Freedom, Compulsion, Compliance and Mystery: Reflections on the Duty Not to Enforce a Promise

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The difference between the law of consensual relationships and the morality of those relationships is one of compulsion and freedom. In the former, we find ourselves being compelled by, or compliant with, a rule some distance removed from the basic norm; in the latter we find ourselves in touch, constantly and sometimes in the face of more visceral obligatory rules, with a far deeper and more fundamental (transcendental) sense of fairness. In commercial relationships, this difference is apparent when we examine the law's inability to address the promisee's moral duty not to enforce an otherwise legally binding contract. *Law, Culture and the Humanities* 2007; **3**: 82–101

I. Introduction

Hypothetical 1: A public company, desperate for somebody who can manage a turnaround, recruits a highly regarded chief executive officer. The employment contract favors the executive. The board's ability to fire him for cause is limited to (a) conviction for the commission of a felony, or (b) willful failure substantially to perform his duties. There are several years of mediocre results. The company's operating performance is up and down. For a mix of endogenous and exogenous reasons, the stock falls to half its value at the time he was hired. In response, the CEO's behavior becomes erratic. While he has always had a mercurial temper, he is now subject to even more angry tirades in front of his staff and the board. He does not share information, and, indeed, on occasion is suspected of being less than forthright either with his staff or the board. There is substantial evidence he is carrying on a consensual extra-marital affair with one of his direct reports (which does not violate either the law or the company's code of ethics). As a result, without having done anything to give the board reason to terminate him for cause, he loses the

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confidence of the board and the staff, and the board decides to fire him. His contract promises him a rich severance package in the event of a termination other than for cause: among other benefits, he is to receive, within thirty days after termination, three times his base salary and target bonus and immediate vesting of stock options and restricted stock. The severance package is worth millions of dollars.

After consulting its lawyers, the board concludes it has no legal basis for withholding the lump sum payment. The company pays as provided under the contract, and discloses the payment in its public filings. Within some constituencies, there is outrage. While it may be that he is legally entitled to the promised benefits, the moral conclusion (at least to those who are outraged) is that any self-respecting human being would decline them as unmerited in the circumstances. The legal promise made by the company at the time of hiring simply failed to account for this particular mode of exit. The right thing, if not the legal thing, would be that the former CEO simply refuse to enforce the company's promise.

Hypothetical 2: A general contractor and a homeowner enter into a fixed price contract for the construction of an addition. As to heating and cooling, the contract merely contains a line item "mechanical" and an allocated portion of the total price. The contractor bases his bid on non-binding advice from the heating subcontractor that a second furnace will not be necessary. Midway into the job, when the time comes for the installation of the mechanical systems, the heating subcontractor says the existing furnace will not be enough to heat the old house and the addition. The cost of a second furnace and redesigned ductwork is $5,000. The contractor pleads a fairness case to the homeowner. Homeowner says, "It was your responsibility to get good advice, not mine." Contractor says, "That's true, but you really haven't been injured. Had I gotten the right price and put it in the bid, you would have accepted it. As it is, you are getting a $5,000 windfall." Homeowner has an attack of conscience. Despite the contract, it really *isn't* fair. He says, "I'm not happy about it, because I think you should have been more careful, but I'll let you add the $5,000." Struck by Homeowner's separation of the moral and legal consequence, Contractor says, "I don't want to come across as a whiner. I will live with the consequence of my mistake." Struck by Contractor's integrity, Homeowner says, "I insist you add the $5,000." Contractor says, "I don't want it." Homeowner says: "Why don't we split the difference, and you may add $2,500" and a deal is struck on that basis.

In this essay, I want to focus on circumstances like these hypotheticals, drawn from business experience, in order to articulate systematically my intuitions about the differences between law and morality. I have puzzled over the strange route contract law has taken in trying to distinguish between those promises to be enforced by the state, and those whose only force is moral. From the tight formalism of the writs of covenant and debt, to *assumpsit*, to more modern attempts to find a coherent distinction between contract and promise in consideration or reliance, all theories have

a consistent approach: they focus on the rights of the promisee or the duties of the promisor.[1]

I want to shift our focus from the actions of the promise-maker, or on the harm suffered by the promise-getter. Making a promise is one action. Keeping it is another. Holding someone else, fairly or unfairly in the circumstances, to a promise she made, is another. And therein lies the distinction I want to make. It is the *choice* to make a promise, and not the promise itself that truly is the moral act. The essence of individual freedom is not promise (though it is the only one contract scholars generally discuss), but the choosing of an action that has moral consequence. Do we really believe every promise should be kept? As promise-getters, we hope that promise-makers at least take seriously the moral impact of their promise. The law of contracts never addresses another issue that seems to me equally fraught with moral implications: as promise-makers, we hope that promise-getters will understand and deal with us fairly when a promise really should not be fulfilled. Hence, the promise-getter's *choice* to *enforce* a promise is also a moral act, but one generally outside the bounds of the law.[2] In the hypotheticals, there is really little doubt that the state would enforce the company's duty to pay under the employment contract or the contractor's duty to perform at the fixed price. There is equally little doubt each promisee's moral obligation, if any, not to accept the benefit of the promise is beyond the scope of the law.

Here is my claim. We perceive a duty of fairness, whose moral "ought" is different from the "ought" of the law, and which despite arguments from natural law theorists in other contexts is not necessarily incorporated into the positive law. I suggest that the difference between the law of consensual relationships (i.e., contracts) and the morality of those

