have superior power over those bound by statute. If we each individually had the power to make or revoke statute, no statute could bind any of us. A statute governing my future behaviour, moreover, must specify each relevant action in some determinate level of detail. And since such enactment of statute does not show up in the phenomenology of action, it is unclear just why we should accept the claim that actions enact statute in this way.

Law is not only made this way, however, and statute is not even a necessary component of law. What is necessary is that cases are brought before people who judge what is to be done and whose decisions are bound by norms of coherence with other judgments made within the same system. There have been many variations on this aspect of law, each with its own terminology,

but for ease of argument we can designate these people 'judges'. The way such judges make law is very different from the way in which legislatures do so. For one thing, judges decide what is to be done in a particular case, rather than making general prescriptions about kinds of actions. For another, their job is to interpret the way the law already stands with respect to each particular case, not to decide on how the law is to be.

Yet in passing judgment, judges make law. They gradually determine the actual extension of the relevant action descriptions employed in statutes and previous judgments. They may uncover inconsistency within the extant system of statutes and judgments, in which case they eliminate this inconsistency. They are bound to judge consistently with previous judgments within the same system, except where they can show previous judgments to have been mistaken or to be no longer consistent with the law. Different systems of law embody different versions of this practice and different terminology, but for ease of reference we can refer to this broad practice as 'precedent'. It is by this force of precedent, which is defeasible by argument but cannot be ignored, that judges legislate. In the absence of such force of precedent, there is no real system of law, since the judgment made in any particular case would be too dependent on the views of the judge who happened to preside over the case. While statute cannot exist without judges to apply it, moreover, the law-making activity of judges does not require statute. In common law, for example, judgments are based on what is held to be the opinion of the population within the jurisdiction, subject to precedent. It is judgment, not statute, that is at the heart of law.

Parallel to the judge judging what is to be done in a given case, we can understand agency as involving judgments about what to do in given situations. Such judgments would not contain any evaluative view of what it is good or right to do, though they could be motivated by such

evaluation. They need not result from conscious deliberation, moreover, so it would be misleading to describe them all as decisions or resolutions. We can distinguish three varieties of these judgments. The simplest is an intention manifested in an action. My judgment that I should apologise may be embodied in my immediately apologising. The second variety is intention for future action. Upon discovering that I have inadvertently offended someone, I might immediately intend to apologise as soon as possible. The third is aimed at immediate action but stymied by a masking disposition. Someone who is witty but very shy might, during the course of a conversation, think of some hilarious aside and want to say it but fail to do so. This person has made an immediate judgment about what to do, in this case what to say, but this judgment has fallen short of an intention.

If we picture agency in this way, then we can construct a model of self-legislation that parallels the way judges make law. To do so, we need the additional claim that each judgment binds future judgments made by the same agent in the same way that the judgments of a judge bind the future judgments of that same judge (and other judges in the same system of law). Our judgments, whether for immediate or future action, whether embodied in action or not, that is to say, can be understood as having the force of precedent. Notice that this does not require the legislator to have superior power over the person bound by the legislation. Neither does it require the explicit adoption of universally quantified policies specifying kinds of actions to some determinate degree, the equivalent of enacting statute.

Legal judgments need be specified only to the degree of detail required to make them consistent with the extant law. As the law evolves, such judgments may retrospectively come to look insufficiently detailed. One way in which judges alter the precedent set by previous judgments,

short of overruling them entirely, is by refining that precedent. This occurs when a case differs from some earlier case only in some detail that the later judge deems to be significant but which the earlier judge did not mention. Both judgments will stand, in such a case, but the precedent set by the earlier judgment will now have been refined. This is important for developing a model of self-legislation. For it would be psychologically implausible to suggest that my judgments are always at some specific level of detail regardless of that required by the situation. And this way of respecting precedent allows well-motivated refinement of earlier judgment to be an aspect of self-legislation.

We have now seen the outline of a model of self-legislation that avoids the influential conceptual objections raised by Anscombe. Over the course of the rest of this paper, we will see that this model does indeed fit the account of agency that Kant promulgates in *Groundwork*, that there is good reason to agree that rational agency sets precedent in the way described, and that there is empirical reason to accept this model of self-legislation as a model of the way human agents in fact operate.

