

Legal Narratives of Freedom Trace a Kantian Pattern

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Abstract

When can a doer of an act be made legally responsible for that act? The common law's attempts to resolve the problems this question raises shares the same structure as Immanuel Kant's attempt to resolve the dialectic of freedom and natural necessity that he identifies in the Critique of Pure Reason. Law and Kantian philosophy are related not merely externally: in their respective discursive registers both attempt to narrate a felicitous relation between individuals and the (social) universal. This paper locates that structure and shows how an understanding of it can illuminate the relation of judicial discretion to the refinement of categories in the case-law history, of the open-endedness of the common law to the objectivity of its judgments, and of law's morality to its amorality.

Introduction

There are few things more likely to make courts anxious than doubts about where the limits of their jurisdiction might lie—at in least in the narrow sense of adjudicating on matters outside what they understand as the geographical or thematic bounds of their competence. The sensitivity to the possibility of exceeding jurisdiction in this narrow sense varies with the worry that even what are taken to be the most mechanical applications of settled legal categories take place under a legitimation deficit, that subjects are unprepared to shoulder the demands of the freedom that's already supposed to be theirs. The question of jurisdiction—of the right to subject individuals to the force of the law— makes itself felt even there. It has not found a satisfactory answer. It has not found an answer, and this lack does not merely permeate legal thought as a feeling or an atmosphere, it is engraved in its characteristic structure. Across what are traditionally understood to be distinct branches of law there exist categories for limiting the imposition of legal liability where, in the eyes of the law, the subject's autonomy has been compromised such that to hold them responsible for their acts or their causes would be unjust. The relation of these categories to the presumption of responsibility that they can be taken to limit is one of the central objects of this paper.

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Kant's Third Antinomy: Compatibilism

In the Critique of Pure Reason's Third Antinomy and in the writings that build on it¹ Kant sought to supply this lack with the idea of unconditioned freedom, what he calls the 'real ground of imputability' of the actions of individuals. His project wants to end the uncomfortable business of attributing responsibility to creatures ill-equipped for assuming it. If successful, it would establish human freedom as an enduring and universal possibility irrespective of what empirical observation might suggest about the social-psychological conditions under which individuals maintain their existence and try to meet their needs.

Kant's strategy is to make room for the postulation of this idea of radical freedom by pointing out that conditioning through natural necessity is limited to objects insofar as they belong to the observable temporal world. This world is the domain of natural science, including those sciences which take human beings for their object, like physiology and empirical psychology, anthropology, political economy, and so on. As objects of these sciences, Kant concedes, human beings are as subject to natural necessity as Newton's apple (A550/B578).² Within this domain natural necessity can admit of no exceptions: if the thought of freedom were to contradict it, then so much the worse for the thought of freedom, whatever our interest in it might be (Kant 1996, pp. 102, 163). Thus, for Kant the problem of freedom initially poses itself as the problem of showing that the thought of it does not contradict our experience of a natural world evincing law-governed regularities. This is achieved by way of the fundamental duality Kant establishes in the Critique between things as we know them, i.e. as appearances under the formal conditions of our empirical knowledge, and things thought in abstraction from those conditions, that is as things-in-themselves. The limitation of those formal conditions, including the category of causal connection, to the realm of empirical knowledge, means that, whatever reality the idea of freedom may or may not have, thinking this idea will not bring us into contradiction with natural necessity so long as we do not predicate it of objects insofar as they are empirical.

If then, we would seek for a real ground of imputability for the actions of human individuals, we need to abstract from their character as empirical objects. What does that leave over? Kant redraws the line between subject and object, agent and world, within the subject itself, opposing to its empirical character as temporal, natural object, a way of thinking the subject's participation in an extra-temporal or intelligible realm: 'a higher, immutable order of things' (1991, p. 226). This distinction, according to Kant, makes it possible to think the same action under two distinct perspectives: as we know it empirically, that is as simply another member in the empirical chain of causes and effects, following with inevitable necessity, but on the other hand, as a product of the individual as subject, of a faculty of reason understood as 'the persisting condition of all voluntary actions under which the human being appears', and thus exempt from any empirical influence (1998, p. A553/581). Nature and freedom are united by showing them to be different ways of conceiving the same act. (In what follows I refer to this

¹ See Kant 1996, especially the Foundation of the Metaphysics of Morals and the Critique of Practical Reason.