1. Autonomy theories of contract justify enforcement of promises because they are deemed to be the free acts of autonomous agents, and hence should be enforced. Charles Fried, *Contract as Promise* (Cambridge, Massachusetts: Harvard University Press, 1981). The consent theory justifies the enforcement of promises if they are manifest in objective evidence of consent to transfer rights owned by the individual. Randy E. Barnett, "A Consent Theory of Contract," *Columbia Law Review* 86 (Issue 2, 1986), p. 269. Efficiency theories presume the promise is the product of rational choice, and seek to influence an individual making promises to do so in a way that maximizes utility. Richard A. Posner, *Economic Analysis of Law*, 6th ed. (New York: Aspen Publishers, 2002). Reliance theories justify the enforcement of promises if the promise-maker had reason to believe the other party would act or forbear from action in reliance on the promise, and the other acts or forbears, and justice requires enforcement. Charles L. Knapp, Nathan M. Crystal & Harry G. Prince, *Problems in Contract Law* (New York: Aspen Publishers, 2003), pp. 73–74.
2. I distinguish the obligation to mitigate damages, which affirms the enforceability of the promise, but simply limits the recovery of the promisee if it were reasonable to mitigate. I acknowledge there is some overlap in a case where the promisee seeks specific performance and equitable principles like clean hands may impact the availability of the equitable remedies. Indeed, if there is truly no remedy at law, the promisee may be left without a remedy, even though the promise is still enforceable. (Perhaps this is analogous to a defamation claim in which the jury awards nominal damages.) I do not believe, however, that this undercuts the main point, which is to focus on the duty, if any, of the promisee not to seek to enforce the promise, whether or not there is a remedy.

relationships is one of compulsion and freedom. In the former, we find ourselves being compelled by, or compliant with, a rule some distance removed from the basic norm; in the latter we find ourselves in touch, constantly and sometimes in the face of more visceral obligatory rules, with a far deeper and more fundamental (transcendental) sense of fairness. In Section II, I will describe Kelsen's fundamental insight into law and morality, which was to find a difference between Kant's transcendental "ought" of free choice, and the "ought" of compulsion that constitutes the basic norm of positive law in the material world. That difference is fundamental to the positive law's non-treatment of the moral duty not to enforce a promise. In Section III, I consider whether the natural law theory of Ronald Dworkin might provide a reasonable basis on which to bring such a duty from the realm of the purely moral to the realm of the legally enforceable. I conclude it does not. Dworkin insists it is possible to discover, if not state, a basic norm as a matter of truth. But the difference between law and morality is the difference between that which can be named (i.e., a set of determinable rules) and that which cannot. Law begins after the norms have been frozen into something that can be described; morality continues to draw from the mysterious well of a basic norm the law has left behind. As long as we are human and not divine, all attempts to capture that mystery in words (much less algorithms) will fail, as does Dworkin's attempt.

II. The Transformation of the "Ought" and the Duty Not to Enforce a Promise

2.1 Kelsen, Kant, and Law's "Ought"

For one of the most cogent philosophical derivations of positive law, we look to Hans Kelsen.[3] Kelsen's fundamental thesis was that law becomes law, not according to its content, but according to authorizing norms.[4] A highway speed limit is fifty-five miles per hour. It is law because certain actions of the legislature and the governor are deemed by an even higher order norm to create legal consequence for those who do not abide by the lower order norm.[5] The actions of the legislature and the governor are authorized by the state constitution.[6] The state constitution *qua* state constitution is authorized by the federal constitution, but what is the ultimate or basic norm that authorizes constitutions? Kelsen rejects divine right or any form

3. Stanley L. Paulson, "Introduction," in Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson & Stanley L. Paulson (Oxford: Oxford University Press, 2002), p. xvii. Kelsen's work influenced the somewhat more accessible writing of H.L.A. Hart. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), p. 18.
4. Kelsen, *Legal Theory*, pp. 55–57.
5. Op. cit., pp. 65–67.
6. Op. cit., pp. 63–65.

of natural law; the source of authorization for a constitution is an *a priori* basic norm.[7]

Kelsen was significantly influenced by Kant's metaphysics,[8] but what is most striking about Kelsen's thesis is the transmogrification of the "ought" from one side of Kant's antimony of freedom to the other. Kant's metaphysics hold that the world is mind-independent.[9] We are subjective observers of an objective world, but how we organize the world is a function of our reason (the "Copernican Revolution") and the *a priori* categories it supplies (as well as their correspondence with how the world works).[10] Thus, synthetic *a priori* propositions may be true, but we may assess truth only to the extent it is a matter of experience (i.e., reality) or possible experience.[11] Reason seeks the organizing principle (i.e., seeks the conditions of truth propositions until it reaches the Unconditioned) whether or not the proposition is moral or natural.[12] But pure reason's ability to tell us what is true ends when the proposition is no longer empirically testable.[13]

Kant contends, however, that there is a distinction between the power of reason to tell us what is true, and its power to tell what we ought to do – i.e., to determine ends.[14] Determining truth requires two processes, first, a subjective ordering of our sense data by means of the *a priori* categories available to our reason (causality, substance), and second, some confirmation that what we have perceived is objectively real.[15] Making a decision about what to do requires no assessment of truth or falsity.[16] Here we sense a difference between the objective and the subjective. I know I am part of, and subject to, the world of cause-and-effect, but my reason seems capable of informing what I ought to do apart from any call of inclination or desire in the natural world. The world "is;" my duty is what I "ought." Put another way, the practice of morality forces the concept of freedom on us.

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7. Op. cit., p. 58. The regress of authorizing norms finally hits a wall at some point. What law or norm authorizes the first law? I believe Kelsen's answer, whether or not it is satisfactory, is that we have an *a priori* understanding of norms – that a particular act (the "conditioning" act) invokes a particular consequence (the "conditioned" consequence). Law is that set of norms that invokes the coercive power of the state. The debate between positivists and naturalists, it seems to me, centers around whether the metaphysics of the law are limited to this basic *a priori* relationship (the positivist position), or whether we can draw upon the metaphysics of morality for the substance of the law (the naturalist position).
8. Paulson, "Introduction", at p. xix.
9. Immanuel Kant, "Selections from Critique of Pure Reason" (1781, 1787), in *Basic Writings of Kant*, ed. Allen W. Wood (New York: Random House, 2001), pp. 60–87.
10. Op. cit., pp. 57–59.
11. Op. cit., p. 3.
12. Susan Neiman, *The Unity of Reason: Rereading Kant* (Oxford: Oxford University Press, 1994), pp. 61–64.
13. Kant, "Pure Reason," pp. 6, 13–14.
14. Immanuel Kant, "Selections from Critique of Practical Reason" (1788), in *Basic Writings of Kant,* ed. Allen W. Wood (Oxford: Oxford University Press, 2001), pp. 223–26.
15. Roger Scruton, "Kant," in *German Philosophers*, ed. Keith Thomas (Oxford: Oxford University Press, 1997), p. 84.
16. Op. cit., p. 84.