3. Maxims and the Law

If we retain the picture of self-legislation as the enactment of statute rather than as setting precedent through judgment, then we must understand the maxims that become law as themselves formulated much like statutes. Maxims must then describe the action in some determinate way and declare actions of that type permissible, impermissible, or required. One influential commentator on Kant's ethics gives 'Always tell the truth' and 'Always tell lies' as

typical maxims (Ross 1954, 44). Since it would be implausible to suggest that every human action is governed by such a maxim at the time of acting, interpreters of Kant sometimes argue that, as Thomas Hill and Arnulf Zweig put it, 'we need to think of maxims, not as principles that we have in mind whenever we do something, but rather as principles that characterize an act in a way appropriate for moral assessment' (2002, 68). Understanding maxims in this way, however, generates a major problem for Kant's moral philosophy.

To see what this problem is and how it is generated, consider an influential reconstruction of Kant's position offered by Andrews Reath (1994, §§ 3-4). This reading distinguishes two levels of self-legislation. On one level, the agent legislates substantive moral laws such as 'do not make false promises' by reasoning through a deliberative procedure that leads to that decision. In this way, the agent simultaneously asserts the conclusion and is moved by the considerations that support it. The deliberative procedure in question ascertains whether the maxim of an action is universalizable, on grounds that otherwise it is not fit to be law. For this to be genuine self-legislation, therefore, the universalizability principle itself must not be externally imposed. This is the second, deeper level of self-legislation: rational volition involves the ability to govern one's action by normative standards, which requires there to be practical laws; analysis of the concept of a practical law shows that the categorical imperative is the only possible practical law. It follows that the categorical imperative is essential to rational agency. It is not imposed from outside, but stands to rational decision-making as the constitution of a political system stands to the making of law within it (Reath 1994, § 5).

Reath is aware that there are many points of potential disagreement in this chain of reasoning, but considers it to be Kant's reasoning nonetheless. What certainly seems right about Reath's

account is that if the categorical imperative is to be self-legislated, as Kant indeed claims that it is, then it must be a product of the very nature of rational agency. It must be entirely independent of the agent's particular inclinations and choices. For otherwise, there can be an agent who does not legislate it. Kant seems to say as much himself: 'the fitness of the maxim of every good will to make itself a universal law is itself the sole law that the will of every rational being spontaneously imposes on itself without requiring any incentive or interest for support' (G 4:444; see also 4:402n).

The limitation of this picture becomes clear, however, when we consider an agent who acts with the aim of satisfying their strongest occurrent inclination. Why should this maxim not be universalizable? I certainly can aim to satisfy each of my strongest occurrent inclinations while everyone else is aiming to satisfy theirs. Even if your satisfying your strongest inclination will preclude me from satisfying mine at some given time, this does not preclude us from simultaneously *aiming* to satisfy them. We can fight over the last biscuit. Any problem with universalizing this maxim would have to parallel Kant's objection to serving my own happiness by never helping anyone else (G 4:423). That objection rests on the thought that my own happiness would not be served by nobody ever helping anyone, since my own happiness requires the prospect of people helping me. However, my own happiness seems perfectly compatible with everyone always aiming to satisfy their strongest inclinations. There seems no reason to believe that someone's strongest inclinations will necessarily be selfish in content, so that acting on them means never helping anyone else and never refraining from harming people, and there seems no

reason to believe that the harm done to me by people acting on their inclinations must outweigh the happiness generated for me by my acting on mine.[3]

For there to be any substantial moral restrictions on behaviour necessitated by the universalizability principle, therefore, one's actions must necessarily involve maxims other than the maxim of acting on one's strongest inclination. For if that is your only maxim, there are no restrictions on your action. This would render Kant's entire moral system nugatory. What is required, therefore, is reason to deny that an action could have only this maxim. What reason could there be? Reath has pointed out that the universalizability principle can count as both self-legislated and universally binding only if it is necessitated by the nature of agency, as we have seen. In order to deny that an action can have only this maxim while maintaining the idea of self-legislation, we would have to show likewise that the nature of agency necessitates that maxims other than this one are generated by actions, whatever the agent's inclinations.

So long as we continue to see maxims as universal statements fit to be statutes, we will be unable to meet this requirement. Such a maxim would not reflect the structure of the action, but the agent's reason for doing it, so an action could have only the maxim of aiming to satisfy one's strongest occurrent inclination.[4] In the next section, we will see that Kant's notion of a maxim

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[3] It might be argued that this maxim is not universalizable since always acting on it is indistinguishable from not acting on maxims at all, which is equivalent to not being an agent. Such reasoning would be mistaken, however. We should distinguish the creature that has no will and so necessarily acts on its strongest inclination from a rational agent who acts on the maxim to do so, because only the latter could do otherwise (compare Korsgaard 2009, § 4.4.3).