² Compare the *Idea for a Universal History with a Cosmopolitan Purpose*: "Thus marriages, births, and deaths do not seem to be subject to any rule by which their numbers could be calculated in advance, since the free human will has such a great influence upon them; and yet the annual statistics for them in large countries prove that they are just as subject to constant natural laws as are the changes in the weather, which in themselves are so inconsistent that their individual occurrence cannot be determined in advance, but which nevertheless do not fail as a whole to sustain the growth of plants, the flow of rivers, and other natural functions in a uniform and uninterrupted course." (Kant 1991:41) In this essay, as well as in the *Critique of Judgment*, Kant begins to address the subjective bias of the concept of freedom in the first two *Critiques*.

position as ‘compatibilism’.)

This distinction, between two ways of conceiving human individuals, two ways of conceiving their actions, is basic to much legal logic; not just questions of criminal liability. In tort law, the development of concepts of duty of care and causation, the calculus of negligence and tests of reasonable foreseeability all involve grappling with the relation between the human being as self-determining and as empirically situated. And at equity transactions are set aside for undue influence or to protect specially disadvantaged or otherwise vulnerable parties, which is to say, when circumstances appear to demonstrate a compromise of their autonomy.³ Thus a court of equity will sometimes emphasize the facts of a person’s this-worldly entanglements—their ‘poverty or need’, their ‘sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education’ or their want ‘of assistance or explanation where assistance or explanation is necessary’⁴—in order to set aside, by reason of this their ‘special disadvantage’,⁵ a transaction to which they had formally assented. But more on this later. For the moment, let me return to Kant.

Retreat from Compatibilism

I had gotten to the point where he distinguishes the empirical and the intelligible character of the subject. I had said that in so doing he had redrawn the line between subject and object within the subject itself. My spatial metaphor is both fair and unfair as a characterisation of his thinking on this point. It is unfair because he means to say that the individual’s empirical and intelligible characters are discontinuous, they belong to two entirely distinct orders, two fundamentally opposed perspectives on the world. But it is fair, because having separated the empirical and the intelligible Kant is compelled to find some way to bring them back into relation, for otherwise it would be impossible to say how the acts of empirical individuals could partake in a purely intelligible freedom. The effect of this compulsion is that Kant’s solution to the antinomy in fact represents a slide back into the dialectic of freedom and necessity that it was meant to resolve. The slide can be exemplified in a single footnote. Its first two sentences adhere to the distinction in its radical form, following which, says Kant,

‘The real morality of actions (their merit and guilt), even that of our own conduct, [...] remains entirely hidden from us. Our imputations can be referred only to the empirical character.’

But then he goes on:

‘How much of it [i.e. the morality or merit and guilt of our actions] is the pure effect of freedom, how much is to be ascribed to mere nature and innocent defects of temperament or to its happy constitution (*merito fortunae*), this no one can discover, and hence no one can judge with complete justice either.’ (A 551, translation modified)

This last sentence seems to carry on the negative thrust of the first two, but Kant’s qualification in the last clause (‘with complete justice’) betrays that he has fallen back into the dialectic that the dissociation of the empirical and the intelligible was meant to dissolve.

³ The complementary assumption is that absent such circumstances, individuals are self-determining and hence responsible.

⁴ *Blomley v Ryan* (1956) 99 CLR 362, 405 (per Fullagar J).

⁵ *Commercial Bank of Australia Ltd. v Amadio* (1983) 151 CLR 447, 462 (per Mason J).

If, as in the footnote's first sentence, the basis of an action's merit is in the person's intelligible character and therefore entirely hidden, then it simply could not be judged at all. The qualified formulation marks the shift to a different conception whereby Kant relates the empirical and the intelligible as if in a tension.⁶ Only by this retreat from the strict compatibilist dialectic—in which the moments were indifferent but at the same time mutually exclusive possibilities—can he talk of ascribing more or less of our action now to our empirical, now to our intelligible character, as if they might be taken as component forces capable of conflict or co-operation.