The moral agent knows that he ought to do a thing, and he recognizes he is free to do it or not.[17]

The antinomy of freedom is that all things in nature have a cause in nature, but I feel that I have free will – i.e., I create action from a source that transcends or is not part of nature.[18] Thus, if my action is part of nature, it contradicts the idea that all events in nature have a cause in nature.[19] If it is not, then it falls outside of causal connection and my will does not create anything in the natural world.[20] On one hand, we are compelled by practical reason to accept freedom, that is, the autonomy of our will, and on the other, that we are physical objects in the world of sense.[21] Indeed, the danger of dealing in only the "supersensible" is that we fall into mysticism; the danger of failing to recognize ends determinable by reason is a world "which founds the practical notions of good and evil merely on experienced consequences (so called happiness)."[22]

Kelsen's fundamental insight was to see how we order events in the material world legally (i.e., ascribe meaning to those events) as another *a priori* category, akin to causality.[23] The law is a social structure, a way human beings organize the world, and accordingly, reducible to a kind of science. Kelsen accepts our cognition of certain relationships in human activity and behavior as *a priori*. The natural world exists, and, as legal observers, we characterize certain acts as legal or not legal. It is not the specific outcome of the relationship, but the very relationship of act and consequence that is *a priori*. A convict is executed in a gas chamber and the act is legal; one person kills another in act of terrorism and it is not.[24] The basic norm, which Kelsen asserts is *a priori* (i.e., one we must assume at the outset, apart from any experience in the world), is "a hypothetical judgment that expresses the specific linking of a conditioning material fact with a conditioned consequence."[25] Kant viewed the category of causation, the linking of two facts in the material world, as something known to human reason alone (*a priori*) as a basis for the observer's seeing enough order in the world to pose the skeptic questions about it.[26] Kelsen viewed as similarly

17. Kant's demonstration of this principle is his hypothetical of the man who has at least the possibility of choosing death (even if he might not so choose) rather than obeying the prince's order to bear false witness. "He judges, therefore, that he can do a certain thing because he is conscious that he ought, and he recognizes that he is free, a fact which but for the moral law he would never have known." Kant, "Practical Reason," pp. 237–38.
18. Op. cit., pp. 235–36.
19. Op. cit., pp. 251–52.
20. Op. cit., pp. 253–54.
21. Op. cit., pp. 253–54. *See also* Immanuel Kant, "Fundamental Principles of the Metaphysics of Morals" (1785) in *Basic Writings of Kant*, ed. Allen W. Wood (Oxford: Oxford University Press, 2001), pp. 210–11.
22. Op. cit., pp. 210–11.
23. Kelsen, "Legal Theory," pp. 8–12. For a thorough and understandable grounding in Kelsen's adaptation of Kant's metaphysics to law, see Michael Steven Green, "Hans Kelsen and the Logic of Legal Systems," *Alabama Law Review*, Vol. 54, p. 365 (2003).
24. Kelsen, "Legal Theory," pp. 9–10.
25. Op. cit., p. 23.
26. Kant, "Pure Reason," pp. 35–38.

a priori reason's imputation of an "ought" between a conditioning fact and a conditioned consequence:

> Both cases [the law of causality and the basic norm] involve simply the expression of a functional connection of elements, the connection specific to the respective system – here nature, there the law. In particular, even causality represents only a functional connection when one frees it of the metaphysico-magical sense originally attached to it by man. . . . Laws of nature say: 'if A is, then B must be.' Positive laws say: 'if A is, then B ought to be.' And neither the laws of nature nor positive laws have said anything thereby about the moral or political value of the connection between A and B. The 'ought' designates a relative *a priori* category for comprehending legal data.[27]

First constitutions are viewed as legitimate, not because like specific statutes they can be traced back to a specific authorization, but because it is an engrained aspect of human reason that we categorize certain behaviors as having or not having a certain kind of conditioned consequence.

In Kelsen's philosophy, the "ought" is a statement of compulsion. Law is that which, according to a series of norms, defines the consequence that ought to derive from a particular behavior. In law, the act of writing an agreement with such-and-such wording ought to have the consequence that failure to pay compensation according to that wording, or the failure to install a furnace, will permit the aggrieved party to draw on the power of the state for enforcement. The notion of that "ought" comes to us *a priori*, apart from any specific act-consequence pair. The underlying promise of the board to the CEO or of the contractor to the homeowner's enforcement may have a moral component. But what distinguishes the moral promise from the contractual right is the application of the basic norm – some subset of promises is deemed to have a legal act-consequence relationship in the physical and objective world of human behavior.

The fact of a moral commitment of promise which simultaneously has legal act-consequence implications masks how significantly Kelsen transformed the "ought." In Kant's philosophy, the "ought" is a statement of freedom. The paradox is how we, as a matter of autonomous will, itself a product of the transcendental self, can manage to impact the physical world. Reason, undertaken by that transcendental self, is the source of our decisions about what we "ought" to do. On either side of the promise/contract relationship, the promisor's decision to make and fulfill the promise or the promisee's decision to enforce it, the choice to act invokes the "ought" of free and transcendental will. But the only "ought" that operates in the real world of legal relationship is the "ought" of a conditioning act – conditioned consequence pair.

27. Kelsen, "Legal Theory," pp. 24–25.

Finally, the "ought" of Kelsen's empirically observable positive law is external to us and something less than free. Even in the case of private law, the threat of coercive force is, *ipso facto*, a matter of external compulsion.[28] In *Hamer v. Sidway*,[29] a case found in most contract law case books, old William Story chose to make a promise to his young namesake: live right until your twenty-first birthday, and I will pay you $5,000. Old Mr. Story was under no compulsion or duress to make a promise, or indeed say anything at all. But having chosen to act, Old Mr. Story's promise had an effect in the physical world. Young William gained an expectation. He relied on it. The effect of the choice was no longer fully within Old Mr. Story's control. A court might or might not conclude that the failure to honor the promise was, in Kelsen's terms, a conditioning act, the result of which ought to be an obligation to pay damages enforceable by the state.