[4] This argument also opposes Onora O'Neill's view that the maxim is the 'fundamental principle' that explains the other intentions involved (1985, § 2), Jens Timmermann's view that the maxim specifies the goal that the agent values in itself (2007, App. C), and Allen Wood's view that a maxim is a principle one

should be construed in a different way, as a particular judgment about what is to be done in the present situation. Such a judgment relates the action's motive to its purpose. Maxims construed in this way reflect the structure of their actions. We will go on to see that Reath's insight can be redeployed to show that rational agency necessitates that such maxims become law binding the agent as precedent for future maxims.

4. The Structure of Maxims

It is unfortunate that Kant does not give a clear definition of a maxim in *Groundwork*, especially given the centrality of this concept to his moral philosophy. He tells us that a maxim is 'the subjective principle of volition' (G 4:400n) and 'contains a practical rule determined by reason in accordance with the conditions of the subject' (G 4:421n), but he does not spell out the form of that practical rule. He does tell us that every maxim has 'form, which consists in universality', 'matter, that is an end', and a 'complete determination of all maxims' (G 4:436). The precise meaning of this is not immediately apparent and the aim of this section is to argue for a particular interpretation of it.

Kant does give examples of maxims, but on their surface these do not clearly indicate a common structure. Here is one of his examples: 'I make it my principle out of self-love to shorten my life if its continuance threatens more evil than it promises advantage' (G 4:422). Here is another: 'When I believe myself short of money, I will borrow money and promise to pay it back, even

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deems important (1999, pp. 41, 52). Each of these interpretations allows an action to have only the maxim of satisfying one's strongest inclination.

though I know this will never be done' (G 4:422). Earlier in the book, Kant discusses 'the maxim of getting out of a difficulty by making false promises' (G 4:403), of which fraudulently borrowing money is an instance. He also talks of refraining from certain actions by following 'my maxim of neglecting my natural gifts', motivated by its 'agreeing with my taste for amusement', and gestures vaguely at a maxim about serving my own inclinations by not contributing to the well-being of others (G 4:423).[5]

If all maxims are to have a common structure, then these examples must each instantiate it. All the examples include purposes, which are at least: to avert a net balance of evil over suffering for oneself; to get out of the difficulty of being short of money; to get out of difficulty; to amuse myself; to serve my inclinations. There is no obvious rule here concerning the level of detail required to specify the purpose. The second purpose, for example, is a specific case of the third. Since the first, second, third, and fourth can each be a purpose set by my inclinations, instances of each of those can also be instances of the fifth. It seems no accident that these statements of purpose vary in specificity in this way. In order to see why, we need to consider what else is included in a maxim.

Christine Korsgaard argues that 'the basic form of a Kantian maxim is "I will do act-A in order to promote end-E" … making a false promise and committing suicide are what I am calling

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[5] In his presentation of this last example, it is unclear what Kant means to refer to by the phrase 'this maxim'. The thought he ascribes to the agent is: 'What do I care? Let every one be as happy as Heaven intends or as he can make himself; I won't deprive him of anything; I won't even envy him; but I don't feel like contributing anything to his well-being or to helping him in his distress!' (G 4:423). This thought itself cannot be the maxim, unless a maxim is to include rhetorical questions and prescriptions for how the world beyond my control should be. It seems to me that the maxim is alluded to in the final sentence of this thought: I will not contribute to the well-being of others, because I am not inclined to do so.

"acts"; making a false promise in order to get some ready cash, committing suicide in order to avoid misery are what I am calling "actions"' (2009, § 1.2.5). On this account, the maxim is the full specification of the action, which includes the act performed and the end or purpose the agent is attempting to achieve. Two further readings of the idea of a maxim also include the act and the purpose, but add a third element. Some commentators add the motive for doing the act, so the maxim in the example of suicide is not simply 'to kill myself in order to avoid misery', but is more like 'out of self-love, to kill myself in order to avoid misery' (e.g. Hill and Zweig 2002, p. 67). Others add the circumstances in which the act is performed: 'If I am ever in a situation of irremediable suffering that is greater than any further pleasure that I can expect, then, in order to gratify my self-love, I will commit suicide' (Guyer 2007, p. 84). Notice that there is some disagreement here over what should be classified in each category: we might consider the avoidance of misery to be the purpose or specify that misery in the circumstances; if we do the latter, then it seems that self-love must be the purpose, rather than the motive, since otherwise there is no purpose.