To summarise the trajectory of Kant's argument: I said earlier that he redraws the line between necessity and freedom within the subject itself, but now that the two aspects are not simply opposed as incommensurables, and are instead related as if in tension or struggle the nature of the problem of freedom has changed. The subject has itself become responsible for realizing freedom within itself; if it is not free, then that can only be because it has been reluctant to subordinate its empirical or worldly needs to the demands of practical reason, with its seat in the subject's own supra-empirical side.

Legal judgement, to the extent that it must attribute responsibility to individuals, follows the path that Kant's argument describes. This accord stands to reason, because law shares Kant's contemplative concept of freedom: both want to be able to judge the freedom of actions simply by reference to the subject, in particular the quality of their will. Both shy away from inquiry into freedom's objective preconditions, perhaps because they suspect that those conditions might constitute a mockery of the idea. Without taking up Kant's reflections, and pushing them beyond themselves, legal judgment is destined to continue to manifest the dialectical pattern that he fastened on but could not escape. Let me describe its path.

The Dialectic Immanent to Judgment

Judgment avers its desire to do justice to the particular individual and the nature of their act. If the act was freely willed, then the individual is responsible for it; but if the will was not free, then they are not. To find out whether the act was free it at first refuses to presume that it was or was not: instead it gives itself over to the bare facts of how the individual acted. It finds, however, that, empirically speaking it can never be said that the will was operating without having been motivated by some need or interest. It is evident that by this way of proceeding every case will turn out the same, that the individual was not responsible for their act, and so judgment concludes that this cannot mean doing justice to individuals, if they all end up being treated in the same way. However to assume that human freedom is always a reality, irrespective of the individual's situation within an empirical world, will produce an equal and opposite monotony: individuals will always be responsible. In any case, it is quite clear that either of these approaches contradict the experiences that individuals have of themselves, the world may frustrate their purposes, but they do have a limited capacity to realize themselves despite it. So judgment tries a modified approach: it presumes that individuals are free unless and until circumstances can be cited that suggest that freedom was compromised.⁷ When it finds such circumstances, judgment holds on to them and makes them the basis of its exoneration of the individual. If none can be convincingly made out, it

⁶ This struggle or tension model becomes the basis of Kant's concept of the "ought" as such. See A534/B562 ('against its power'); 1996, pp. 55 ('as at a crossroads'), 163 ('overcome his love of life').

⁷ Please note that the presumption is usually not made the other way around: the significance of this will become apparent below.

insists that responsibility must follow. In so proceeding judgment is content that it has done justice to particularity.

The modified approach appears to have solved the problems with the first approach, which were the very problems faced by Kant's compatibilist position. The modified approach is still connected to the first in that it understands freedom as a property of the will, but now not every motivating factor counts to relieve the individual of responsibility. The question is: which circumstances or combinations of circumstances will suffice? Judgment is only able to answer: poverty, gender, drunkenness, etc., because it remains in the here and now of its particular case; it refuses to see that in different judgments such categories are now made the empirical sign of unfreedom, and now of its opposite. What counts changes from case to case, sometimes within the same case. Judgment has only apparently escaped the either—or of compatibilism. This would account for the feeling of freedom which judges experience in the face of their materials: neither the facts of the case nor the given law can definitively constrain them in order to relieve them from the responsibility of judgment. The task of the judge is paradoxical: like the poet of Wordsworth's dictum, she must create the taste by which she is to be enjoyed. The resolution of the either—or must not only do justice to particulars, it must do so without appearing to be a matter of mere subjective inclination. The judge's freedom must be exercised, but also made to disappear in a narrative that produces an effect of objectivity. This is the case even where the judge is ostensibly exercising discretion. Here, the priority which judgment was earlier prepared to accord to the object known threatens to make the judgment fail for appearing too subjective; it must give way to a different kind of objectivity, that which belongs to the universal and necessary. But an individual judgment does not bear this kind of objectivity on its face; it possesses it only through its relation to other judgments. Its claim to objectivity will only be redeemed, if at all, in retrospect, by a later decision.⁸ If the judgment refers backwards in time, to the decisions and discourses of the past then it does so only because it expects that these will have sway with the later decision by which its authenticity can only be sealed.

In this reaching out beyond itself, in attempting to rise to the objectivity of universality and necessity, the judgment threatens to leave unfulfilled the desire with which it began: to do justice to particulars. It returns out of its concern with precedents and discourses and once again becomes attentive to what lies before it. But it is clear to us that here the circle can only begin again.

