

Apartheid Now: The Private Lives of Others

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Apartheid Now: The Private Lives of Others

Executive Summary

My primary concern in this paper is to develop an account of freedom which incorporates within its very definition a moral responsibility to others, and which is therefore automatically limited by the conditions of its own exercise. It is my view that freedom, conceived in this way, leads ineluctably to a mandate to respect and promote the dignity of all others. When this freedom is objectively realised through the law in the form of direct horizontality of human rights, it breathes new life into the substantive legal revolution which took place in South Africa in 1994, and which ultimately led to the Constitution being grounded in the fundamental principle of human dignity.

My paper begins with a brief account of apartheid, focusing particularly on the way in which violent racial oppression was embodied in law. I then proceed to draw on the legal sociology of Niklas Luhmann, whose account of the legal system as a normatively closed, self-referential system produces two important insights for using the law as a tool for social justice. First, Luhmann's conception of how societal sub-systems, including the law, feed off one another's complexity to generate new operations shows us that the deeply systemic nature of South Africa's socio-economic problems can be sourced in the deeply systemic nature of the apartheid laws which produced them. What this means for us now is that the legal system as a whole cannot merely adopt a stance of neutrality and formal equality in the hope that this will produce a more equal and just society; rather, the entire legal system must make positive moves, most notably in the form of direct horizontality, to counter the ongoing effect of the morally bankrupt laws of the past. Luhmann's second insight is that the law is not inherently grounded in ethical principles, which means that the legal system often operates with harsh results for poor and disadvantaged South Africans. What this means then, is that we must find a way for the law to continually transcend itself and ground itself in substantive ethical principles, even if this endangers the continued existence of the law as a relatively autonomous, operatively closed system.

My paper then proceeds to develop an account of freedom which promotes this sort of transcendence in the law. This account proceeds, in the first place, by explaining Immanuel Kant's defence of the possibility of our free will. Kant showed us that, whilst we cannot know ourselves definitively free, we can and indeed must posit ourselves as free in order to live up to the aspirations of our humanity. Kant shows further that positing ourselves as free requires that we exercise our freedom in the only meaningful way we can, which is to determine our free will on the basis of a moral law we lay down for ourselves and others. Secondly, my account draws on the work of Georg Hegel to show that freedom not only consists in relationships of mutual recognition between independent and free beings, but that we must objectively realise this freedom in our laws and institutions if it is to have any meaning for us at all, and if we are fully to live up to the demands of our free and rational nature.

After having developed my account of freedom as morality in the law, I explain the true nature of direct horizontality both in theory and in practice, and show that placing legal duties on individuals to promote the well-being of others through direct horizontality is not only permissible in terms of our Constitution, but is in fact essential if we are to live up to the Constitution's mandate to respect the dignity of all others.

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Nick Friedman

TABLE OF CONTENTS

I.	Introduction	1
II.	Apartheid: A Legal History	3
III.	What Is the Law and What Does It Do?	10
	A. Luhmann and Systems Theory	11
IV.	Preliminary Observations: Social Transformation, Direct Horizontality and Freedom	23
V.	German Idealism: Freedom as Morality as Law	30
	A. Immanuel Kant: Freedom as Morality	30
	(i) David Hume and the Near (Death) Experience of Freedom	32
	(ii) The Critique of Pure Reason	35
	(iii) The Critique of Practical Reason	42
	(a) The Conditions of Pure Practical Reason	43
	(b) The Possibility of Pure Practical Reason	48
	(c) The Need for Pure Practical Reason	51
	(iv) The Categorical Imperative: What Must We Do?	54
	B. Kant's Ambiguous Commitment to Morality as Law	60
VI.	Hegel and the Objective Realisation of Freedom	68
	A. Outline of Hegel's Dialectic	69
	B. Relationships of Mutual Recognition	72
	C. Freedom as Law	77
VII.	Direct Horizontality and the Mandate of Dignity in the South African Constitution	88
	A. What is Direct Horizontality Anyway?	89
	B. From Spirit to Substance	96
	C. When the Law Runs Dry	100
	D. To Dignity Horizontality	106
VIII.	Conclusion	109
IX.	Bibliography	110

I. INTRODUCTION

The attempt to understand and actualise freedom has arguably been humanity's greatest preoccupation, most certainly since the Enlightenment. To extract merely one (but, as we shall see, important) philosophical strand of this attempt, Immanuel Kant argues that freedom – as the necessary product of our free will, which is itself a uniquely human quality – is in fact the very *basis* of our humanity. In this same vein, Hegel suggests that history itself can be explained primarily as the self-conscious rationalization of freedom. These arguments are borne out by the fact that every historical struggle against oppression (of which there have been too many to recount here) has been, by definition, a struggle for freedom. The struggle for freedom is therefore the struggle for humanity.

But what does “freedom” mean? What *should* it mean? What, exactly, are we fighting for? Human freedom serves as the very foundation of liberal democracy, and our political institutions and, as is the focus of this paper, our laws, are centred on the preservation and promotion of that freedom. It is vitally important, then, that we understand what freedom truly “is”. As I hope to make clear in this paper, our conception of freedom has radical and far-reaching implications for how we structure society, and more specifically, for how we think about the law.

In this paper, I advocate a conception of freedom which is centred on an ongoing ethical responsibility to the communities of which we are apart, and which, if it is to be true freedom, must be objectively realised in our laws and institution. This creates a powerful argument for direct horizontality, viewed as a demand on individuals to respect and actively promote the freedom of others. On my account of freedom, direct horizontality is not only permissible, in that the neoliberal, absence-of-constraint style of freedom which prohibits it is a sham; rather, direct horizontality must necessarily be realised in the law of any modern constitutional state which is committed to the realisation of dignity, equality and freedom. This account also presents direct horizontality as a powerful means of countering the profound material, psychological and symbolic damage caused by the morally bankrupt law of apartheid.

In the result, , my paper proceeds as follows. I begin by offering a brief account of South Africa's history of oppression (most notably, though not exclusively, during the apartheid years), focusing particularly on the way in which the violence of that history was

embodied in law. Next, I analyse in general terms the nature of a legal system and its effect on society, and explain how that analysis is relevant to understanding the full impact of apartheid and, indeed, how that impact can be resisted. It is already clear from what I have said above that I think direct horizontality has an important role to play in that resistance. However, it is necessary first to advance a conception of freedom within which direct horizontality can flourish. This task will consume the bulk of my paper. Once I have argued for an appropriate understanding of freedom, I will then proceed to discuss horizontality (as that concept has been understood and misunderstood over the years), and explain why direct horizontality, properly conceived, is an essential tool for overcoming the injustices of South Africa's past.

II. APARTHEID: A BRIEF LEGAL HISTORY

Any description of apartheid is bound to be at least partially trite. Reading historical accounts of South Africa's racial policies is often as awkward to read as it is to write them: in an attempt to be ethically responsible towards apartheid's countless victims, writers are strained to use an ever-increasing number of graphically descriptive words to describe the horrors of the past, only to find at the end of the process that there are simply not enough words; that indeed no words can ever tell the complete story of injustice of each singular South African who suffered at the hands of the apartheid regime. It is perhaps for this reason that these stories have mostly gone untold.¹ But whether one attempts to tell these stories, or simply chooses to leave them out of the picture altogether, one must face up to the difficult truth that, either way, one will inevitably fail to write fully the terror of apartheid, and thus fail in some sense to do justice to its victims.

However, accounts of the past must nevertheless be ventured. If one is concerned to promote a vision of social justice in this country and to make progress towards improving the quality of lives of all South Africans, one cannot proceed without a firm understanding and acknowledgment of the tangible evils of apartheid. Therefore, it is in the name of providing a foundation for a project of social justice that I offer the brief history below.

To the extent that one can lend any rational coherence at all to the exploits of the apartheid state, Sampie Terreblanche's work in *A History of Inequality in South Africa*² is an excellent place to start. Terreblanche's account of the history of apartheid is essentially a history of forced black labour, an account which centres, as it must, on the complex interrelationship between the availability of labour, the ownership of land and the locus of political power. Terreblanche correctly places land at the centre of the analysis of the legacy

¹ See O'Regan, C.O.R. "For Life and Action: Justice, Reconciliation and the Work of Memory" (Paper delivered at a seminar organised by the Nelson Mandela Foundation, Johannesburg on 2 April 2009). See also Dyzenhaus, D. *Judging the judges, judging ourselves: Truth, reconciliation and the apartheid legal order* (Hart Publishing, Oxford 1998); Boraine, A. *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press, Cape Town 2000); Bronkhorst, D. *Truth and reconciliation: Obstacles and opportunities for human rights* (Amnesty International, Amsterdam 1995); Minow, M. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston 1998).

² Terreblanche, S. *A History of Inequality in South Africa: 1652-2002* (University of Natal Press, 2005).

which colonialism and apartheid have left behind, whilst explaining the devastating results of the interplay between land deprivation and other racist policies.³

Briefly, Terreblanche's account proceeds as follows. In the countless ethnic conflicts which characterise South Africa's past, one can generalise that it was mostly white people (initially the colonial settlers and thereafter their descendants) who emerged victorious over indigenous peoples, thereby claiming for themselves the political power to dominate the conquered.⁴ Faced with an abundance of land (which was easily procured, owing to the superior economic and military might of the white property-owning class), and the comparative difficulty of subjugating black labour outright, white people sought primarily to deprive indigenous people of their land.⁵ This promoted the impoverishment of indigenous people and consequently increased the supply of black labour to the point where it became virtually free for the white class - and completely unfree for black South Africans. This cycle of winning power to take land in order to promote forced black labour is one which is endlessly repeated across South Africa's history.⁶

For the sake of brevity I pick up the story of land deprivation in 1913, the year in which the white government's segregation policy was officially legalised in the form of the Natives Land Act.⁷ This act, in combination with those pieces of legislation which would follow in its wake,⁸ legally precluded black people from owning and occupying land outside of the relatively tiny geographical areas⁹ which these statutes set aside for them - some of which would later become the ethnically based homelands or Bantustans.¹⁰ The Native Administration Act 38 of 1927 gave the state president wide and uncontrolled powers to

³ The Constitutional Court has repeatedly emphasised that racially-based land deprivation was the "cornerstone of the apartheid policy" (*Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at para 41). See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 9.