My aim here is to show that we should understand the maxim as specifying the purpose of the action and the motive for pursuing that purpose. We will first consider a problem with Korsgaard's inclusion of the act alongside the purpose, through which we will also see that it is unnecessary to give circumstances a special place in the structure of the maxim. Korsgaard's proposal faces the problem that there are many possible specifications of any act (see Anscombe 1957, § 23). How are we to decide which to include? Why describe my act as 'making a false promise' rather than as 'making a promise', 'speaking in English', or 'emitting sounds through my mouth'? Korsgaard suggests that we should include in a maxim all the relevant considerations that go into deciding upon the 'proposed reason' for acting in a certain way (2009, § 4.2.2).

Whether or not we accept this as a reason for including the falseness of the promise in the maxim, however, we still need to ask why this should be the appropriate description of the *act* rather than part of the agent's *purpose*.

The same goes for Korsgaard's example of the maxim of committing suicide in order to avoid misery (2009, § 1.25). Why should the act be identified as suicide, rather than as drinking this poison or even just as drinking liquid? Suicide is a purpose the agent is pursuing, albeit for the further purpose of avoiding misery. Kant's own examples similarly identify acts by such purposive phrases as 'to shorten my life', to 'borrow money and promise to pay it back even though I know this will never be done', 'making a false promise', 'neglecting my natural gifts', contributing nothing to the well-being of others. Once we see that Kant places no restrictions on the level of detail required for the purpose involved in a maxim, we can see that all the examples given so far can be stated in terms of a complicated purpose without adding any further description of an 'act' done for that purpose or the circumstances in which the purpose is pursued. Such a purpose might be ending one's own life in order to avoid misery or making a false promise in order to gain money.

Yet there is more to the maxim than just the purpose. For there can be a purpose in the absence of an action. The purpose of perspiring, for example, is to cool down, but perspiration is not an agent's action. What is missing is a specification of the agent's motive for pursuing that purpose. In his own examples, Kant specifies that the purpose of ending my life to avoid further suffering is pursued 'out of self-love', the purpose of making a false promise in order to get money is a 'principle of self-love or personal advantage' (G 4:422), and the negative purposes of neglecting my natural gifts and helping nobody are adopted out of the motives of amusement and serving

one's own inclinations respectively (G 4:423). When there is a motive for pursuing the purpose, and when that motive explains how the pursuit of the purpose has come about, then there is an action. So we should construe the maxim of an action to relate the purpose to the motive that explains its pursuit.

We should understand the universalizability test accordingly: a maxim is universalizable if and only if (a) it is possible for everyone to always pursue that purpose on that motive, and (b) my motive would not be defeated by everyone doing so. Since a maxim involves only a motive and a purpose, moreover, deciding to respect the categorical imperative is itself an action with a maxim even though it involves no movement of the body, there are no particular circumstances in which it should be acted upon, and it has no purpose beyond respecting the categorical imperative. What deserves moral esteem is action with the maxim 'out of duty, I will obey the categorical imperative' (see G 4:400-1). Such an action is simply the decision to ensure that the maxim of one's action in the world is universalizable.

We can now see why every action must involve its own maxim, why it is not possible for an action to have only the maxim of satisfying the strongest occurrent inclination. A maxim is not necessarily a thought. It need not be an explicitly adopted rule or policy. It need not result from deliberation. It is simply the specification of the action. Without a purpose pursued for a motive, an event is not an action; a maxim reports the purpose pursued and its motive. Even the most spontaneous actions will have maxims, so long as they are intentional actions at all rather than mere mechanical bodily reactions. This helps us to see what Kant means by the claim that a maxim has 'form, which consists in universality', 'matter, that is an end', and a 'complete determination of all maxims' (G 4:436). That the form consists in universality follows from the

fact that the maxim specifies only the motive and the purpose. Neither the agent nor their spatiotemporal location feature in the maxim itself. The matter or 'end' is not just the goal or purpose, since otherwise all teleological processes would be governed by maxims, but is the pursuit of that purpose (however finely specified) with this motive. That the maxim contains a determination of all maxims, finally, is the claim that it sets a constraint on all other maxims: that they be consistent with this one. In the next section, we will see why this is so.

