Introduction

A prior Legal Theory Lexicon post explored utilitarianism, an approach to normative moral theory that has had an enormous influence on legal thought. This week, I take up one of utilitarianism's main rivals, deontology. Deontological moral theories vary in myriad ways, but the focal point for deontology is the concept of duty with its correlative notions of rights and permission. Thus, the distinctive thesis of deontology in general might be formulated as the claim that the rightness of action is a function of whether the action is required, prohibited, or permitted by a moral rule.

This is, of course, a simple formulation, and contemporary philosophical theories in the deontological tradition offer more sophisticated and nuanced formulations. This post aims to introduce the central idea of deontological moral theory with special reference to the interests of a first-year law student with an interest in legal theory. Almost every first year course will include deontological ideas. In criminal law, deontology is reflected in the notions that an action cannot be a crime unless it is the violation of a moral duty and in retributive theories of punishment. In torts, deontological theories argue against the economic analysis of tort law and for the idea that tort law is best explained by a theory of corrective justice. In property law, deontological theories emphasize the role of property in creating spheres of autonomy. In contracts, the deontological approach results in the idea that contract is fundamentally explained by the duty to keep a promise. And even in civil procedure, deontological ideas appear in the view that litigants have a right to a "day in court."

What Rights and Duties Do We Have? The idea that some actions are wrong and therefore forbidden has a strong intuitive appeal. And we can easily generate a list of action types that are at least ceteris paribus wrongful: telling lies, breaking promises, intentionally killing or injuring an innocent person, stealing, and so forth. For some purposes, a simple list of wrongs may be sufficient. But philosophers and legal theorists are unlikely to be satisfied with a list. Why not? Because the content of the list is likely to become controversial. Lying belongs on the list, but what about the failure to make a full disclosure to a stranger in an arms length commercial
transaction? Battery is on the list, but should the exception for self-defense be extended to defense of property?

So what method or principle allows us to identify the list of duties, rights, and permissions that would provide the content of a fully specified deontological moral theory? One possibility is that we would identify the list by appeal to our sense of what is right and wrong. Let's give that sense a fancy name: call it "moral intuition." One possible method for identifying the content of a deontological moral theory would be to consult our moral intuitions about particular cases. But objections to this method are likely to arise immediately. For example, my intuition may not agree with your intuition. What then? Even if I consult only my own intuition, I may come to see that my intuitions about particular cases are not consistent at the level of principle. My intuition makes an exception for lies told to instructors as excuses for turning in late papers, but not for lies told to friends as excuses for extreme lateness.

Raw moral intuitions might be refined through a technique suggested by the philosopher John Rawls--the method of *reflective equilibrium*. We might aim to order our raw moral intuitions by positing some general principles that would explain and unify our considered judgments about particular cases. Once we have a set of general principles, it may turn out that some of our considered judgments about particular cases need to be revised. In other cases, a general principle may conflict with a considered judgment about a particular case that we hold very firmly. In such a case, we may wish to modify our general principles. If we work at it, we might eventually reach a point where our revised general principles are in agreement with our revised judgments about particular cases. Rawls call this state "reflective equilibrium." The same procedure might be used collectively to resolve conflicts between the judgments of different individuals; Norman Daniels call this interpersonal use of reflective equilibrium, "wide reflective equilibrium."

Kant Reflective equilibrium is one way to specify the content of a deontological moral theory. The German philosopher Immanuel Kant provides another. Before I proceed any further, I want to make it clear that what I am about to say does not provide anything close to even a basic introduction to Kant's moral philosophy. That would take a series of several Legal Theory Lexicon posts. Nonetheless, we can get a glimpse of one of Kant's most important ideas, the *categorical imperative*. Kant believed that duty was the central moral idea, and he recognized the
problem of specifying duty. Kant had a particularly deep and interesting solution to that problem which begins with the idea of a good will: "Nothing can possibly be conceived in the world or out of it that can be called good without qualification except a good will." And a good will is a will that aims for the good and not merely for the objects of desire and inclination. If we act on the basis of a hypothetical imperative (if I want X, then I should do Y), we act on the basis of desire and inclination--"heteronomously" in Kant's terminology. In order to aim for the right, we must act on the basis of a categorical imperative, that is, on the basis of a reason or principle that does not include a desire or inclination. (In Kant's terminology, this would be acting "autonomously.") So what would a categorical imperative look like? Kant's answer to this question is stunningly brilliant--one of the most awesome moves in the history of philosophy. Kant suggested that one could act on the basis of a categorical imperative by consulting what he saw as three equivalent formulas:

*The Formula of the Law of Nature*: "Act as if the maxim of your action were to become through your will a universal law of nature."