⁴ Terreblanche above note 2 at 6-7.

⁵ In the course of his explanation, Terreblanche (id at 7-8) canvasses Evsay Domar's hypothesis that when land is widely available, the landowning class succeed in turning the working class into unfree labourers (see Domar, E.D. "The causes of slavery or serfdom: a hypothesis" (1970) *Journal of Economic History* 30 (check ref)).

⁶ Terreblanche above note 2 at 6-14.

⁷ Act 27 of 1913.

⁸ See, for example, the Black (Native) Laws Amendment Act 46 of 1937, the Natives Resettlement Act 19 of 1954, the Group Areas Development Act 69 of 1955. See also the Natives (Prohibition of Interdicts) Act 64 of 1956 which prevented black people from appealing against their forced removals.

⁹ It is estimated that these areas constituted approximately 13% of South Africa's total land mass. By contrast, South Africa's population has never been less than X% black.

¹⁰ See, for example, the Bantu Authorities Act 68 of 1951, the Promotion of Bantu Self-Government Act 46 of 1959 and the Black Homelands Citizenship Act 26 of 1970.

govern black South Africans, enabling him to uproot entire communities (by mere proclamation) to the areas reserved for them.¹¹ These powers were only increased by the Group Areas Act 41 of 1950 which also set aside certain areas for use only by specific racial groups.

Of course, in order to continue to profit from subjugated black labour, the apartheid government could not eliminate contact between white and black people in totality. This problem was solved, in the first place, by way of the Native (Urban Areas) Consolidation Act 25 of 1945,¹² which expressly (and consistently with Terreblanche's perspective) provided for the setting aside of urban land for the occupation of black South Africans who were "necessary to supply the reasonable labour requirements of the urban areas".¹³ In the second place, in order to maintain control over the movement of black people into and out of "white" areas, influx control was introduced by the Natives (Urban Areas) Consolidation Act 25 of 1945, which control was expanded by the Native Laws Amendment Act of 1952 and the Black Labour Act 67 of 1964 (with the latter act sanctioning the removal of "idle" Africans to rural areas). Thirdly, in order to make sure that black people were limited to unskilled labour which was "unsuitable" for whites, the apartheid government made direct legislative interventions into the labour market. Notable measures in this regard include the Abolition of Passes and Coordination of Documents Act 67 of 1952, which required all black people to carry a reference book (at that point the new word for a "pass") at all times, which maintained influx control and aided in the manipulation of the distribution and allocation of African labour. The Wage Act of 1925 and the Bantu Laws Amendment Act of 1970 served to keep black people out of work reserved for whites, especially skilled work – the latter act went so far as to allow the prohibition of the employment of Africans in any job, in any area, in the service of any employer.

As though these measures were not enough, the apartheid government further sought to lock black people out of jobs and into poverty by depriving them of a decent education. The Black Education Act 47 of 1953 formalised the racial segregation of schools and laid the foundations for what would later be called "Bantu education". The Extension of

¹¹ *Western Cape Provincial Government* above note 3 at para 41.

¹² Which repealed and replaced the Native (Urban Areas) Act 21 of 1923.

¹³ Sections 26 and 28. Those who were not employed were removed or detained. Any black South African living outside of the areas which the apartheid government had set aside for them was usually convicted of a criminal offence and subjected to a summary eviction (see the Prevention of Illegal Squatting Act 52 of 1951).

University Education Act 45 of 1959 achieved the same effect in tertiary education, allowing for the designation of colleges for specific African ethnic groups.

Of course, not all apartheid legislation was so directly concerned with labour and land. Terreblanche explains, however, that economic factors did indeed play a role in the crystallisation of Afrikaner Christian Nationalism, and thus contributed to the development of further racist legislation which sought to entrench the ethnic power of white Afrikaners. Terreblanche states:

“[T]he ideology of Afrikaner nationalism was really a means to an end, namely the mobilisation of ethnic power to attain political power, and especially greater wealth. The racism accompanying this ideology was also a means to an end, namely maintaining the subordination of allegedly inferior races in order to create the ‘space’ for Afrikaners to attain their political and economic aims, and their promised land.”¹⁴

In the result, the apartheid government passed a multitude of laws aimed purely at maintaining ethnic “purity” and racial subordination. Of these the laws, the most infamous include the Immorality Act 5 of 1926 and the Prohibition of Mixed Marriages Act 55 of 1949, which prohibited sexual relations and married whites and other races, as well as the rather ironically-titled Preservation of Good Morals Act 14 of 1980. The Sexual Offences Act 23 of 1957 entrenched the prohibition on white people having sex with black people, as well as prevented them from committing “immoral or indecent acts”, which included sexual relations between persons of the same sex. Over and above these laws, racial segregation was expanded even further by the Reservation of Separate Amenities Act 49 of 1953, which provided for the reservation of public facilities and transport, of substantially different quality, for people of particular racial groups. The Population Registration Act 30 of 1950 robbed all people of the ability to determine their own identities: all people were identified and registered from birth as belonging to one of four racial groups. In the event of some doubt as to your classification, an official would stick a pencil in your hair to see if it fell out; if one dared to question the rigorous science of the pencil test, the Racial Classification Board would ultimately decide what you were on your behalf.

¹⁴ Terreblanche above note 2 at 299.

Such laws were bound to stir up resistance, necessitating further laws to deal with the backlash. Various acts gave unlimited powers to the police, allowed for detention without trial, ousted the jurisdiction of the courts, and created a number of new, overbroad and ill-defined crimes. Protests and public gatherings of any kind were prohibited by the Riotous Assemblies and Suppression of Communism Amendment Act 15 of 1954, the Riotous Assemblies Act 17 of 1956, the Unlawful Organisations Act 34 of 1960 (in terms of which the ANC and the PAC were banned), and the Riotous Assemblies Amendment Act 30 of 1974. The Native Labour (Settlement of Disputes) Act 48 of 1953 made it illegal for black workers to strike. Any attempt by the free media to criticise the government or even simply report what it was doing was shut down in terms of the Newsprint and Imprint Registration Act 19 of 1977 and the Publications Act 15 of 1983.

Of course, one must bear in mind that, in the background to all of this, the apartheid government secured its political power through the most overt measures of all; that is a variety of legislative measures which deprived everyone who was not white of the right to vote and thereby to influence the passing of any legislation by the parliament.¹⁵

It should be clear by this stage that the apartheid government was one of the most efficient and productive legislatures in the history of world politics, choosing to formalise all of its racist policies and procedures in the law.¹⁶ It should also be clear that the legislation did not merely operate with broad strokes; it expanded the reach of the law to the most minute details of the sectors it sought to regulate. In fact, if one surveys a chronology of apartheid legislation, particularly towards the late 1980's, one gets the sense that, as the apartheid government was trying ever more helplessly to enforce and hold onto its collapsing vision of the state, the legislation it passed became detailed in a way which reflects the government's hysteria. Excellent examples of this legislative frenzy include the Internal Security Amendment Act 22 of 1984, in terms of which any meeting of more than 20 people required the consent of the Minister of Law and Order, as well as the Extension of University Education Amendment Act 29 of 1971, which prevented students from

¹⁵ Representation of Blacks Act 12 of 1936, Representation of Natives Act 16 of 1936, Separate Representation of Voters Act 46 of 1951,¹⁵ Separate Representation of Voters Amendment Act 30 of 1956, the Boroughs Ordinance of 1924.

¹⁶ Of course, it was not just the apartheid legislature which was producing an endless stream of one corrupt law after the next. The apartheid judiciary was by and large complicit, with the exception of one or two brave judges who refused to participate in the ongoing suppression of dignity. See *Truth and Reconciliation Commission of South Africa Report: Volume 4* at 93ff for a report on the role of judges in the apartheid legal machine.

changing courses after admission to university without the consent of the Minister of Education. Perhaps the best example of the paranoid detail of the legislation comes from the Special Offences Act 6 of 1986, which made it a crime to possess a tyre in circumstances where you might commit an offence with it.

The reason that I have undertaken this rather tedious examination of apartheid legislation is to raise a simple but fundamental question: Why bother? For a totalitarian regime which did not hesitate to enforce its policies with the utmost brutality, and which had no respect or need for the rule of law, it seems somewhat paradoxical that it should have chosen to make such overwhelming use of the legal system. Indeed, many other totalitarian governments (Milosevic's Serbia and Pinochet's Chile spring to mind) have pursued similar policies and actions to those of the apartheid government without any extensive recourse to the law at all.

Of course, one part of the answer to this paradox is that the apartheid government was pretending, both to the international community and to itself, that South Africa had at least some of the hallmarks of a democratic state founded on the rule of law. In my view, however, the real motivation for the uniquely legalised nature of the apartheid state's racial oppression runs much deeper: the insight of the apartheid government – an insight shared by Josef Stalin – is that law can shape the social fabric in profound ways that no rule of men could ever hope to match. Men are constrained in the force they can exercise by space and time; men are finite; men die. The law, on the other hand, is intangible and everywhere; the law coerces compliance through more than just physical violence; most of all, the law is built to endure.