Cutting the Dialectic Short

No case, however, seems capable of remaining in the circle. The dialectic must be cut short at some point. My description already dropped the hint as to how judgment does this when it noted that in the modified position freedom was presumed until circumstances amounting to a rebuttal of this presumption were recognized. The debate that this presumption amounts to is a familiar one. You can imagine its two protagonists, A and B. To begin with A says something like this:

In the end all human beings are capable of self-determination, and so we should not hesitate to make them responsible for their actions, even though many try to shift the blame from themselves onto their situation.

⁸ On this point see also Luban (1989).

B replies by saying:

I think they are rather too much a product of their environment to treat them always as if they had free will. Instead, we should make allowances for the fact that their behaviour can often be understood as the product of external influences.

But the debate is really only an apparent one. The positions can, and usually are made to fit one another. B's contention, that actions can *often*, but *not always*, be understood as the product of external influences, is qualified in advance in order to fit with A's position as the exception to its general rule. All that is required is for A to concede to B a right to a limited number of cases which will count as exceptional. In Kant's compatibilist formulation, the intelligible and the empirical are two incommensurable perspectives that are, however, co-ordinated: neither the one nor the other can claim priority, and this is the source of the antinomy. Logically, if not explicitly, each legal judgment must make passage through this antinomial indeterminacy in order to settle on a way resolve their opposition anew, to find the right way to put them into relation. Stated in terms of its pure form, this right relation turns out always to be the same, it is the subordination of B's position to that of A. But this does not suffice for us to tell what is going to fall under the rule and what under the exception. There is a true element of openness retained here, a reminder of the passage through indeterminacy. Nevertheless, the form cannot be entirely indifferent to its content, for otherwise it wouldn't matter if freedom was presumed as the general rule or if unfreedom had that role, since both would be mere tokens capable of representing every content. But as a matter of fact the presumption is always in favour of freedom and hence responsibility.

Let me try to account for this by reference to two cases. The first is *Law Society Of New South Wales v Foreman*.⁹ In that case the Law Society brought proceedings seeking the removal from the Roll of a solicitor who had produced a falsified document to a court. She had done so in an earlier proceeding in which the costs owed to her by a client were in dispute. On Foreman's part it was argued that she was of good character but that the effect of long hours working in a large firm under budget and other pressures had contributed to her default. An argument with this type has since had success in another professional misconduct case, which is my second example: *A Solicitor v The Council Of The Law Society Of New South Wales*.¹⁰ There the trial judge and the High Court saw fit to separate the appellant solicitor's indecent assaults on his step-daughters from his intrinsic character; the offences were ephemeral accidents to his enduring essence.¹¹ They were to be understood in the context of the very stressful periods occasioned by 'personal setbacks' that were of an exceptional nature and that led to professional counselling and treatment.¹² In Kant's terms, his acts during those periods were attributed to his empirical character, his intelligible character, or true self, remaining sealed off and unblemished.¹³ By contrast, the court in Foreman's case refused to break the link between her fraud and the essence of her true self. In other words, she freely willed the fraud. In support of that refusal, Mahoney JA offered

⁹ Ibid, 269-271, 274-5.

¹⁰ (2004) 216 CLR 253 ('*A Solicitor*').

¹¹ Ibid, 269-271, 274-5.

¹² Ibid 268-9.

¹³ The appellant "is 36 years of age and a solicitor by profession. In normal circumstances one would say a person whose character would be expected to [be] exceptionally high, and he would be well aware of the seriousness of conduct such as that which he has committed. Now that is easily said of course but one does not know the frailty of human beings, particularly when they go through very stressful periods in their life. This conduct that he engaged in seems quite obviously totally out of character for the appellant." Ibid 269.

this definition of character:

‘Character involves, inter alia, two things: the acceptance of high standards of conduct; and acting in accordance with those standards under pressure. Character is tested not by what one does in good times but in bad.’¹⁴

In effect this definition activates Kant’s intelligible character perspective in order to make Foreman responsible. It says to her that the court will not understand her capacity for free action as having been susceptible to compromise by merely empirical causes. All of the concern in *A Solicitor*, on the other hand, was apparently with precisely these kinds of empirical causes, particularly as they appeared in medical discourse.