5. Maxims as Precedent

To say that every maxim legislates for the agent, therefore, is to say that this specification is laid down as law binding the agent. Since there are many ways to specify the motive and purpose of a given action, we cannot understand this legislation as analogous to the enactment of statute, since statute requires the action it rules about to be specified in some determinate way. My aim here is to show that we can understand this legislation as analogous to the way judges make law. Understanding maxims as reflecting the purposive structure of action allows us to view them as judgments about what is to be done in the circumstances, as judgments were defined in section 2 above: such judgments are not necessarily evaluative, though they can be, do not necessarily result from deliberation, though they can do, and need not be consciously entertained, though they can be; they can occur in the form of intentional actions, intentions for future action, or judgments falling short of action due to masking dispositions such as shyness.

If such judgments are to have the force of precedent, this cannot be due to some decision or inclination on the part of the agent to respect them in this way. For then self-legislation would

not be a universal fact about all agents: there could be agents who did not treat their judgments as precedent. Parallel to Reath's point about the legislation of the categorical imperative, therefore, we should accept that if maxims are to have the force of precedent then this must be due to the nature of rational agency. The law of precedent must be seen as the constitutional framework within which agents make judgments. What is more, if this is right then it is not an additional constitutional fact alongside the categorical imperative: as we will see, the categorical imperative is necessitated by this constitution of precedent.

For example, consider an action specified by the maxim 'out of desire for advantage, borrow money by making a false promise to pay it back'. If I judge that this is the thing to do in a given situation where gaining money in this way is available to me, then prima facie I ought to judge that this is the thing to do when I am next in that situation. This does not require the judgment to have a normative dimension: it does not require that I think this is the right or good thing to do. All it requires is that I pursue a purpose for a given motive. The next time I can pursue that purpose for that motive, it seems, I should do so unless there is some reason why I should not or need not. Otherwise my behaviour would be irrational: if a particular situation warrants a specific judgment this time, then it warrants it every time; any situation that does not warrant the same judgment is not the same situation.

This prima facie obligation to repeat the judgment might be defeated by the circumstances being different in some important way. It might be that the previous person I defrauded was a recent acquaintance passing through, but this time I have the opportunity to defraud a member of my own family. So I might judge that I do not really have the same opportunity here. In which case, the purpose of my original judgment will now be understood differently, such as making a false

promise in order to gain money from somebody who will not be able to ensure that I repay it. The situation is not repeated, so the same judgment is not warranted. Alternatively, the prima facie obligation might be defeated by the purpose having been arbitrarily chosen from a range of equal ways of satisfying the motive. If my motive of enjoyment leads me to choose a glass of Viogner, then it is not irrational to choose Gewürztraminer the next time, so long as I believe that I will find either wine equally enjoyable. Finally, a different judgment might be warranted by having changed my mind about some relevant factor: perhaps I have discovered that I do not like Viogner; perhaps I have decided to stop committing fraud.

In the first two of these ways, the precedent set by the original judgment is refined into a more specific judgment or is enlarged to contain a disjunctive purpose. This is why there should be no specification of the required level of detail in a maxim: one way of respecting precedent is to reconsider the maxim that one previously acted upon, the relevant content of the judgment, in the light of factors whose relevance might not have been apparent at the time. Changing my mind about some relevant factor, on the other hand, undermines the precedent set by the previous judgment. But this is not the same as failing to respect the rule of precedent: that rule allows previous judgments to cease to exert the force of precedent, so long as the judge judges that there is good reason for this to happen. The rule of precedent is flouted only when a judgment fails to be repeated in relevantly similar circumstances without the agent judging that it should be refined, enlarged, or overruled. Making contrary judgments without reason to do so is irrational. The nature of rational agency, therefore, imposes the rule of precedent. When we flout that rule, we fail to act rationally.

We can read Kant's argument for the universalizability principle as claiming that it is binding on all rational creatures because rational agency involves setting precedent in this way. The rule of precedent constrains action by generating 'the necessity that the maxim conform to this law' and the law 'contains no condition limiting it', from which Kant thinks it follows that 'there is nothing left over to which the maxim of action should conform except the universality of a law as such' (G 4:421). Since the precedent set by a maxim will need to be respected as precedent however my inclinations and my life might change in the meantime, that is, the maxim must be fit to be law governing agents irrespective of their inclinations or other details of their lives. It must be fit to be law for all people. We are rationally bound, therefore, to will only those maxims that we can at the same time will to be universal law.