It is my view that the extensive and interlocking network of apartheid legislation, which regulated virtually every sphere of public and private life in the minutest detail, is the single greatest cause of the specifically *systemic* nature of inequality which persists in South Africa today. Problems of housing, education, poverty, joblessness, violence and the fracturing of human dignity are all mutually reinforcing – any attempts to solve the one are counteracted by the persistence of the others. This is so because the apartheid government designed it to be so – they sought, by every conceivable means, to subordinate black people and to destroy any hope they had of achieving a decent quality of life for a long-time to come. The complexity and systemic nature of the problems in South Africa are the product of the

complexity and systemic nature of the laws that caused them. Since it was the law that was the substantial cause of these problems, I believe that the law must be the substantial part of the solution. It is for this reason that, in the next section of this paper, I undertake a sociological analysis of the legal system – in order for us to understand what the law has already done to our society, and to understand how the law might be used to repair it, we need to understand the nature and impact of the operations of the legal system in general.

III. WHAT IS A LEGAL SYSTEM AND WHAT DOES IT DO?

As it was stated in the previous section of this paper, the unique feature of the apartheid regime was its intensive legalisation of racial oppression. The purpose of the present section is to attempt to understand the effect of that legalised oppression through an analysis of the way in which the law shapes our social fabric.

It must be acknowledged, of course, that the relationship between the law and society is dialectical: the law not only produces society, but it is also produced by it. Understanding both aspects of this relationship is obviously critical to an analysis of the law's ability to promote social justice. However, it is the law's impact on society, rather than the converse, which is of most direct concern to me here. Analysing this aspect of the relationship between law and society helps us better to understand the law's role in creating the dire social circumstances faced by the vast majority of South Africans today, as well as how the law might reshape those circumstances in the name of creating a more just society. Once we determine how the law operates and produces social outcomes *in general*, we then can determine how the law must be changed in order that it produces social outcomes which are *just*.

Analysing how the nature of the law itself produces social outcomes requires an approach which draws from two different disciplines, namely sociology and legal philosophy. More specifically, we must approach legal philosophy from a sociological perspective. Such an approach has been largely neglected by Anglo-American legal scholars, who tend to focus predominantly on the content and validity of laws themselves (and thus remain solely in the sphere of legal philosophy), rather than on the broader structure and external implications of the legal system (which is the home of sociology). What is neglected, in particular, is an account of the legal system as a *system*. Thus, even the limited scholarship which has dealt with the legal system in a sociological way usually proceeds on the basis of uncritical assumptions about the concept of a system itself.¹⁷ As I hope to make clear in this section, the application of systems theory to the law reveals novel and important aspects of the law's operation in society, and thus illuminates the problematic of using law as a tool for social justice.

¹⁷ See, for example, Raz, J. *The Concept of a Legal System* (Oxford University Press, 1980). See also the criticism in that work which Raz levels at previous attempts by Austin, Kelsen and Hart at understanding legal systems.

My analysis of the legal system as a system draws primarily on the work of Niklas Luhmann.¹⁸ Whilst I cannot here present a comprehensive defence of his broader sociological project,¹⁹ it is my view that he provides arguably the most unique and theoretically rigorous account of the operations of systems in general, and has produced a significant amount of work which applies his thinking on systems specifically to the operation of law.²⁰ It is my hope that the merits of Luhmann's work are evident from the analysis presented below.

A. Luhmann and Systems Theory

Before beginning my discussion of Luhmann's systems theory, it is necessary to advance the following caveat concerning his work. Luhmann's work is expressly sociological in nature, and thus does not confront questions of jurisprudence directly. Consequently, Luhmann's work must be viewed as a purely descriptive project. We will see, for example, that Luhmann argues that the validity of a modern legal system is determined by recourse only to the norms which are internal to the legal system itself, and not with reference to norms which are external to the system (such as those norms to be found in ethics or religion). This should not lead us, however, to conclude that Luhmann is a positivist. He does not assert that the legal system *should* be devoid of validation by external norms; rather, he asserts that in order for a legal system to remain a system (properly so-called), it *necessarily* looks inwards for its own validation.

¹⁸ In this section I draw particularly on the following works: Luhmann, N. *Law as a Social System* (Ziegert, K. trans) (Oxford University Press, 2008) (hereinafter "*Law as a Social System 2008*"); Luhmann N. *Social Systems* (Bednarz, J. and Baecker, D. trans) (Stanford University Press: California, 1995); Luhmann, N. "Operational Closure and Structural Coupling: The Differentiation of the Legal System" (1992) 13 *Cardozo Law Review* 1419; and Luhmann, N. "Law as a Social System" (1989) 83 *Northwestern University Law Review* 136 (hereinafter "*Law as a Social System 1989*"). I also rely on a helpful analysis of Luhmann by Klaus Ziegert, who has translated many of Luhmann's works into English: Ziegert, K. "The Thick Description of Law: An Introduction to Niklas Luhmann's Theory of Operatively Closed Systems" in *An Introduction to Law and Social Theory* (Banakar, R. and Travers, M., eds) (Hart Publishing: Oregon, 2002).

¹⁹ In particular, I steer clear of Luhmann's complicated relationship with modernity.

²⁰ See Luhmann *Law as a Social System 2008* above note 18 at 1-3; Ziegert above note 18 at 55-57 and 75; Cornell, D. *Philosophy of the Limit* (Routledge, 1992) at 116-154.

Luhmann, then, is not making grand ontological statements about the law. Instead, he is merely *describing* the general process of how modern positivist legal systems work, and what law becomes after it has gone through this process. In so doing, Luhmann becomes useful to us not because he demonstrates the value of systems, but rather the converse – his analysis of systems highlights (albeit not always expressly) the harsh social consequences attendant upon the operations of the legal system. By explaining to us how systems operate, Luhmann helps us to understand how they must be changed or resisted in order to be socially just.

With this caveat in mind, we can begin our exploration of Luhmann's work. As stated above, Luhmann is concerned with the theory of operatively closed social systems. His work is centrally premised on the assumption that systems do, in fact, exist as an empirical or scientific reality.²¹ For Luhmann, such systems, by their very nature, are responsible for maintaining their own boundaries with their environment, as well as for creating and organizing their own functions. Having a concrete existence, systems are thus an important area for sociological investigation.²²

Definitionally speaking, a system cannot be a system (properly so-called) until it can sustain and perpetuate its own operations by recourse only to those operations which are already in place within the system.²³ In other words, the system must be able to maintain its existence without recourse to its external environment. In this way, the system delineates itself from the environment and thus creates its own, separate, identifiable existence.²⁴ It is important to note early on that this does not mean that a system is completely autonomous of its environment - it is indeed stimulated by its environment, but the way it understands and reacts to the environment is dealt with purely by way of its internal operations.²⁵

The simplest example of this concept of a system can be drawn from the field which originally inspired it, namely biology.²⁶ A cell of the human body is a system (in Luhmann's terms) because it can sustain all its processes and its boundary with its environment by

²¹ Luhmann *Social Systems* above note 18 at 12-13; Ziegert above note 18 at 58-60.

²² Luhmann *Social Systems* above note 18 at 16-17; Ziegert above note 18 at 59.

²³ Luhmann *Law as a Social System 1989* above note 18 at 147; Luhmann *Social Systems* above note 18 at 34-36; Luhmann *Operational Closure* above note 18 at 1424.

²⁴ Luhmann *Law as a Social System 1989* above note 18 at 138.

²⁵ Luhmann *Operational Closure* above note 18 at 1424 and 1431-1438; Luhmann *Law as a Social System 1989* above note 18 at 139; Ziegert above note 18 at 65.

²⁶ Luhmann *Law as a Social System 1989* above note 18 at 137.

recourse only to its internal operations and structures. Of course, a cell will both stimulate its environment and receive stimuli from that environment, but these stimuli are produced and dealt with according to the cell's internal operations.

Thus, returning to the concept of a system in general, we can identify three central elements. First, a true system displays “recursivity” - the generation of new operations by recourse only to its own, prior operations (those operations which are already in place within the system).²⁷ Second, through recursivity, systems maintain and perpetuate themselves, which Luhmann refers to as “autopoiesis”.²⁸ And third, once a system can function autopoietically, and therefore without recourse to its external environment, the system has achieved “operative closure”.²⁹ Without operative closure, there would be no way for observers, or indeed the system itself, to distinguish the system from its environment. Systems which are not operatively closed cannot make adequate sense of their environments – they consequently disintegrate, and cease to exist as observable phenomena at all.

With this general idea of a system in place, we can now begin to explore how systems evolve, and thereby come to the question of how the law functions as a system. Broadly speaking, Luhmann's analysis proceeds on the basis that “society” or the “social system” is the overarching system in human life. For Luhmann, the social system is defined as the totality of all human communications³⁰ - beyond the social system is not merely *an* environment, but rather, generally speaking, what we have come to know as *the* environment.³¹ The environment, of course, together with its impact on society, is complex, and in order to deal with that complexity the social system must also become increasingly complex. It does so by creating its own specialized sub-systems – these are entire systems of their own (which have as their environment the broader social system, including the other sub-systems) which perform unique tasks delegated to them by the broader social system.³²

²⁷ Luhmann *Operative Closure* above note 18 at 1425; Luhmann *Law as a Social System 1989* above note 18 at 138-139.