2.2 Law's "Ought" and the Duty Not to Enforce a Promise

My observation (which I believe would be broadly if not universally accepted by successful business leaders were they to consider it) is that as much commercial progress is made by the promise-getter's choice not to enforce all or part of her entitlement, as by a system of law that seeks to enforce contractual promises. In the introductory hypotheticals, consider the duties not of the board or the contractor, but of the promisees, the CEO and the homeowner. For the promisor, the "oughts" of law and morality are congruent. The "ought" of the legal act-consequence non-performance leads to damages. The "ought" of a moral promise is that promisors ought to keep their promises. But we have posited that neither the CEO nor the homeowner, as a moral matter, "ought" to seek enforcement of his legal rights. If either chooses what he *ought not*, the non-congruent "ought" of the legal system will give him a remedy that is legally correct and morally wrong. Yet something would be sorely amiss if there were a case in which a court imposed a legal duty on a promisee not to enforce an otherwise valid and binding contract merely because it would be unfair to do so.

Why have courts not imposed a duty of fairness on the promisee? It may be as simple as saying that no single source, whether law, etiquette, or morality can offer contradictory normative instructions. The law can only address duties capable of being articulated under the basic norm of positive law – there is a conditioning act and a conditioned consequence.[30] Where there is a legal "ought," the obligation to perform a promise, there cannot

28. *See* Menachem Mautner, "Contract, Culture, Compulsion, Or: What is So Problematic in the Application of Objective Standards in Contract Law," *Theoretical Inquiries in Law*, Vol. 3 (2002), p. 545. Professor Mautner argues it is not surprising that objective standards derived from culture, inconsistent with subjective intent, might govern the outcome of contract disputes, because even the law most sympathetic to private autonomy and consensus, that of contract, at its heart, is a matter of compulsion. Op. cit., pp. 560–62.
29. 124 N.Y. 538, 27 N.E. 256 (1891).
30. *See* note 25.

be in the same transaction, a legal "ought-not." To repeat Kelsen's statement of the basic norm, law connects acts in the material world in the same way causation defines the relationship of two material facts. It is a contradiction to say in the material world "A causes B" and at the same time "A does not cause B." Similarly, judges have not said, because they cannot say, at the same time "the promise A made to B ought to be enforced" and "the promise A made to B ought not to be enforced."[31] Is it because the law does not incorporate the notion of fairness, or because, where the moral "ought" conflicts with the legal "ought" of the material world, the latter prevails? A judge *could* decide the CEO has, by some standard, forfeited his right to compensation, but it would not be a decision based on the law.

Coming to terms with the intuition that something is amiss in the positive law's enforcement of a promise that morally should not be kept calls not for an indictment of the law, but for recognition of its limits. My thesis is that the acknowledgment of a moral duty not to accept the benefit of legal obligation requires a concept of freedom so mysterious, harkening back to the very core of our moral consciousness, that it simply cannot be reduced to a rule of law. My concept of freedom owes its epistemological derivation to Kant, but if it is not wholly faithful to Kant's conclusion that the duties dictated by practical reason were the essence of freedom, then my defense is we are operating at what even Kant acknowledged to be the cutting edge of the metaphysics of morality.

We first need to review Kant's linkage of freedom and duty. Hume said we never determine ends as a matter of freedom: we are slaves to our passions.[32] Kant disagreed: freedom is the ability to will an end for oneself. If I undertake action because of any external cause, including my inclinations in the natural world, it is not freedom; I am the process through which an external cause works.[33] The only truly free act is one that originates in my transcendental self – i.e., is not a part of the causality of nature.[34] Hence, I do not consult any need, desire or external source – its source is a transcendental duty.[35] Autonomy of the will contrasts with heteronomy of the agent in the natural world.[36] Autonomy of the will is the only legitimate source of all moral laws, because it is guided only by reason in the choice of ends, and not by any desire or need.[37] Moreover, in the matter of the will "freedom and an unconditional practical law reciprocally imply each other."[38] Freedom is not just independence from the pull of

31. Kelsen says:

> A logical contradiction is represented by the figure 'A ought to be, and not-A ought to be', but not by the figure 'A ought to be, and not-A is. 'Contrariety to norm' is a completely different category from logical contradiction. Kelsen, "Legal Theory," p. 30.

32. David Hume, *A Treatise on Human Nature* (1739), ed. Ernest C. Mossner (London: Penguin Books, 1985), p. 462.
33. Kant, "Practical Reason," pp. 240–41.
34. Op. cit., p. 241.
35. Op. cit., pp. 244–45.
36. Op. cit., p. 240.
37. Op. cit., pp. 255–56.
38. Op. cit., p. 236.

empirical needs or inclinations (negative freedom); "this self-legislation of the pure, and therefore, practical reason, is freedom in the positive sense."[39] God would be incapable of determining any maxim of action in any circumstance that would not be a universal rule, but finite humans are only capable of accessing the moral law as a set of imperatives, or statements of what we ought to do.[40]

In Kant's formulation, the moral law is at once constraining on the pure will and free:

> the moral law is an imperative, which commands categorically, because the law is unconditioned; the relation of such a will to this law is dependence under the name of obligation, which implies a constraint to an action, though only by reason and its objective law; and this action is called duty, because an elective will, subject to pathological affections (though not determined by them, and therefore still free), implies a wish that arises from subjective causes, and therefore may often be opposed to the pure objective determining principle; whence it requires the moral constraint of a resistance of the practical reason, which may be called an internal, but intellectual compulsion.[41]

This sense that is at once free of empirical inclination and at the same time one of internal compulsion is at the very edge of our ability to talk about freedom at all. Kant recognized he could not prove the very essence of his thesis of practical reason from which the categorical imperatives are derived: "But Reason would overstep all its bounds if it undertook to *explain how* pure reason can be practical, which would be exactly the same problem as to explain *how freedom is possible.*"[42] As Kant recognized, even the categorical imperative is a human articulation of a transcendental sense. There is a limit to our ability to articulate the moral law in human terms, distinguishing the pure moral law which is holy, and which finite rational beings can only approach indefinitely.[43] Indeed, the paradox is that once a transcendental thought has been reduced to human language, it is no longer transcendental.