6. Precedent and Normative Law

To bring this analogy between agential and judicial precedent more sharply into focus, we need to distinguish two aspects of legal judgment. Unless we are clear on this, moreover, the relation between Kant's language of self-legislation in his moral philosophy and his discussion of legislation in his legal and political philosophy will seem puzzling. For the ideal state as Kant conceives it contains a separation of powers between executive, legislature, and judiciary. Only the legislature makes laws, he argues; only their activity is properly called 'legislation'. The executive can make decrees about particular cases but cannot make general laws, and the role of the judiciary is to apply the law to particular cases, 'to award to each what is his in accordance with the law' (MM 6:313; see also MM 6:316-7). This is no mere terminological point. The judiciary has rightful authority only to apply the law that is given by a distinct legislative body

(MM 6:317-8). In which case, it might be difficult to see how agency could be analogous to the activity of the judiciary.

Relatedly, the only analogy that Kant explicitly draws between the individual agent and the judiciary concerns not the self-legislation of maxims but the moral evaluation of one's own actions and those of other people. Conscience, he tells us, is like a judge or tribunal applying the moral law to cases after the action has occurred (MM 6:438; LE 27:296-7, 27:354), as indeed is our judgment of other people's actions (LE 27:703-4), though we ought to strive to develop the use of conscience to assess possible actions in deliberation (LE 27:617). This fits very well with his legal theory: judges are likewise restricted to determining whether a given case falls under a particular law (see LE 27:573-4). Given this, it might be difficult to see how the analogy with legal judges could also hold for the agent's self-legislation of maxims.

That the judgments of the judiciary are laid down as precedent, however, neither entails nor is entailed by the restriction that these judgments only apply law made by a distinct legislative body. The former is just the requirement that the law be consistent in its application, as we saw in section 2. Kant argues that the latter is required for the judiciary to be part of a mechanism by which the population imposes its will on itself, that without an independent legislature a judiciary is simply imposing its own will (MM 6:317). Whether or not we agree with Kant here, it is clear that no parallel point can be made about individual self-legislation. The separation of powers in the state is required to legitimate the coercion of defendants by the judiciary, but in the case of individual agency there is no coercion of one person by others. Coercion is a feature of collective self-legislation by a plurality of people, not a feature of individual self-legislation.

The analogy between agency and the judiciary, therefore, is just that judgments are laid down as precedent. In neither case is the judgment itself normative. The court only rules on whether the case falls under a certain law, which is not itself a normative question. It has normative implications only because the law it applies is normative. Perhaps it is because the judiciary's judgments are not normative in themselves that Kant refuses to classify them as legislative: only the legislature promulgates normative law. Kant applies the same structure to moral evaluation of action. In comparing an action with the moral law, one makes a judgment that is itself factual but which generates normative implications when conjoined with the moral law. But such assessment does not legislate right and wrong.

Conversely, on the model of agency outlined in this paper, the judgment involved in agency does not apply the moral law. It is simply the maxim that a certain purpose be pursued on a specified motive. The normativity of precedent does not derive from the content of the judgments, but from the system within which they are made. Law requires the judiciary to be consistent. Rationality requires the agent to be consistent. This model of agency is therefore distinct from that indicated by Robert Nozick and Michael Bratman, according to which one sets as precedent the weights accorded to each consideration in deliberation (see Bratman 2002, §§ 2 and 7). Their model seems restricted to judgments that result from deliberation, however swift or unconscious, whereas the model presented here has no such restriction. On their model, moreover, precedent governs evaluative judgments, whereas on the model presented here the relevant judgments are not evaluative.

Kant does not distinguish clearly between these two aspects of the judiciary's judgments. All that is required for precedent to count as some kind of legislation within Kant's conceptual

framework, however, is that it make sense to describe something as law even though its content is not normative. The agent's maxims would then be legislated if they become part of the non-normative law. (The rulings of Kant's judiciary could be described as legislative in the same sense, even though Kant does not use this term and even though the judiciary does not alter the normative law.) Kant does often use the term 'law' in a non-normative sense throughout *Groundwork*, as well as using it in a normative sense. He uses it of the metaphysics of nature at the very start of the book, for example (G 4: 387-8); the laws of nature do not prescribe what things *ought to* do. The categorical imperative, moreover, requires that you could will your maxim to be a 'universal law of nature' (G 4: 421). The requirement is not that you could will that everyone *ought to* act on that maxim, but that you could will that everyone *does* act on it, as though it were a law of nature. It is not impossible for a world to contain the prescription that everyone ought to make promises only when they do not intend to keep them, for it is possible that there be such a world in which this prescription is generally flouted. What is impossible is that everyone makes promises only when they do not intend to keep them.