²⁸ Luhmann *Law as a Social System 2008* above note 18 at 84-85; Luhmann *Social Systems* above note 18 at 34-36; Luhmann *Law as a Social System 1989* above note 18 at 138.

²⁹ Luhmann *Law as a Social System 2008* above note 18 at 80; Luhmann *Social Systems* above note 18 at 8-9; Luhmann *Law as a Social System 1989* above note 18 at 138.

³⁰ Luhmann *Law as a Social System 2008* above note 18 at 89; Luhmann *Social Systems* above note 18 at 137.

³¹ Luhmann *Operative Closure* above note 18 at 1423-1424.

³² Luhmann *Social Systems* above note 18 at 187-194; Luhmann *Operative Closure* above note 18 at 1424; Luhmann *Law as a Social System 1989* above note 18 at 137-138; Ziegert above note 18 at 64.

Thus we find within the social system a political system, an economic system, a legal system, and so on.³³ As a consequence of the proliferation of these sub-systems, the complexity of the social system as a whole increases; and, in turn, as the complexity of the social system increases, individual sub-systems evolve further in order to deal with that complexity.³⁴

Through this “specialisation of labour” within the social system, the legal system comes to exist. What function is the legal system performing for the broader social system that necessitates its existence? For Luhmann, the primary, and in fact the only, function of the legal system is the stabilization of normative expectations in society.³⁵ Other systems, such as the economic system, all generate their own normative expectations about how things “ought” to be in the social system, and about who is right and who is wrong in the inevitable multitude of social conflicts.³⁶ When conflicts arise between competing normative expectations (say, for example, between parties disputing whether a repudiation of a certain contract is justified), they are referred to the legal system, the sole function of which is to resolve the conflict through the generation of normative projections (in the form of new legal decisions or rules) and thereby stabilise society’s normative expectations. In this way, Luhmann postulates that the legal systems acts as the “immune system” of society: by continually creating new normative projections in response to new social conflicts, the legal systems acts to “immunize” society against an unpredictable future by coordinating that future.³⁷

Importantly, the law must be able to stabilize normative expectations in spite of counterfactual disappointments.³⁸ In other words, the law’s normative projections must remain valid even if they are not adhered to in other sub-systems. Returning to the example

³³ Luhmann *Law as a Social System 1989* above note 18 at 139.

³⁴ Luhmann *Social Systems* above note 18 at 191-192; Luhmann *Operative Closure* above note 18 at 1431-1434.

³⁵ Luhmann *Law as a Social System 2008* above note 18 at 142-152; Luhmann *Law as a Social System 1989* above note 18 at 140.

³⁶ Luhmann *Law as a Social System 2008* above note 18 at 148; Luhmann *Operative Closure* above note 18 at 140; Ziegert above note 18 at 66.

³⁷ Ziegert above note 18 at 63; Cornell above note 20 at 63. Luhmann terms this the “present’s future”. In this regard, Luhmann spends a great deal of time arguing that the law in fact binds time, and not people. His argument is quite complex, and unnecessary to explore for the purposes of this paper. Broadly, his argument is that the law projects a performance that it cannot control – the law may say that it is illegal to murder another human being, but the law cannot prevent murder from happening in fact. Thus, according to Luhmann, the law cannot be considered to bind people; rather, the law promises certainty by projecting norms which ought to be followed in the future. In this way, the law makes society’s future binding in the present (and therefore binds time). See Luhmann *Law as a Social System 2008* above note 18 at 142 ff.

³⁸ Luhmann *Law as a Social System 1989* above note 18 at 140.

concerning the law of contract, the law's normative projection that contractual obligations must be honoured must remain valid even when contracts are breached.

Of course, for the legal system to qualify as a system at all it must achieve operative closure – the operations it generates in the course of fulfilling its function must be generated solely by the prior operations of the legal system itself.³⁹ Since the function of the legal system is the stabilization of normative expectations, Luhmann refers to its operative closure specifically as “normative closure”.⁴⁰ Therefore, when the legal system, in response to social conflict, generates new norms in the form of legislation or judicial decisions (and thus perpetuates itself), it does so always and only with recourse to the legal norms already in place within the system. In other words, decision-makers in the legal system base their decisions exclusively on law as validated by earlier legal decisions – in this way, the legal system grounds the validity of its own (new) propositions by turning back on itself.⁴¹

This is significant. It means that the legal system's normative projections (about right and wrong) are valid only because they are legitimated by the legal system's own prior operations – the legal system does not (and, if it is to remain normatively closed, and thus remain a system at all, *cannot*) refer to values external to the legal system for its legitimacy. It is worth noting here that this echoes Jacques Derrida's argument that the founding force of the law cannot rest on anything but itself; and, consequently, the founding moment of a legal system can be neither legal nor illegal, neither just nor unjust (because, in Luhmann's terms, there is no prior operation of the legal system to validate that foundation).⁴² More importantly, though, we begin to see that the legal system (and indeed all systems) is inherently conservative, in the sense that its recourse to prior operations makes it difficult to institute rapid transformation. This is not to say that the legal system *cannot* change, but merely that it intrinsically *resists* change.

As the legal system continues to increase the number and complexity of its own internal operations, and therefore continues to specialize in the function delegated to it by

³⁹ Luhmann *Law as a Social System* 2008 above note 18 at 99; Luhmann *Law as a Social System* 1989 above note 18 at 147: “the autopoiesis of law [is] the production of law by law.”

⁴⁰ Luhmann *Law as a Social System* 2008 above note 18 at 107-109; Luhmann *Operative Closure* above note 18 at 1429.

⁴¹ Cornell above note 20 at 118-121; Ziegert above note 18 at 64.

⁴² Derrida, J. “Force of Law: ‘The Mystical Foundation of Authority’” in *Deconstruction and the Possibility of Justice* (Cornell, D. et al, eds) (Routledge, 1992) at 14; Luhmann *Operative Closure* above note 18 at 147.

the broader social system, it must do so in a way which maintains the integrity of its boundary with its environment.⁴³ In fact, the more specialized the legal system becomes, the more efficiently it must be able to sort through information from the environment which is relevant to the system, and thus the more rigid its boundary must be.⁴⁴ Luhmann thus argues that the proliferation of the internal operations of the legal system leads to a hardening of the system's boundary, as the system creates an ever sharper distinction between what is "law" (and therefore something relevant to the legal system) and "non-law" (something which is external to the legal system and which can more appropriately be referred to another social sub-system).⁴⁵ Luhmann argues that this distinction is in fact a sharp binary code (law/non-law) which is embedded in every operation of the system and which facilitates normative closure.⁴⁶ The operation of this binary code is most clearly demonstrated when courts strike a case from the roll because it fails to disclose a "legal cause of action". Similarly, the code is embodied by the Latin maxim "*de minimis non curat lex*" – that certain cases are of too little significance to attract the attention of the law. Of great relevance in this paper (as we shall see below), the binary code is also at play when cases do not attract the attention of the law because they are of a "moral" or "private", rather than a "legal", nature.

It should be obvious that the binary code does not operate without injustice. Take, for example, the case of *Carmichele v Minister of Safety and Security*.⁴⁷ The applicant in the case had been raped and assaulted by a man who, but for the negligence of the police and prosecutors involved in the case, would not have been out on bail when he committed those crimes. In the court of first instance, her case was struck from the roll on the basis that she had failed to disclose a cause of action – at that time, the delictual action she sought to invoke against the state was not recognised at common law. She appealed the decision all the way to the Constitutional Court, which held that the Constitution mandated a development in the law of delict to recognise the applicant's action, and referred the case back to the lower court for a hearing on the merits. She ultimately won her case on the merits, which was clearly a rather significant reversal of her legal fortunes – originally, her

⁴³ Luhmann *Law as a Social System* 1989 above note 18 at 141.

⁴⁴ Luhmann *Law as a Social System* 1989 above note 18 at 142.

⁴⁵ Luhmann *Law as a Social System* 1989 above note 18 at 140; Ziegert above note 18 at 66-67.

⁴⁶ Luhmann *Law as a Social System* 2008 above note 18 at 99ff; Ziegert above note 18 at 66.

⁴⁷ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

case was deemed to have been so devoid of merit that it was struck from the court roll; subsequent to the Constitutional Court's intervention, she was deemed not only to have had a legal action, but to have proven her case against the state on a balance of probabilities.⁴⁸ Ultimately, what must be recognised about this case at this stage is that it shows that the decision as to what constitutes law and non-law is not merely academic; rather, the way in which the binary code of the legal system operates has drastic consequences for the law's role in achieving social justice.

That the binary code could operate harshly was recognised by Luhmann himself. He points to examples from Roman law and early English common law to illustrate attempts to introduce a "third value" (such as justice or equity) into the legal system (for example, the Praetorian edicts in Roman law or the Courts of Equity in England).⁴⁹ However, Luhmann argues that these additional values cannot withstand the gravitational pull of the binary code over time, and thus they inevitably become merely another form of legal-decision making.⁵⁰

From what we have seen so far, one can draw numerous conclusions about how the law might influence society. However, by far the most express explanation of this impact comes in the form of what Luhmann terms "structural coupling".⁵¹ In this regard, Luhmann argues that once each sub-system in society has achieved its own operative closure, it is capable of adjusting its performance in response to the performance of other sub-systems (and indeed does so). Thus, systems can enlist the complexity other systems for the operation of their own self-generation or autopoiesis, and therefore co-evolve.⁵² What is important to note here, however, is that this co-evolution always takes place according to the internal operations of the separate sub-systems themselves. The systems necessarily remain in a state of operative closure, and therefore whatever stimuli they receive from their environment (which includes the external stimuli produced by the internal operations of other sub-systems) will be assimilated by their own internal operations. This is what Luhmann means when he states that a system can only "stimulate" or "irritate" the

⁴⁸ See generally Van der Walt, J. "Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga" (2003) 19 *SAJHR* 517.