Kant deduced the principle by which we have a sense of what is right or just in the practical world,[44] but he did not suggest we were therefore necessarily capable of knowing by that sense we are right. "Sometimes it happens that with the sharpest self-examination we can find nothing beside the moral principle of duty which could have been powerful enough to move us to this or that action and to so great a sacrifice; yet we cannot from

39. Op. cit., p. 241. This idea of positive freedom contrasts with the purely negative freedom of a skeptic like Hume. See P.S. Atiyah, *Promises, Morals, and Law* (Oxford: Clarendon Press, 1981), pp. 17–18.
40. Kant, "Practical Reason," pp. 239–40.
41. Op. cit., p. 240.
42. Kant, "Fundamental Principles," p. 216.
43. Kant, "Practical Reason," p. 240.
44. Kant, "Fundamental Principles," p. 162.

this infer with certainty that it was not really some secret impulse of self-love, under the false appearance of duty, that was the actual determining cause of the will."[45] But ironically (no doubt reflecting that he was a practical man), Kant believed that there was an obligation to obey the positive law, because each individual would likely interpret the categorical imperative in a different way, resulting in chaos or even violence.[46]

In this philosophy, the duty not to enforce a promise is a mysterious and difficult one. Neither enforcing a promise nor being forced to perform or pay damages puts Kantian duty and Kelsenian positive law in conflict. We believe there is a moral right or a moral obligation (the transcendental "ought"), and the legal obligation (the material "ought") corresponds. In that circumstance, whether or not we have confronted the mystery that calls fairness out of the very core of our moral consciousness, our actions in the material legal world are the same as those of one who is merely compelled or compliant.

It is not so in the case of a duty not to enforce a promise. The legal "ought" gives an entitlement that the moral "ought" denies. Our CEO says: "I have a right to millions of dollars in severance and the contract does not prohibit it me from getting it; why should I give it up? Even Kant said part of the categorical imperative was to obey the positive law." Yet, as in the case of the homeowner and the contractor, in acts that are free from compliance with the rules that are the law, that recognize subject and subject, sometimes we do, and the world is a better place for it.

I suggest it is in our nature, having accepted a rule (even one that seems to be as categorical as is accessible to our reason), to believe the inquiry is over. It is unremarkable to observe that we interact with others, as often as not, as subject-object and not subject-subject.[47] I contend we can (and do) permit ourselves to be objects by accepting the primacy of rules. Once we identify, in a moment, the universal rule that governs the choice at that moment, we impose upon ourselves an artificial stasis. We have stated a rule; rules ought to be followed. It is a good thing, indeed, a duty, to make morally or legally binding commitments, and we have a duty to honor them. It is not so much that we believe in honoring commitments as a universal rule as we believe as a universal rule in doing the right thing, which is a far more complex and indeterminate obligation.

Failing to do the right thing because, as Kant suggested, we are obliged to follow the positive law (in this case, the one attendant to my having made an enforceable promise), strikes me as compliant. Nevertheless, and here is the mystery: the foregoing suggests I blow with the wind, yet I know I am not unprincipled; my only unyielding duty is that I do the right thing. That duty is paramount. All other rules (including the positive law) imposed upon me, even those to which I have agreed voluntarily to be bound, once I have

45. Op. cit., p. 165.
46. *See* Jeremy Waldron, "Kant's Legal Positivism," *Harvard Law Review*, Vol. 109 (1996), p. 1535.
47. *See* Martin Buber, *I and Thou*, trans. Walter Kaufmann (New York: Simon & Schuster, 1970).

accepted their binding nature, bespeak a world in which I am compliant, and thus something less than free.[48]

III. Natural Kinds, Names, and Rules and Mystery

It is possible, then, to be compelled by, or merely to be compliant in, rules (a subset of which is the positive law of contracts) even though later circumstances invoke a sense of moral duty not to abide by those rules. Could such a duty – here one *not* to enforce an otherwise legally enforceable promise – find its source in a natural law that could be, or should be, the basis of the positive law in that changed circumstance?

Perhaps we may find such a source in the work of a natural law theorist like Ronald Dworkin. His position is that all law *qua* law has a morally normative aspect.[49] More fundamentally, this morally normative source of law, whether arising out of justice, fairness or liberty, can be discovered as a matter of knowledge. If the argument is correct, a judge should be capable of resolving a case in which the moral obligation not to enforce the promise overrides the legal sanctity of the contractual promise itself.

Dworkin contends the incorporation of values like justice or fairness into the law is more than mere coincidence of morality and positive law: that the law so incorporates is a matter of a "deep structure."[50] Dworkin's premise is that values can be stated as truth-propositions: it is possible to come to know what democracy, or justice or fairness is, both as a value in itself (i.e., "detached") and as it operates in the world (i.e., "integrated").[51] His project is nothing if not ambitious; it seeks to discover, albeit as "rebuild[ing] our boat one plank at a time, at sea,"[52] the holistic relationship of law, morals, ethics, and values as part of the philosopher's responsibility of "making as much critical sense as is possible of any, let alone all, parts of this vast humanist structure."[53]: If this approach cannot at least begin to explain why there is no legal reason not to enforce a promise, then I suspect no other will succeed.

But I cannot find in Dworkin a satisfying answer to the puzzle. Kant's breakthrough was to find the middle way between "dogmatic rationalism and skeptical empiricism, by arguing that the notion of 'a world of the senses existing of itself' – existing absolutely – amounts to a self-contradiction, and must be replaced by the notion that the world exists not 'of itself' but only in

48. There are pertinent observations on the relationship between the freedom at the very core of belief and its elusive slip into compulsion when fixed into words from a contemporary and friend of Kant, the Jewish philosopher Moses Mendelssohn. Moses Mendelssohn, *Jerusalem*, trans. Allan Arkush, (Hanover, Brandeis University Press, 1983), p. 66.
49. Ronald Dworkin, "Hart's Postscript and the Character of Political Philosophy," *Oxford Journal of Legal Studies*, Vol. 24 (2004), pp. 1, 5.
50. Op. cit., p. 12.
51. Op. cit., p. 14.
52. Op. cit., p. 17.
53. Op. cit., pp. 17–18.

relation to mind."[54] Reason seeks noumena, the thing-in-itself of pure mind, the world in itself and from no particular perspective, but noumena cannot be proved or disproved.[55] Hence, there is a permanent divide between that which can be known and that which cannot. That is not to say access to the transcendental cannot guide our actions; it is only to say that in contemplating noumena we are beyond claims of knowledge and truth.