In laying down my maxims as precedent, therefore, I do not legislate right and wrong. But I do add to the descriptive law within which I live. The maxim does not, of course, become a law that governs me in the way that the law of gravity governs me. But it does become part of the precedent that I am rationally bound to respect. Maxims are legislated, then, in the sense that they become part of the the way things are, part of the descriptive law of the agent's life. Our constitution as rational agents requires us to respect that descriptive law. This is why it requires us to act only on maxims that are fit to be part of that law.

7. Evaluating the Model

The foregoing considerations clarify the notion of self-legislation understood as analogous to judicial precedent, show that this agential precedent is essential to rational agency, and show that we can coherently read Kant as understanding self-legislation in this way. On this picture, the will is autonomous when it acts to ensure that its maxims are universalizable and hence fit to become law by precedent, and the reason we ought to act on universalizable maxims is that we are rational agents whose maxims do set precedent for our own future action, which is what it means to be a self-governed agent. But we have not yet addressed one final issue arising from the critique of the usual idea of self-legislation. Is the idea that we are self-governed by precedent any more plausible than the idea that we are self-governed by the enactment of statute? Since a maxim specifies the motive and purpose of an action, this account does not face the phenomenological objection. Whereas the claim that every action involves endorsing a statute seems phenomenologically false, the idea that each of my actions has a motive and a purpose has no phenomenological implications. The question we need to ask, however, is whether there is good reason to believe that such maxims are laid down as precedent for future actions to conform to. We have seen that this is a requirement of rational agency, but why should we believe that we are rational agents as so described?

Kant argues for our being self-governing agents by arguing for transcendental idealism (G 4:450-3). But we need not accept this in order to have reason to agree that our actions set binding precedent. We can instead look for empirical evidence. This might seem to be a profoundly anti-Kantian suggestion. After all, Kant distinguishes the 'metaphysics of morals' under discussion in *Groundwork* from 'practical anthropology' on the grounds that the former is a priori whereas the

latter is empirical (G 4:387-8; see also G 4:431). But the suggestion is not that we should use empirical research to ground our conception of agency, since we have already derived this conception. Nor is it that we should look to empirical research to confirm the idea of the autonomy of the will, since this is a normative ideal to which we should aspire. It is simply the claim that if humans really are self-governed agents as we have defined them, then this ought to show up in their behaviour.

Kant agrees. It is because the moral law applies to us, he claims, that we feel pleasure or satisfaction in obeying it (G 4:460). It is because we are imperfectly rational agents that we do not feel responsible for having our desires and inclinations but do feel responsible for acting on them (G 4:457-8). In addition to these phenomenological claims, Kant makes an empirical prediction on the basis of his metaphysics of agency. 'There is no one', he writes, 'not even the most malicious villain, provided only that he is otherwise accustomed to use reason, who, when presented with examples of honesty of purpose, of faithfulness to good maxims, of sympathy, and of general benevolence, even when requiring great sacrifice of advantages and comfort, does not wish that he too might have these qualities' (G 4:454). Because we are agents, the moral law is binding on us, and our recognition of this fact is empirically manifest in our behaviour.

It is not only this recognition that ought to be manifest in our experience and action, however. For if agency does indeed involve the self-legislation of maxims, then this ought also to be detectable in behaviour. A major research tradition in empirical social psychology, moreover, supports the idea that we are subject to our own precedent in this way. According to the cognitive dissonance paradigm, agents experience dissonance whenever two or more 'cognitions' stand in tension. The term 'cognitions' is intended to cover actions as well as thoughts, beliefs,

judgments, and desires. The proposed dissonance is an unpleasant feeling. Within the paradigm, there is significant disagreement over which tensions produce dissonance. It need not be outright contradiction. It can be a more subtle lack of coherence in which cognitions are logically consistent but lack structures of mutual inferential support. Or it might rather be that one cognition, particularly an action, has consequences that conflict with the desires or values enshrined in some other cognition. Or it might again be that a cognition conflicts with the agent's self-image. However dissonance occurs, the agent is moved to reduce it either by revising one of the cognitions or by attending to something else until the feeling fades away. Since actions cannot be undone, the former strategy involves either revising beliefs, revising desires, or intending not to repeat the action. If the latter strategy is taken, on the other hand, then the agent is likely to meet the same dissonance again when relevantly similar circumstances arise.[6]