⁴⁹ Ziegert above note 18 at 66.

⁵⁰ Luhmann *Law as a Social System* 2008 above note 18 at 130-135; Ziegert above note 18 at 66.

⁵¹ Luhmann *Law as a Social System* 2008 above note 18 at 381-422; Luhmann *Operational Closure* above note 18 at 1431-1432.

⁵² Luhmann *Operational Closure* above note 18 at 1431-1437; Ziegert above note 18 at 72-75.

operations of other systems – he is not saying that systems cannot be affected (dramatically) by each other, but rather that the effect will occur on the terms of each individual system.⁵³

The implications of structural coupling for the legal system are as follows. First, the concept of structural coupling provides us with a strong theoretical (rather than empirical) basis for concluding that the legal system does, as a fact, affect other aspects of society. Second, that effect is significant. This is so because all other sub-systems in society, as a condition of their increasing complexity and differentiation, produce normative expectations. It is the unique responsibility of the legal system to stabilize these expectations, effectively by validating some and invalidating others. Once the legal system has performed this function, and in the process has produced a new legal operation (such as a judicial decision), that operation is internalized by other sub-systems, which consequently realign their normative expectations as part of their structural coupling with the legal system. Put more simply, all the internal operations of other sub-systems necessarily take place against the background of the law. Therefore, developments in the legal system are of great moment in the broader social system.

The third implication of structural coupling is that it explains the nature of the legal system's effect on other sub-systems – it is pervasive, long-term and difficult to undo. This is so because, as the notion of structural coupling dictates, the operations of the legal system, as stimuli for other systems, are internalized by the very operations of those systems themselves. And here one must bear in mind that these other systems, like all systems, continually have recourse to their own operations to sustain and perpetuate their own further operations. In this way, the changes in systems prompted by the legal system's normative projections have a lasting impact, since they become embedded in the very operations of the systems they affect, and therefore continue to influence all future operations of those systems. Thus, to say that the normative projections of the legal system are merely "irritations" to other legal systems disguises the reality that the impact of the legal system is not only potentially tremendous, but once that impact has been internalized by other systems, it is also immensely difficult to reverse.

What lessons, then, can Luhmann's work teach us about the historical relationship between law and society in South Africa? First, given (i) the unique nature of the law as

⁵³ Luhmann *Operational Closure* above note 18 at 1431-1433.

society's only mechanism for stabilizing normative expectations, (ii) that each sub-system in society continuously produces normative expectations and relies on the legal system to confirm or invalidate those expectations, and (iii) that the legal system's realignment of those expectations become absorbed into the internal operations of other sub-systems, we begin to see that in South Africa, where oppression and disadvantage were entrenched in an intricate and expansive network of legislation, the law is not simply one possible mechanism for instituting transformation in the broader social structure. Rather, the law must be seen as one of the primary, if not *the* primary, means of instituting social change. The apartheid legislation canvassed above affected the most minute details of virtually every aspect of human life (social sub-systems). In particular, apartheid laws affected what Luhmann would call the "personal sub-system", which can be understood broadly as the individual's private sphere of thought, morality and action. Therefore, by highlighting the unique function performed by the legal system in the broader social system, Luhmann shows us that it is the law which is mainly responsible for the systemic nature of the economic and social problems faced by an overwhelming number of South Africans today, and consequently, in trying to remedy those problems, it is the law to which we must return.

Second, by thinking about society in terms of systems and structural coupling, Luhmann helps us to understand the systemic nature of the law's impact on other sub-systems in society. When the law deprives black people of the right to vote, excludes them from educational, health and job opportunities, and promotes various distinctions which imply differences in the inherent dignity of members of different racial groups, these harms are not restricted to the legal sub-system alone. Nor do they merely affect other sub-systems in a superficial way. Instead, these harms in fact become entrenched in the very operations of those systems, and are perpetuated in the further operations generated by those systems. Thus, even though our new constitutional regime has now rendered these laws neutral within the legal system itself, this overall neutrality of the legal system has been insufficient to remove the lasting impact which those laws made within other systems in society. As we will see later in this paper, there has been little positive action in the law to reverse this impact by way of direct horizontality, and hence it remains.

Third, Luhmann shows us that ethical values are not essential to the law in order for it to exist as a system. Rather, the necessary and sufficient requirement for a legal system to

qualify as a system is that its operations simply need to be internally coherent.⁵⁴ However, because the legal system sustains and perpetuates itself without recourse to any norms external to itself, there is no means for the legal system to validate the objective rationality or ethical nature of its own operations. Seen in this way, the law becomes an empty vessel to be filled with whatever values can be successfully impregnated (mainly by the political system) in its internal operations. Thus, during apartheid, the internal operations of the legal system (its rules and its decisions) came to embody the racialised oppression of the apartheid state. What must happen now, therefore, is for the law to be reinvigorated with ethical values which are equal and opposite to the deeply unethical values with which it was infused during apartheid.

However, and this is the fourth conclusion I want to draw from Luhmann, his illustration of the legal system's binary code shows us that whatever ethical values we introduce into the law will merely be absorbed into its binary code and become merely another form of legal-decision making. This, we know, is essential to the very survival of the law as a system. Thus, Luhmann shows us that if the law is to be truly ethical it must transcend itself, grounding itself in ethical principles which are not embedded within it, but which in fact lie outside of itself. In other words, Luhmann shows us that for law to approximate justice, the boundaries of the legal system, and therefore the legal system itself, must remain continually unstable and in a state of flux. This results in a blurring of the boundary between the law and other sub-systems, in particular the ethical sub-system, thus allowing for a meaningful intervention of ethics in the law. As we shall see, the South African Constitution envisages this precise transcendence of the law, in that the entire Constitution roots itself in dignity. Thus, when law comes to be validated according to its compliance with the Constitution, it moves through a process of being validated by higher order norms until it reaches the point where the Constitution itself turns the validation process away from law to the ethical aspiration of dignity.

Fifthly, Luhmann's analysis of the arbitrary nature of where the binary code of the law draws the line between law/non-law provides a new perspective on the reach of the law, including on the debate concerning the public/private divide. In terms of the binary code,

⁵⁴ Luhmann *Law as a Social System* 2008 above note 18 at 103; Luhmann *Operational Closure* above note 18 at 1429 and 1431.

the legal system's internal operations (rules) determine that what is public qualifies as "law", and is therefore a problem which the legal system can solve, and that what is private qualifies as "non-law", and is therefore a problem which must be turned away to another sub-system in society. However, as we have seen above, there is no objective rationality operating within the binary code – to succeed as a system, the law's binary code simply needs to be internally coherent. Hence, the line between what is public (law) and private (non-law) is in some sense arbitrary, unless it is validated by external ethical norms (which, as we have seen, the legal system will not do). From this, it follows that concerns about where the law can legitimately go must be channeled towards how the legal system itself decides what qualifies as law.

Related to this, however (and this is the sixth and final lesson I want to extract from Luhmann), is that the law must ultimately held responsible for where it decides to draw its own boundary.⁵⁵ Since, as we have seen above, the location of the law's boundary has significant implications for issues of social justice, the law must take responsibility for the social problems it, by its own operations, excludes from its reach. I want to advance the argument here that the law must then be held accountable both for where it is, and also for where it is not; that the law is implicated both where it is present (in the form of positive law) and where it is absent.

To illustrate this point, take the following two examples. As the first example, under our new constitutional regime a black man can walk between two neighbourhoods freely and as often as he likes. The law neither forbids it nor requires it – it is simply silent on his personal choice to walk between neighbourhoods or not. However, not so long ago in our history that same man was legally prohibited from entering certain neighbourhoods except in a limited number of circumstances and subject to numerous conditions. In other words, what we take today to be a simple, private act which supposedly has nothing to do with the law, had everything to do with the law just two decades ago.

As a second example, we can take the laws which ban smoking in public places. In contrast to the example above (which involves the historical presence but contemporary

⁵⁵ Luhmann *Operational Closure* above note 18 at 1428: "The legal system can expand or shrink according to societal violence; but this does not change the rule of attribution and connection, it simply changes its range of application."

absence of law), smoking in public historically took place in the absence of positive law. Now, however, it is subject to intense regulatory scrutiny.

What I am trying to illustrate through the use of these two examples is that there are very few aspects of human life which are inherently incapable of legal regulation. Positive law can be wherever the binary code of the legal system decides it will be. In this sense, the law is not only relevant to us where it exists positively (as legislation or a judicial decision) - the law is operating everywhere, both when it is present (in the form of positive law) and when it is absent (where there is no positive law at all). Where the law is and is not is a consequence of the operations of the legal systems binary code, and when that consequence involves an ethical injustice, it is the legal system which must bear the responsibility for that.

Seen in the light of these conclusions, direct horizontality takes on new significance for us. First, insofar as direct horizontality relates to the drawing of the law's boundary, Luhmann shows us that the law is not inherently opposed to horizontality. In his own words, this "simply changes its range of application."⁵⁶ Secondly, insofar as direct horizontality serves to create positive, ethical normative projections for other social sub-systems, projections which might become a part of those sub-systems and serve to counteract their corruption by apartheid law, Luhmann demonstrates to us the absolute urgency of this task. Finally, what Luhmann helps us to understand is that direct horizontality cannot be thought through a Hartian conception of the law - if ethical duties simply become black-letter laws, our commitment to dignity, freedom and equality will ultimately fail as justice once again returns simply to law.