Freedom, said Kant (and I would add fairness), is a mere idea, and one we cannot prove according to the laws of nature.[56] One cannot prove what is fair in the same way one can prove something is more efficient.[57] And yet, as thinking beings, we can no more give up the idea that we are able to exercise our free will in the physical world or conclude what is fair than to accept the fantastic notion that man is mere chimera, a thing unto itself, unaffected by natural cause-and-effect, or the pull of inclinations, passions and desires.

That latter sense is both the appeal of, and the problem with, Dworkin's philosophy. The appeal is the recognition of all those values, like fairness and respect and equality and virtue, the ones we admire with Dworkin, and agree with him ought to operate in the world, even in sophisticated business transactions. One understands, and indeed sympathizes with, Dworkin's desire to see law *as law* only when it affirms those values. The problem is that Dworkin's values are the stuff of Kant's noumena – that which we know only by our reason as things-in-themselves and not by experience. Kant only asked that we access the transcendental for the purpose of *verbs*: to act justly, to act fairly, to act mercifully. Dworkin asks that we access the transcendental in order to have knowledge of the *noun* forms: justice, fairness and mercy.

> This picture of political philosophy is not only wildly ambitious – it can only even be imagined in a cooperative way – but it is also, as I conceded, very much against contemporary fashion. It is not in the spirit of modest value pluralism. It aims at a utopian and always unrealized goal – Plato's unity of value – instead.
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> We should try to approach the ancient puzzles of law in that way. We need to find, however, a political value that is linked to those puzzles in the right way. It must be a real value, like liberty, democracy and the rest, and it must be widely accepted as a real value, at least if our project is to have any chance of influence.[58]

54. Paulson, "Introduction," at xxix–xxx.
55. Kant, "Pure Reason," pp. 13–14.
56. Kant, "Fundamental Principles," p. 216.
57. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (Cambridge, Massachusetts: Harvard University Press, 2002) for the argument that because we cannot measure fairness and can measure welfare, and fairness seems to reduce welfare, fairness should not be the basis of legal policy.
58. Dworkin, "Hart," p. 23.

Kant did not deny the existence of utopian, transcendental truth; he simply cautioned as to its accessibility and as to the dangers of evangelism.[59]

My goal is far less weighty than Dworkin's, but if the holistic integration of values and law is possible, then it ought to be able to start with the articulation of a duty not to enforce a promise. But that is not part of Dworkin's project, and, putting myself (humbly) in his place, I cannot find a way to bridge the gap. Dworkin identifies another value, "legality," but struggles to give it an abstract definition other than "the rule of law" or an insistence upon fit of the coercive action of the state to pre-existing standards.[60] What is clear is that Dworkin's conception of legality cannot, any more than Kelsen's, envision a circumstance in which the law simultaneously declares there to be a promisor's duty to fulfill the promise, and a promisee's duty not to enforce it:

> We can sensibly think that though the law rejects Mrs. Sorensen's claim for damages . . . , justice supports that claim. Or (less plausibly) the other way around: that though the law grants her that claim, justice condemns it. But it would be nonsense to suppose that though the law, properly understood, grants her a right to recovery, the value of legality argues against it. Or that though the law, properly understood, denies her a right to recovery, legality would nevertheless be served by making the companies pay.[61]

Under this articulation, the duty not to enforce a promise, though moral, cannot be part of the law. If the value of legality demands that the promise be enforced, the law cannot dictate otherwise. Or if the law were to require a duty not to enforce a promise, seeking to enforce one in that case would have to be outside the conception of legality.

Dworkin makes an argument based upon the concept of "natural kinds" in the philosophy of language. The argument is that there is an analogy between, on one hand, the meaning of a word like *water* and its essence as the chemical compound H_2O, and on the other, the meaning of the word *justice* and a discoverable universal understanding (the "deep structure") of what justice really is.[62] Dennis Patterson has responded to this argument on its own terms.[63] I also contend it is flawed, but for a different reason. All we

59. Kant, "Practical Reason," p. 240.
60. Dworkin, "Hart," pp. 23–26.
61. Op. cit., pp. 24–25.
62. Op. cit., pp. 10–14.
63. Dennis Patterson, "Dworkin on the Semantics of Legal and Political Concepts," *Oxford Journal of Legal Studies*, Vol. 26 (2006), p. 545. The "natural kind" argument in semantics says, for example, "water" is properly used as a word only when it refers to a liquid having a chemical structure of H_2O. Dworkin argues, by analogy, that concepts like liberty or justice or fairness, have a "deep structure" and a natural meaning. Patterson's critique is that even if natural kind theory could be analogized to values, it would undermine the "fit" requirement of Dworkin's jurisprudence: it should account for a significant part of the practice of the community. Patterson asks: if the judge's obligation is to get at the true meaning of a value, what does it matter whether the practice fits?

know about H_2O is that our synthesis of sense data and the Kantian categories (causality, substance, etc.) to observable and testable phenomena work. Accordingly, we can predict as a matter of science what makes water water and gold gold. But that is only until now. Perhaps someday string theory will demonstrate that the difference between gold and water is nominal and not real. The point of a scientific theory is that experience can prove it wrong. Kant's fundamental insight was to find a third way between empiricism/realism and rationalism. He acknowledged and incorporated the transcendental (what Dworkin instead calls the "deep structure") but also acknowledged and incorporated its limits, at least for claims of knowledge.