Intelligible character was emphasized in one case, empirical character in the other. What determines the difference? The assumption basic to the judgment in Foreman is that the conditions in a large law firm under which so many people work cannot be pathological.¹⁵ Foreman’s defence consisted only in an attempt to trace her bad act *directly* to those conditions, a suggestion that the court would not countenance. In the other case, the conditions were not exceptional either, but the defence merely made them the observable occasion for an exceptional change in the solicitor’s character, not the immediate and determining cause of bad acts. An action can be dissociated from what the agent really willed, but only if its genesis can be narrated as accidental to what law represents to itself as the normal order of things. Decisively for the appellant in *A Solicitor*, he underwent counselling and treatment, proof that his acts belonged to an extraordinary period of ecstatic behaviour. People are frequently made redundant, but most suffer the shock of that phrase and the reality it expresses in less diagnosable, less treatable ways than did he. As a basis for judgment law calls compassion with them subjective, and hence grounds for appeal. For a judgment aspiring to objectivity a report from a psychologist is a much better ticket to redemption, whereby the distinction of the psychologist lies not so much in her role as an expert, as in the particular quality of her expertise: she has the acknowledged ability to recognize the (miraculous) signs of the aberrant, in order to distinguish it from, and therefore exonerate, the everyday.¹⁶

To Conclude: Objective Judgments and the Individual

There is a taboo on the suggestion that what law calls normal social life might in fact be an inhuman machine for producing individuals whose default state is lucid heteronomy: were that thought entertained it would call into question the possibility of doing justice through a single decision. It would threaten to show law to be the executor of an injustice prepared in the normal processes of the objective side of life. Law prefers to blinker its own vision, and with Kant makes freedom almost exclusively the product of subjective good will; the objective preconditions of freedom are largely forgotten. Kant’s retreat from compatibilism draws the line between the heteronomous and the autonomous within the individual, tending to burden it with the sole responsibility for bridging the gap in order to realize freedom. The prejudice in the form of judgment towards freedom, and hence responsibility, as the general

¹⁴ *Foreman* (1994) 34 NSWLR 408, 448.

¹⁵ *Ibid*: ‘It is relevant also to bear in mind that some of the pressure to which she referred was not different in kind—whatever be the position as to degree—from the pressure to which other solicitors are subjected when practising in large firms’.

¹⁶ In this she is the twin of Kant, who, after relinquishing compatibilism, had sought signs of freedom in extraordinary (but still empirically observable) acts of self-sacrifice.

rule, does the same to individuals as a class. If, in a particular case, the good did not eventuate, then it was because individuals gratuitously, and hence censurably, did not choose it, or else because, exceptionally, the happy manifestation of their hidden powers of choice were impaired.

Each judgment has the prospect of achieving legal objectivity to the extent that it reinforces this story. Doing so is not a mechanical business. Firstly, what law includes in the category of normal social life is subject to change, albeit gradually, at the category's edges. Secondly, each case is an opportunity to employ different discourses and emphasize different facts in defence of the goodness of the normal. The same case could conceivably fit under either the rule or the exception without failing the test of objectivity.

If an exoneration of subjectivity can be made to present its exceptionality clearly enough, then it may be proof against appeal or revision. Legal ideology—as for instance, in the conscience theory of equity—holds out such recognitions of the individual as evidence of law's ultimate morality. It could benefit from a reminder, which economic analysis of law is happy to offer it, that individuality is rarely recognized per se, and then only in the decisions that later judgments will not certify as objective. The exceptionality of the exception is never really in doubt. An instantiation of the exception in a given case will not lead the law out of the domain of the general rule, just as musical passages in the dominant or related minor key need not preclude an ultimate triumphant return to the home key. This sense of returning home out of flirtations with anarchy is what lends their pathos to decisions which go the other way, which make responsible. They reassure the law that individuality remains domesticated, its dangerous waywardness under control.

References

Kant, I (1991), *Political Writings*, (2nd ed.), Cambridge: Cambridge University Press.

Kant, I (1996), *Practical Philosophy*. Cambridge: Cambridge University Press.

Kant, I (1998), *Critique of Pure Reason*. Cambridge: Cambridge University Press.

Luban, D 'Difference made legal: the Court and Dr. King' (1989) 87 *Michigan Law Review* 2152.

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