If we understand agency to involve precedent, then we should expect agents to recognise that each action demands that other actions and judgments are consonant with it. This is exactly what the cognitive dissonance literature suggests. Human agents, according to that literature, feel the need to ensure that their actions are consonant with one another and with their beliefs, desires, and evaluative judgments. This is not to say that we all strive to ensure such consonance among our cognitions. Such a finding would suggest not only that we legislate for ourselves in the way that judges make law, but further that we are all driven to act in accordance with the categorical imperative to ensure that the law that we make is indeed fit to be law. It would suggest that human behaviour manifests the autonomy of the will that Kant thinks we are normatively

[6] Joel Cooper's book *Cognitive Dissonance* (2007) is a masterly study of this research paradigm over its fifty-year history. The view that dissonance always involves the agent's self-image brings this research into line with research into the influence an agent's self-expectations has on their behaviour, which has been carefully reviewed by J. David Velleman (2000).

required to attain. The literature rather supports the idea that we recognise this normative demand, although this recognition tends to occur after action and we commonly respond to it by distracting ourselves until it is no longer felt.

Cognitive dissonance research is an ongoing programme within which many debates continue. In particular, there is currently much discussion of the extent of cultural influence on cognitive dissonance (see Cooper 2007, ch. 7). We should distinguish, however, between the structure of dissonance and its manifestations in behaviour. For it could be that the former is explained by the present model of agency whereas the latter depends on that model along with contingencies of upbringing and situation. Even universal generalisations based on empirical evidence can track such historical contingencies rather than the basic metaphysical structure of agency. Yet the framework of cognitive dissonance as a thriving research paradigm does seem to be what we should expect to find in a science that studies agents whose actions set precedent for their future actions. The model of agency outlined here is empirically respectable, that is to say, if not positively confirmed. Evaluating it as a model of agency, moreover, should involve careful analysis of relevant empirical evidence, including the continuing discussion of cognitive dissonance, to ascertain whether the model can account for such evidence better than rival models and, if not, whether it can be refined in the light of such evidence in such a way that it does best account for the evidence.
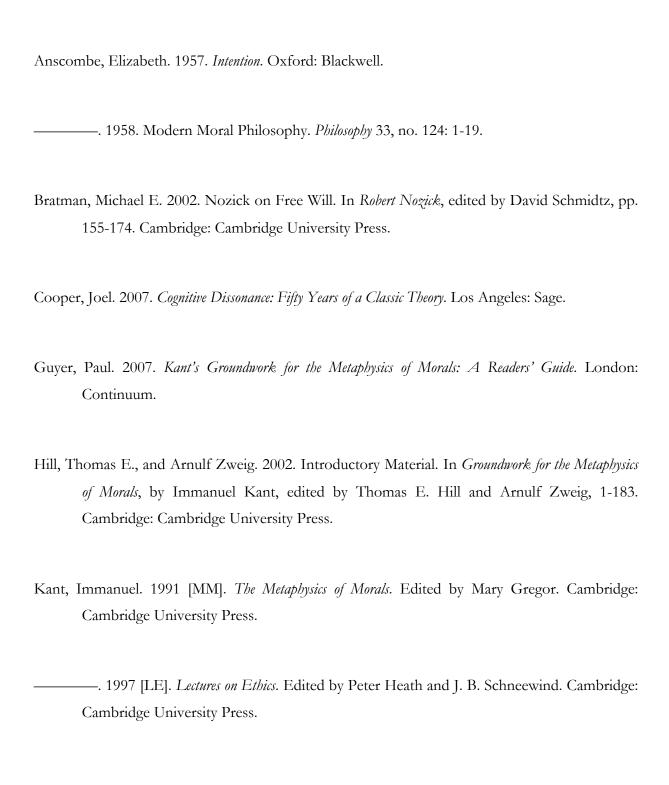
Just as there is much more to be said about the adequacy of this model for explaining human behaviour, there is much more to be said about the interpretation of Kant's moral philosophy presented in the course of developing the model. But these are for another time. One last point to note, however, is that this model has implications for another debate central to contemporary

moral psychology. For on this model of agency, action constitutes the character of the agent. While one can adopt general policies, such as deciding to become vegetarian, that is to say, this model has such policies coming to exert the influence of precedent with repeated manifestation in actions and other particular judgments. It is thereby an account of the structure and development of character traits. Kant himself points this out when he equates 'the maxims of the will' with the agent's *Gesinnung*, meaning the agent's overall attitude, disposition, or character (G 4:435). The firm and unchangeable character of the virtuous, on this view, is developed through consistency in self-legislation. The viability of this model of agency should be assessed, therefore, within the larger context of debates in moral psychology in general.[7]

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