There is something of the "natural kind" idea in Kelsen's Pure Theory of Law, but it falls well short of the abstract concept Dworkin contends has a knowable, discoverable essence that would allow it to be considered a "natural kind." Kelsen uses the word "law" to refer to the positive law – that set of norms subject to the coercive power of the state, and authorized by a higher order norm – in the same way we use the words "tiger" or "gold" or "water" in connection with their referents. The existence of "law," to Kelsen, is as mind-independent as the existence of the tiger, gold, or water.[64] Kelsen distinguishes the concept of law as ideology from the fact of the existence of law as a positive reality:

> If one considers the positive law *qua* normative system in its relation to the reality of actual events that the positive law claims ought to conform to it (even if the events by no means always do conform), then one can qualify the positive law as 'ideology.' If one considers the positive *qua* normative system in its relation to a 'higher' system that claims the positive law ought to conform to it, say, natural law or some imagined absolute value of justice, then the positive law represents the 'real' existing law, and natural law or justice represents ideology.[65]

Indeed, Kelsen rejects the idea that a natural essence of law can be discovered, beyond a presupposition of the basic norm. What Kelsen is saying is simply that the positive law is that manifestation in the physical world of a set of authorized legal act-consequence pairs.[66] In that sense, what constitutes law is more a verb than a noun.

> The empirical data given to legal interpretation can be interpreted as law, that is, as a system of legal norms, only if a basic norm is presupposed. The nature of these data – the acts to be interpreted as

64. Kelsen's point would be that the existence of the "ought" norms between act and consequence in the real world are also mind-independent. "The relationship between Kant's transcendental self and the empirical world it represents is precisely the same as the relationship between Kelsen's empirical self and the world of legal meaning that it represents." Green, "Kelsen," p. 400.
65. Kelsen, "Legal Theory," p. 35.
66. Op. cit., p. 26.

> legal acts – accounts for the particular content of the basic norm of a particular legal system. The basic norm is simply the expression of the necessary presupposition of every positivistic understanding of legal data. It is valid not as a positive legal norm – since it is not created in a legal process, not issued or set – but as a presupposed condition for all lawmaking, indeed of every process of the positive law.[67]

Actors in the real world, solving real legal problems, cannot resort in each instance, to contemplation of the self-evident basic norm that is the source of all lower order law.[68] Put another way, by the time we actually use the law (as opposed to contemplating its ultimate origin), we can attach a name, "law," to that set of authorized norms the coercive power of the state will enforce.[69]

I suggest there is another implication of the "natural kind" argument to the distinction between law and morality, but to get at it we must go back to Saul Kripke's famous *Naming and Necessity* lectures at Princeton.[70] Kripke demonstrated that the designation of a thing by a proper name is what he called a *rigid designator*. "A singular term t is a rigid designator of an object o [if and only if] t designates o with respect to all possible states of the world (in which o exists); and, moreover, t never designates anything other than o (with respect to any possible-world-state)."[71] Usually, descriptions of the referent of the name are not rigid designators.[72] The existence of Jeff Lipshaw was not a necessary event, and my parents need not have given me this moniker, but I *am* Jeff Lipshaw. "Jeff Lipshaw" is a rigid designator because it refers to something that is essentially *me*. It is also a description of me that I presently live in Indianapolis and am a visiting professor at Tulane University. The latter description is not rigid; I am Jeff Lipshaw in any possible-world-state, but the description does not necessarily apply in any possible-world-state. The relationship of rigid descriptor is *a priori*; "we know apriori that properties like non-identity, being human, being not made out of clay, and being made out of molecules are essential properties of the things that have them. So if we know apriori that if things have these properties, then they have them necessarily . . . Still, finding out that they are, in fact, true requires empirical investigation."[73] Accordingly, there is a class of proposition that is necessary (i.e., relating to an essential property) but also *a posteriori* (i.e., knowable only as a matter of experience).

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67. Op. cit., p. 58.
68. Green, "Kelsen," p. 388.
69. This is not to say the rule is necessarily easy to determine, either because it conflicts with other rules in the legal system, or because the rule is subject to interpretation. Kelsen, "Legal Theory," pp. 71–89.
70. Here I am going to dive deeply into a concept Professor Patterson only touched upon. Patterson, "Semantics," p. 6, n. 28. I am relying on Scott Soames's explication in Scott Soames, *Philosophical Analysis in the Twentieth Century*, Vol. 2 (Princeton: Princeton University Press, 2003), pp. 333–456.
71. Op. cit., pp. 340–41.
72. Op. cit., pp. 343–44.
73. Op. cit., p. 377 (emphasis in original).

Scott Soames captures the tension of the metaphysical and the real that occurs as we attempt inquiry into the referent of the name – what really is a tiger or the law, and how do we know? He describes the dilemma of the strict empiricist, the "hypothetical objector," who does not accept either noumena or essential properties, as to whom "inquiry is the process of escaping from ignorance."[74] To the hypothetical objector, the pursuit of knowledge means finding contingent truths "that distinguish the way the world actually is from other ways it might possibly be." These predicate contingent truths ("a newly discovered beast is not a tiger because it does not have stripes") narrow the class of possible world states (or contingent truths) to those that are consistent with what the objector knows. Proposition p is "tigers are those mammals having certain characteristics which include stripes." If the newly discovered beast without stripes were a tiger, it would make p untrue. But proposition q, that the beast does not have stripes, rules out the possibility that this particular contingent state of the world makes p untrue.

> On this picture, a proposition q provides evidence supporting the truth of a proposition p by ruling out certain possible ways in which p might fail to be true. This has the immediate consequence that the idea of necessary truths which are knowable only *a posteriori* becomes problematic. It is problematic because to say that p is knowable only *a posteriori* is to say that one can have the justification required to know p only if one has empirical evidence supporting its truth.[75]

The dilemma is that a tiger having stripes defines a *tiger*. Yet the strict empiricist can never get to the necessary truth of "tigerness" as having stripes, except by the empirical ruling out of ways in which other things are not tigers.