In the next section of the paper, I elaborate on direct horizontality and draw some preliminary conclusions about its content and application. Thereafter, I turn to the main substance of my paper, which is to develop a conception of freedom which can challenge neoliberalism, and a conception of the law which can challenge Hart's soft positivism.

⁵⁶ Id.

IV. PRELIMINARY OBSERVATIONS: SOCIAL TRANSFORMATION, DIRECT HORIZONTALITY AND FREEDOM

The concept of direct horizontality is intimately tied to South Africa's history. First, apartheid systemically deprived black South Africans of the material conditions required for a meaningful exercise of their freedom. The new South Africa continues to be characterised by this systemic deprivation in the form of gross socio-economic inequality which exists along primarily racial lines. That this inequality exists along racial lines makes the argument, advanced by some, that white South Africans did not benefit materially from apartheid a little difficult to swallow. Secondly, apartheid served to produce and promote a discriminatory mindset amongst all South Africans, and entrenched an attitude of self-entitlement in white heterosexual males in particular. Anyone who is mildly attuned to contemporary social realities will know that these racism and self-entitlement remain pervasive evils, even if there are those who have become skilled at clothing their racism beneath seemingly benign political attitudes. Thirdly, apartheid constituted a total suppression of human dignity and sense of self-worth amongst all South Africans who fell outside of the white heterosexual male hegemony, most particularly of course amongst black South Africans. Once again, black South Africans (as in all other post-colonies) are faced with the task of reaffirming their dignity in the wake of hundreds of years of having it denied.

In essence, then, the result of apartheid is a radical shattering of the ethical relation (Hegel's *Sittlichkeit*) within our communities, an ethical relation which as a society we have clearly failed to rebuild. We have seen above that the law has played a unique and significant causal role in producing the history that we have inherited. First, because Luhmann shows us that the legal system infiltrates other social sub-systems with such totality, and because the legal system was so thoroughly corrupted by racism, oppression and totalitarianism, its moral bankruptcy infected every corner of social relations. This explains why South Africa's socio-economic problems are systemic – they have been imbued with their interlinking, system-like nature by the '*system*' in 'legal system'. Secondly, we have seen that the legal system also affects the personal sub-system in particular, where its normative projections foster attitudes about how people are required to treat each other and what they are entitled to expect for themselves and others. Thirdly, we see that apartheid law is a textbook

example of the power of the law to transform the world by naming it. Black South Africans were labeled by the law as criminals, as inferior, as less-deserving, as being inhuman and without dignity. Of course, no one can really lose their inherent dignity; but you can still feel as though you have. Many black South Africans today are still fighting to recover from these deep psychological wounds.

The South African Constitution is a direct and express response to this history.⁵⁷ Several features of its response are particularly interesting. First, it is notable that the response is a legal one. It is this feature which has led Laurie Ackermann and others to describe South Africa's transition from apartheid to democracy as a "substantive legal revolution".⁵⁸ This notion recognises the significant role that the law has played in the annihilation of the ethical foundations of society, as well as the role which the law has to play in rebuilding them. Of course, the Constitution is not only a legal response in the strict sense: it embodies deep ethical aspirations for South African society, and commands that all law must be rooted in respect for human dignity. In this way, the Constitution makes the law transcend itself, grounding itself not in positive law, but in a *grundnorm* of dignity. I will say more about this later.

The second interesting feature of the Constitution is that it is profoundly socialist and egalitarian. These two aspects are prevalent from the first page of the Constitution to the last,⁵⁹ but I want to highlight two expressions of these aspects in particular. The first is that it contains an intense commitment to substantive equality. This commitment stems most notably from the statement in section 1 that the South African state is founded on the "achievement of equality and the advancement of human rights", as well as from section 9(2), which states that the focus of equality must be the "full and equal *enjoyment* of all rights and freedoms", rather than equal access or equal treatment. The focus on substantive equality is also evident from subsections (3) and (4), which prohibit not only direct discrimination, but also indirect discrimination, thus ensuring that equality is not undermined by facially neutral laws which in fact have an unequal impact.

⁵⁷ Preamble to the Constitution.

⁵⁸ Ackermann, L.W.H., "The Legal Nature of the South African Constitutional Revolution" (2004) *New Zealand Law Review* 633. See also the introduction to *Dignity, Freedom and the Post-Apartheid Legal Order* (Barnard-Naude, A.J., Cornell, D. and Du Bois, F., eds) (Juta: Cape Town, 2008) at ix-x; Cornell, D. "uBuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa" (2009) 20 *Law Critique* 43.

⁵⁹ See Klare, K.E. "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146.

The second aspect of the Constitution's commitment to socialism and egalitarianism is that it expressly envisages a redistributive program. This is clearly evident from the preamble's emphasis on social justice in the improvement of the quality of life of all citizens. It is also evident from various provisions of the Bill of Rights. Section 9(2) also permits government to undertake positive steps to alleviate material disadvantage left in the wake of apartheid.⁶⁰ In this sense, the Constitution's equality guarantee goes beyond even substantive equality, and includes a commitment to restitutive equality. The Bill of Rights also requires the state to undertake reasonable measures to provide housing,⁶¹ health care, food, water, social security⁶² and education.⁶³ Furthermore, section 25 provides for the expropriation of property subject to compensation, mandates the state to take measures which enable equitable land access, and entitles people to restitution of property dispossessed by apartheid government.

Thus, the Constitution's egalitarian and socialist vision for South Africa is evidenced by at least the provisions cited above. The third aspect of the Constitution that I want to highlight is that it recognises (as, given our history, it must) that the rebuilding of our country is a mammoth undertaking, and cannot be the responsibility of government alone. This aspect of the Constitution was articulated by Justice Madala in *Du Plessis v De Klerk*.⁶⁴

"Ours is a multi-racial, multi-lingual, multi-cultural society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society".⁶⁵

⁶⁰ See for example *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 12 BCLR 1517 (CC) at para 60.

⁶¹ Section 26 of the Constitution.

⁶² Section 27 of the Constitution.

⁶³ Section 29 of the Constitution.

⁶⁴ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC).

⁶⁵ *Id* at para 163. See also the statement of Kriegler J at para 145:

"My reading of Chapter 3 gives to the Constitution a simple integrity. It says what it means and means what it says. There is no room for the subtleties and nice distinctions so dear to the hearts of mediaeval theologians and modern constitutional lawyers. The Constitution promises an "open and democratic society based on freedom and equality", a radical break with the "untold suffering and injustice" of the past. It then lists and judicially safeguards

Since the “private sphere” has benefited from apartheid, and since it stands in a powerful economic position to assist in the promotion of substantive equality, redistribution and the reforging of *Sittlichkeit*, it only makes sense that the Constitution seeks to recruit individuals and corporations into the reconstructive effort.

This is the historical and legal background against which direct horizontality is set. Direct horizontality postulates that human rights do not impose duties on the state alone; rather, duties to respect (and, indeed, to protect, promote and fulfil) rights fall also on individuals. Direct horizontality recognises that it is not only the state which can violate human rights, but also economically, politically and socially powerful individuals and corporations; it recognises that it is not just government which has a duty to build better communities, but rather that all those who can, should.

Seen against the backdrop of South Africa’s past, the power of direct horizontality is immediately apparent. In the first place, it commits individuals to the rebuilding of the ethical relations through the undertaking of legal duties to improve their communities. In the second place, given the massive task of reconstruction faced by the new South Africa, given the limited resources of the state, and given the grossly unequal and enormous wealth which resides in the private sector, direct horizontality breathes new hope into the possibility of creating a more equal and just society in the medium term. Thirdly, by commanding individuals to uphold duties towards one another and to cooperate in realizing a new vision for our shared future, direct horizontality reaffirms the human dignity of those who bear such duties as well as of those who are the beneficiaries of those duties. Insofar as direct horizontality contributes to the realisation of substantive equality and the establishment of the material conditions necessary to exercise freedom in a meaningful way, it builds freedom and fosters a culture in which the infinite worth of each person is respected and valued.

Despite these powerful prospects, however, direct horizontality is all but absent from South African legal culture. In respect of the interim Constitution, it was declared by the

the fundamental rights and freedoms necessary to render those benefits attainable by all. No one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the state can possibly bring those benefits.”

Constitutional Court that human rights are not directly horizontal – at most, they apply indirectly by influencing the common law and the interpretation of legislation.⁶⁶ Even though the final Constitution is significantly different to the interim Constitution, in particular in respect of its express statement that the rights in the Bill of Rights bind natural persons,⁶⁷ direct horizontality has hardly experienced a resurrection. It has formed the basis of only one Constitutional Court decision since the enactment of the new Constitution, namely *Khumalo v Holomisa*.⁶⁸ In some subsequent cases the possibility of direct horizontality has been left open and is the concern of some minority judgments, but this hardly constitutes a great victory. If something positive is to be drawn out of all this, one can at least say that direct horizontality has not been closed down by judicial precedent in the event that horizontality experiences a revival.

The question which must be asked is why direct horizontality has been rendered dead in the water? Part of the answer to this question is that even progressive judges, who may be ideologically open to horizontality, are anxious about it. They are afraid to make use of it because they are not clear about what it is in theory, nor are they sure how it would actually work in practice, in terms of assimilating it into their legal reasoning.