*The Formula of the End Itself*: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."

*The Formula of the Kingdom of Ends*: "So act as if you were through your maxims a law-making member of a kingdom of ends."

Onora O'Neill, the great Kant scholar, has a really wonderful essay called *A Simplified Account of Kant's Ethics*. If you are still reading this post and you haven't already read O'Neill's piece, download the word file and read it now--believe me it is worth it.

O'Neill focused on the formula of the end itself, so let me say just a few words about the formula of the law of nature by giving an example. Suppose you are deciding whether to tell a lie to a friend to get out of a lunch date. You first ask yourself, "What is the maxim (or principle) of my action?" Suppose the answer is "Lie when convenient!" Now, you imagine that if you were to lie to your friend the principle upon which you acted would become a universal law of nature--everyone would one lie when it was convenient. Could or would you do this? Arguably not, for two reasons. *First*, if everyone were to lie whenever it was convenient, human communication
might become impossible, because no one could be trusted. The maxim--lie whenever convenient--has a *contradiction in conception*, because the lie would never be believed in the possible world in which the maxim of your action was a universal law of nature. *Second,* if one can imagine a world in which everyone lies when convenient, you might not be willing to lie on this occasion if the result of your action was that the maxim--lie whenever convenient--were to become a universal law of nature as a result. You might not want others to lie to you when they thought it was convenient--we can call this a *contradiction in the will*. Of course, my analysis of this example has been very sketchy and crude, but I hope that I have done enough to give you the general idea.

**Some Objections to Deontology** All of the main approaches to moral theory are controversial, and because the debates have been raging for centuries, the arguments are now enormously complex. So I am going to give two very simple objections to deontology, with the warning that the current state of play on these objections is now so complex and ramified that you really must be a specialist to give even a rough summary.

**The Indeterminacy Objection.** The first objection is that the content of a deontological moral theory is underdeveloped by the various methods for deriving a set of duties, rights, and permissions. So, for example, the method of reflective equilibrium may help us to order our considered judgments about particular rights, duties, and permissions, but it might be objected that this method is unlikely to settle any of the major disputes about what the duties, rights, and permissions actually are. Different people will arrive at different reflective equilibria. Even a single individual may come to believe that a variety of equilibriums are equally plausible or that her view of the most stable equilibrium is unstable, changing frequently in response to new examples or arguments. Kant's approach is subject to the same objection, with many critics arguing that Kant's method does not produce unique answers to particular questions about duty. Deontological moral theorists might counter that although their methods may not always produce unambiguous answers that will produce universal assent, that this is an unrealistic criterion for an acceptable moral theory. Particular deontological theories may allow the zone of moral disagreement to be narrowed and provide illuminating insights about particular cases.

**The Rigor Objection.** The second objection begins with the assumption that deontology does produce determinate answers to particular questions of morality, but argues that the answers are
implausible, because they are too demanding or inflexible. Consequentialist critics of deontology argue that absolute rights, duties, and permissions can lead to consequences that would not be morally acceptable. One famous hypothetical, based on Kant's discussion of lying, imagines that you are in Germany before World War II and a Nazi has come to your door and inquired whether you have seen a Jew who has escaped. If there is an absolute moral duty to tell the truth, then you are not permitted to lie in response, but telling a lie may be the only way to save the life of an innocent person. Surely, the consequentialist argues, telling the lie is not only morally permissible, it is morally required. Deontologists can try to escape from examples like these in a variety of ways. For example, the deontologist might simply argue that there is no duty to tell the truth to evil doers who will use the truth for evil purposes. Or the deontologist might argue that this is a case which duties conflicts, and that some higher order principle favors the duty to protect the innocent person from evil over the duty to tell the truth. Or the deontologist might allow that duties can be overridden by consequences in some circumstances. Some deontologists may bite the bullet and argue that one is required to tell the truth, even if the consequences are horrific.

**Conclusion** In a sense, the battle between deontology and consequentialism is one of the great battles of contemporary legal theory. Legal theorists argue over deontological and consequentialist theories of contract, tort, property, criminal law, procedure, constitutional law, and many other doctrinal fields. As a law student, you might start to look for deontological arguments in cases and class discussion. Almost every time class discussion turns to the question, "What should the rule be?," you will be able to construct both consequentialist and deontological arguments for and/or against the various possible rules. Getting the hang of normative legal theory is, in large part, a matter of mastering a set of consequentialist and deontological moves.