It seems to me Soames's resolution of the dilemma follows the middle road between rationalism and empiricism first traveled by Kant. The "necessary *a posteriori*" proposition is the one that connects the noumenal and phenomenal worlds – it is the best the minds of finite human beings can manage in taking our inquiry back toward the Unconditioned. We accept more than the strict empiricism of the hypothetical objector:

> By expanding the range of the epistemically conceivable states of the world to include some that are metaphysically impossible, one can modify the original conception of inquiry so as to accommodate Kripkean examples of the necessary *a posteriori*. Whether or not this is the final word on the subject is another question. . . . However, the central idea that not all epistemic possibilities are metaphysical

74. Op. cit. p. 454.
75. Op. cit.

possibilities seems both to be solid and to provide the key to responding to Kripke's hypothetical objector to the necessary *a posteriori*.[76]

I suggest one way to tell the difference between law and morality is to determine if it is possible to express the source of the "ought" in a non-noumenal rule, i.e., to see it as both necessary and *a posteriori* – i.e., as a rigid designator. There is an essential, necessary property of law (the "basic norm"), but we only know it as a matter of experience. That is to say, the name of the thing, the "law," albeit intangible, can bear a relationship to the thing itself: here, "contract law" is that particular set of empirically observable act-consequence pairs relating to the legal enforcement of promises.

In the CEO and contractor hypotheticals, a strict empiricist (e.g., a rational actor contract theorist) would reject the noumenal as a basis for resolving the issue: there is no such thing as *a priori* "truths" like "fairness" or "justice." The applicable law or norm ought to be the one most likely to maximize social welfare (the correct answer escapes me for the moment). The natural law theorist not only accepts that there is *a priori* truth, but contends what purports to be law is only so if it incorporates that truth (like "fairness"). Soames's exposition of the Kripkean theory of naming cuts a middle path. We can all agree the name "contract law" includes within it the following principle: the promisee gets the benefit of an unconditional written promise, supported by consideration, even if there are circumstances *ex post* that, had they been considered, the promisee should have agreed would be conditions to the promise. Doing so is neither entirely *a priori* nor entirely *a posteriori*; classifying the principle as contract law states a necessary *a posteriori* truth.

Hence, it is possible to be a highly moral legal positivist, one who neither rejects the possibility that there is a transcendental "ought" to which we have access by virtue of our reason, nor believes that purely noumenal principles (i.e., transcendental values) can be stated as truth propositions. We need to distinguish between human-informed institutions created to deal with the mind-independent realities of the physical world, and the noumena of values, which may or may not be reflected in those institutions. To be a positivist or a realist or a pragmatist about the world does not mean I have to accept a mechanical or technological set of values or morals. I do not deny the existence of the noumena; I simply contend they cannot be the subject of rational debate over their truth. More importantly for our discussion, rules are human and therefore imperfect attempts to create both justice and equity. The world is arbitrary; sometimes the law is cruel; we have interests and inclinations and they often clash. But that does not mean I have to give up the idea that there is some source – to which reason strives but will never achieve – of beauty or order or inspiration.

76. Op. cit., p. 455.

When we deal as a practical and cost-constrained manner in the social systems, like law, that make up this world, we must give names to things. We must slice and dice and categorize. We cannot (or do not) proceed down the infinite regress to contemplate the unnamed Unconditioned that must lie at the source of either science or morality.[77] It is an impossible task for us to connect *law* to something like fairness as a rigid designator; there we are dealing in the noumenal. We can say, however, that it is an essential property of a law that it state a rule about an act and consequence backed by the state's coercive power, and we are still not restricted from further empirical inquiry about what the law is.

IV. Conclusion

To get a laugh (and it always works), I tell people my academic niche is the overlap of venture capital and Kantian philosophy. I have been wrestling with the polarities of compulsion and freedom, particularly as I have seen it operate in the business world. Few decisions are easy; there are heuristics in the art of management and leadership, but rarely does the manual give the bright-line answer. Whether or not they are conscious of it, business leaders and managers sense the fundamental indeterminacy that is at the core of a hard case, or in the center of a paradox. "If the answers were easy, they wouldn't need us," they say. But the organization, like ourselves, simply cannot operate, or indeed survive, in the physical world of cause-and-effect, without some reduction of the totality of experience to rules. Experience tells us we need rules and laws, but reason is capable of divining abstract forms and spirit, whether or not they are tied to the real world.

I certainly recognize the elusiveness of the distinctions I have tried to make. To call on a lyrical allusion of another philosopher, we can distinguish the problems sought to be solved by the law from the mystery at the center of our existence:

> We must carefully avoid all confusion between the mysterious and the unknowable. The unknowable is in fact only the limiting case of the problematic, which cannot be actualized with contradiction. The recognition of mystery, on the contrary, is an essentially positive act of mind, the supremely positive act in virtue of which all positivity may perhaps be strictly defined. In this sphere everything seems to go on as if I found myself acting on an intuition which I possess without immediately knowing myself to possess it – an intuition which cannot be, strictly speaking, self-conscious and which can grasp itself only through modes of

77. Mystical traditions have a way of capturing in poetic allusion the end of the infinite regress. See, for example, the first verses of the Tao and some Kabbalistic writing on the relationship between the infinite and names that finite humans give to it. Lao-Tzu, *Tao Te Ching*, trans. Steven Mitchell (New York: HarperCollins, 1992), p. 1. Abraham Kook, "Heretical Faith," in Daniel C. Matt, *The Essential Kabbalah* (New York: HarperCollins, 1996), p. 32.

> experience in which its image is reflected, and which it lights up by being thus reflected in them.[78]

Our default state is to operate on our needs, desires and inclinations and to comply. Yet we are always free to choose, to resolve problems or recognize mystery, to engage in discourse between subject and subject, and to comply with a system of compulsion, or to resist it. We face that choice every minute of every day, and the commitments of a lifetime ago, or the contracts of yesterday, are as binding upon us as we, in this current moment, choose them to be. That is the mystery of the choice not to enforce a promise the law cannot address. And it is the grease that makes the business world (if not the world as a whole) work, whether or not it is recognized in the law. Let us not forget what is human-made and what is not. Mine is no doubt a theology so abstract and universal as to say the only thing we are sure to be God-given is the mystery of that very paradox that provides the richness in hard cases that mere rules ignore.

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78. Gabriel Marcel, *The Mystery of Being, Volume 1: Reflection and Mystery*, trans. G.S. Fraser (South Bend, St. Augustine's Press, 2001), pp. 211–12.