The real answer, however, lies in the fact that judges, academics and practitioners who are open to direct horizontality are rather hard to come by. Instead, there is a wealth of opposition to direct horizontality, which opposition can be classified into two broad categories. The first category is one of ideological opposition to direct horizontality, which for the most part goes unarticulated in judgments and academic articles. The most common forms of ideological objections are that duties between individuals are *merely* moral in nature, and should not be made into legal duties, or that direct horizontality destroys the public/private divide which is designed to protect individuals from totalitarian governments. Essentially, the variety of objections can be summarized as viewing direct horizontality as an unjustified invasion and curtailment of individual freedom. If freedom is understood as the absence of constraint – which is in fact the most popular understanding of freedom and which is at the heart of conservative neoliberalism – then the ideological opposition to direct horizontality is a formidable one indeed.

⁶⁶ *Du Plessis* above note 64.

⁶⁷ Section 8(2) of the Constitution.

⁶⁸ *Khumalo v Holomisa* 2002 (5) SA 401 (CC).

The second category of objections concerns perceived practical problems relating to the use of direct horizontality in legal reasoning. The claims here tend to assert that direct horizontality involves the direct balancing of competing rights against one another, a task with which courts are supposedly ill-equipped to deal. They tend also to assert that horizontality involves courts too directly in “non-legal”, moral reasoning, with which they are also supposedly lacking the skills, and indeed the political mandate, to deal. In the light of these practical difficulties, many judges and academics simply ask: “What’s the point?”, since they believe that there is nothing which direct horizontality can do that indirect horizontality cannot do better.

In the result, my primary goal in this paper is to revive the debate about direct horizontality by seeking to defend it against these two categories of objections. Against the first class of objections, I aim to develop an alternative conception of freedom in contrast to the neoliberal view of freedom as the mere absence of constraint. This conception of freedom incorporates within its very definition an ethical responsibility towards others, and which must be objectively realised in our laws and institutions. This freedom, which is automatically limited by the conditions of its own exercise, turns out to be a fuller, more meaningful conception of freedom, one within which direct horizontality can flourish. The task of developing this alternative view of freedom, drawing on the work of Kant and Hegel, will consume the bulk of my paper.

Against the second category of objections, I aim to respond to the practical concerns about direct horizontality by explaining what direct horizontality is and how it can work in practice. In my response to these objections, I hope to make a novel contribution to the horizontality discourse by distinguishing between direct horizontality and direct horizontal *application*. It is my view that direct horizontality concerns the theoretical determination of the substantive rights and duties which human rights impose on individuals in their relations with each others. Direct horizontal application, by contrast, relates exclusively to the application of the rights and duties which have already been determined by direct horizontality. Thus, direct horizontality is logically prior to and necessary for direct horizontal application: the former concerns substantive legal reasoning, while the latter will only feature at the stage of determining the remedy necessary to give effect to the substantive law.

As will be seen, this distinction is both conceptually necessary and in fact expressly sanctioned by the Constitution. It is my view that the conflation of these two distinct notions has been the substantial cause of the confusion over and opposition to direct horizontality. In fact, direct horizontality discourse has been exclusively preoccupied with direct horizontal application, a preoccupation which has served only to obscure fundamental aspects of the content, operation and necessity of direct horizontality.

I turn now to the development of an ethically responsible vision of freedom, in the hope of providing a strong ideological basis for direct horizontality which can counter neoliberal concerns about the role of morality in the law and the public/private divide.

V. GERMAN IDEALISM: FREEDOM AS MORALITY AS LAW

In this section of my paper I will seek to develop a conception of freedom which is grounded in morality. More specifically, I will argue that freedom incorporates within its very definition a mandate to respect the dignity of all others, and to realise relationships of reciprocal recognition amongst members of our community. Furthermore, I will argue that the imposition of laws is not antithetical to this conception of freedom – rather, freedom can, and indeed must, be embodied in our shared legal practices.

In support of these contentions, I draw heavily on two of the great thinkers of German Idealism, namely Immanuel Kant and Georg Hegel. Kant is crucial because, first, he defends the very possibility of the existence of freedom, and second, because he proceeds to link freedom inseparably to morality. We will see in more detail later what that morality requires.

However powerful Kant's insights may be, though, one cannot escape the use of Hegel, not only because of his own contribution to what it means to treat others in a morally acceptable way, but because Hegel is very clear on how we progress from morality to law. As we will see, there is a tension in Kant's work, which he never fully resolved himself, as to whether or not one could ever use legal coercion to produce actions which are morally right. For whatever ambivalence there is in Kant on this point, however, there is no such ambivalence in Hegel. Thus, I will draw on his commitment to the objective, external realisation of freedom in the world, which includes the realisation of freedom in the law, to open a space in which direct horizontality can be thought through to its full conclusions.

A. Immanuel Kant: Freedom as Morality

We will begin our exploration of German Idealism with Kant. Kant's work on rationality, freedom and morality is complicated and vast – it is dealt with in several books dedicated exclusively to these topics, and makes numerous appearances in his other writings. I think it will be of assistance, therefore, to provide a brief overview of the works I intend to canvas, the themes covered in those works, and how they relate to one another.

To see how Kant links freedom to morality, we must review the development of his ideas in at least three of his books: (i) the *Critique of Pure Reason*⁶⁹ (the first critique); (ii) the *Critique of Practical Reason*⁷⁰ (the second critique); and (iii) the *Groundwork of the Metaphysics of Morals*⁷¹ (the *Groundwork*). In the first critique, Kant lays the foundation for what he considers to be a new and necessary approach to metaphysics and epistemology, in the hope of demonstrating, on the one hand, what we can know to be true about our world, and on the other hand, the concepts about which we have to remain agnostic, since we can neither prove their truth nor falsehood. One such concept, as we will see, is freedom – according to Kant’s epistemological scheme, the most we can know about freedom is that it *might* exist.

Chronologically speaking, the next step from the first critique would be to investigate the *Groundwork*, which was written between the first and second critiques. However, the *Groundwork* assumed much of what would only come to be explained by Kant in the second critique. Thus, it is more true to the logical development of Kant’s argument to move from the first to the second critique, and return to the *Groundwork* only once we have established certain concepts.

The second critique picks up where the first critique left off, namely with the possibility of the existence of freedom. In this critique, as we will see, Kant shows that, without morality, we would never have come to know about freedom, since morality is the only genuine evidence that we have of the possibility of our free will. Kant also shows that, without freedom, morality would not be possible at all. It is in this way that Kant explains why, in order to be free in any meaningful sense, we must comply with our moral duties. The content of those moral duties is then spelt out in the *Groundwork*, where Kant develops various formulations of his categorical imperative.

With this brief background in mind, we can now begin our engagement with Kant’s work. The importance of, and indeed, the *raison d’être* for, Kant’s commitment to the possibility of moral action can best be gleaned from an overview of David Hume’s central

⁶⁹ Kant, I. *Critique of Pure Reason* (J. Meiklejohn trans.) (J.M. Dent & Sons Ltd: London, 1969). Page references to this work are in the format A/B, where A refers to the page in the Meiklejohn translation, and B refers to the page in the Friedrich Max Mueller translation (2nd revised ed.) (Macmillan: New York, 1922).

⁷⁰ Kant, I. *Critique of Practical Reason* (T. Abbot trans.) (Prometheus Books: New York, 2006).

⁷¹ Kant, I. *The Moral Law: Groundwork of the Metaphysics of Morals* (H. Paton trans) (Routledge: New York, 2007).

thesis in *A Treatise of Human Nature*.⁷² As will be seen, Hume's argument there denies the very existence of free will, and consequently the existence of truly moral action – it was Kant's perceived need to counter this argument which spawned the *Critique of Pure Reason* and his subsequent work on freedom and morality.

(i) David Hume and the Near (Death) Experience of Freedom

*A Treatise of Human Nature*⁷³ is fundamentally premised on empiricism – Hume believes that legitimate knowledge can only stem from our sensory experience of the world. More specifically, Hume believes that all knowledge falls into one of only two categories: matters of fact and relations of ideas.⁷⁴ Matters of fact are basically states of affairs which actually exist in the world, about which we can only learn through our ongoing experience of the world – in this way, knowledge of matters of fact can only be gained through a process of inductive reasoning. In short, we generalise our experience of how things happen around us into working principles. For example, we observe that when wood is brought into contact with fire, it tends to ignite. We generalise, through a process of inductive reasoning, that wood is flammable, and this qualifies as a matter of fact.

However, the shortcoming of inductive reasoning, which Hume exposed, is that it is not strictly rational.⁷⁵ In other words, the causal relationships between events that we observe in the world are not logically, necessarily, linked to one another. Rather, inductive reasoning is based on the *mere assumption* that the future will always resemble what we have observed in the past.⁷⁶ But, of course, there is no rational reason why the future *must* resemble the past – just because wood, historically, has ignited when brought into contact with a flame, it does not mean that wood *must necessarily* always ignite in the future.⁷⁷ Initially, this conclusion seems bizarre, but only if we confuse scientific principle with the rules of

⁷² See, for example, the following statement by Kant: "As regards my own labours in the critical examination of pure reason, which were occasioned by Hume's skeptical teaching . . . I proceeded in the following manner with respect to the doubts raised by the Scottish philosopher touching the notion of causality." (Kant *Critique of Practical Reason* above note 70).

⁷³ Hume, D. *A Treatise of Human Nature* (T. Green and T. Grose, eds.) (Longmans, Green and Co, 1898). In my discussion of Hume I have benefited greatly from the useful summary of his thought in Dudley, W. *Understanding German Idealism* (Acumen: Stocksfield, 2007) at 3-9.

⁷⁴ Hume above note 73 at 66-72 and 372-394; Dudley above note 73 at 4-5.

⁷⁵ Hume above note 73 at 66-71; Dudley above note 73 at 7.

⁷⁶ Dudley above note 73 at 7.

⁷⁷ Hume above note 73 at 68, 272-273 and 285-289.

logical deduction. The very foundation of science is inductive reasoning – we develop a hypothesis, test it through factual experimentation, and draw conclusions based on what actually happens. When we say that wood is flammable, that is good science. But if we were to say that flammability is necessarily entailed by the very concept of “wood”, that is bad logic. Inductive reasoning cannot be employed to exclude other possibilities as *a matter of strict logic*. In the future, as strange as it may seem, we may find that wood does not always ignite, or only does so under certain circumstances, and then we must revise our conclusions. Which, once again, makes for good science, but does not produce definitional, logical truths which can withstand the rigour of formal logic. We will return to the significance of this below.

In contrast to matters of fact, Hume argued that relations of ideas are indeed definitional truths that we can deduce from the meaning of the terms involved.⁷⁸ For example, when we have an idea of a “disabled person”, that necessarily relates to the idea of a person who is impaired in some mental or physical way. It is logically impossible for our idea of a “disabled person” to relate to someone who suffers no physical or mental impairment – this possibility is logically excluded by the very definition of the term “disabled person”. Similarly, our idea of a “square” is necessarily related to our idea of an object that has four corners and four sides of equal length – if it does not have four corners and four equal sides, then, necessarily, it cannot be a square. The one idea is logically entailed by the other.

Now, relations of ideas cannot tell us whether something exists.⁷⁹ Therefore, for Hume, metaphysics must resign itself to explorations of matters of fact. (Of course, if we understand the study of metaphysics to involve necessary truths about how the world *must be*, rather than merely factual statements about how the world *is*, we can see that Hume is really obliterating metaphysics as a discipline altogether.) On this account, we can deduce all the truths we like about squares, which will lead us to relations of ideas; however, whether squares actually exist in the world is a matter of fact.

Hume proceeds to argue that, as far as matters of fact are concerned, the only types of epistemologically valid ideas are: (i) mental representations which are direct copies of

⁷⁸ Hume above note 73 at 66-72 and 372-394; Dudley above note 73 at 6.

⁷⁹ Dudley above note 73 at 4.

impressions (mental representations of sensory experiences) that we have had; or (ii) mental representations which provide the best explanation of those impressions that we have experienced.⁸⁰ An example of the first kind of idea would be the idea of a “car” – all of us will have had a direct sensory experience of what that is. An example of the second kind would be our idea of “Roman civilization” – although no one alive today has any sensory experience of Roman civilization, it is the best explanation for the historical remnants that we have discovered, and of which we do have direct sensory experience.

It should be apparent that, under this epistemological scheme, freedom is not a “matter of fact”: freedom cannot be represented in our minds as a copy of some sensory experience we have had; nor are there sensory experiences in the world which we can only explain cogently if we consider that freedom exists.⁸¹ Since freedom cannot be a matter of fact, it cannot, according to Hume’s view of metaphysics, be said to *exist* in the world. Thus, for Hume, whatever we may be able to deduce about “freedom” or “free will” from the meaning of those terms (in other words, whatever relations of ideas we may be able to produce from those terms), this would merely amount to futile intellectual horse-play. In order to qualify as a valid idea in Hume’s epistemological schema, we would have to have some sort of direct sensory experience of freedom.⁸² Since we can have no such experience, we cannot know ourselves to be free.

How, then, does Hume explain human behaviour? Hume does not, as many people think, argue that we are subject to the “causality” that we see in the natural world. Causation, like freedom, fails to meet the rigorous standards of deductive reasoning: since we can have no sensory experience of causality either, our idea of it can form no part of a valid account of our world.⁸³ Rather, Hume’s view of human behaviour is more subtle – although we cannot legitimately attribute “causation” to natural phenomena, we nevertheless experience those phenomena *as if* they were subject to necessary causation. Yet, since we cannot know ourselves to have free will, we cannot distinguish ourselves from natural phenomena on that front – in other words, we have no legitimate basis on which to

⁸⁰ Hume above note 73 at 372-388; Dudley above note 73 at 5.

⁸¹ Whatever experience we may think provides evidence of our freedom can be explained (to a certain degree, more simply) by the deterministic hypothesis.

⁸² Dudley above note 73 at 8.

⁸³ Hume above note 73 at 379ff; Dudley above note 73 at 8.

base our belief that we are not subject to the same necessary causation that we attribute to the phenomenal world.⁸⁴

Thus, for Hume, human behaviour can be described in the same way as the behaviour of all other animals – we are merely attempting to satisfy our biological needs and other desires as best we can in our environmental circumstances. Our actions are determined exclusively by our mechanistic reactions to the environment, and we cannot, in any real sense, motivate our actions through reason alone. Ultimately, in Hume's famous words, what we perceive as our reason is merely "a slave to the passions". This is the nature of Hume's determinism.

On this account, our supposed capacity for rational self-determination is simply an illusion. We are incapable of genuinely choosing between two different courses of action on the basis of reason. If we are with Hume on this point, then the way in which we respond to any given situation is already predetermined by our biology and environment.

The implications of this account for any possibility of moral behaviour are clear. If we cannot really choose between different actions by way of our reason alone, then we cannot attribute moral personality to human beings; nor can we visit moral judgment on people's wayward behaviour. On Hume's account, when a man chooses to kill someone, he is not truly exercising a moral choice; rather, he is merely responding mechanistically in a way which is determined exclusively by his biology and environment. Whatever other reasons we may have for wanting to punish or judge this behaviour, it cannot be because we view it as morally wrong. Without the freedom to choose to do right or wrong, morality ceases to exist as a possibility at all.

This is the gauntlet which Hume had laid down for Kant. Before Kant could even think about the link between morality and freedom, or what obligations morality requires of us, he had first to rescue metaphysics through a revision of epistemology, and then to find a way to defend the existence of freedom within that framework. This is the task of his first critique, the *Critique of Pure Reason*.

(ii) The Critique of Pure Reason

⁸⁴ Dudley above note 73 at 8.

According to Kant in the first critique, Hume's epistemology (which founds his argument against free will) is premised on the assumption that our knowledge must conform to the object. Kant proposed a radical new approach to epistemology (often called his "Copernican revolution"), namely that we should assume that objects must conform to our knowledge (or more specifically, to the way that we come to know things). To quote Kant himself:

"Hitherto it has been assumed that all our knowledge must conform to objects. But all attempts to extend our knowledge of objects by establishing something in regard to them a priori, by means of concepts, have, on this assumption, ended in failure. We must therefore make trial whether we may not have more success in the tasks of metaphysics, if we suppose that objects must conform to our knowledge. This would agree better with what is desired, namely, that it should be possible to have knowledge of objects a priori, determining something in regard to them prior to their being given."⁸⁵

Kant argues that if we can determine universal and necessary features which all objects must possess in order for us to experience them at all, we can produce knowledge of our world which, in contrast to Hume's contention that we can gain knowledge only through experience, we can know *a priori*.⁸⁶ I will now explain how Kant develops this new approach to epistemology.

Kant distinguishes between knowledge that is *a priori* and knowledge that is *a posteriori*. *A priori* knowledge is knowledge the justification for which does not rest on experience, merely through the necessary truths implicated by our ideas.⁸⁷ *A posteriori* knowledge, on the other hand, is empirical knowledge gained through our sensory experience of the world.⁸⁸ Kant then makes a further distinction between analytic and synthetic propositions.⁸⁹ An analytic proposition is one in which a mere logical analysis of the terms involved produces further content which is implicit in those terms. A synthetic proposition, by contrast, is one which connects the terms involved to ideas that are not logically implicit within them.

⁸⁵ Kant *Critique of Pure Reason* above note 69 at 12/xvi.

⁸⁶ Id.

⁸⁷ Id at 25/1.

⁸⁸ Id at 25/1.

⁸⁹ Id at 30/6.

For Kant, these distinctions give rise in principle to four types of knowledge: analytic *a priori*, analytic *a posteriori*, synthetic *a priori*, and synthetic *a posteriori*.⁹⁰ Analytic *a priori* knowledge is similar to Hume's concept of "relations of ideas" – definitional truths that we can deduce from the meaning of the terms involved without experience of the real world – and synthetic *a posteriori* knowledge is similar to Hume's "matters of fact" – facts about what really exists in the world which we can only learn through empirical observation. Kant wants to show that, in addition to analytic *a priori* and synthetic *a posteriori* knowledge, synthetic *a priori* knowledge is also valid – knowledge which can tell us facts about our world (which is thus synthetic), but which we can know prior to our encountering that world, merely through the use of reason alone (which is thus *a priori*). Kant believes that synthetic *a priori* knowledge forms the basis of all metaphysical knowledge – thus, the very fate of metaphysics depends on Kant proving the existence of synthetic *a priori* knowledge.⁹¹

Seeking to show that synthetic *a priori* knowledge is indeed possible, and proceeding on the assumption that objects must conform to the way we mentally represent them to ourselves, Kant explains the capacities that enable us to experience objects in the world. This consumes the bulk of the first critique, and involves a lengthy and intricate argument which is not strictly necessary to present here. What is relevant, for our purposes, is Kant's conclusion that there are certain conditions which objects must meet in order for them to be experienced by us. The first set of conditions, which Kant calls the two forms of "pure intuition", is that objects must already appear to us in space and time.⁹² These are the bare necessities that create the possibility of experiencing the world. In contrast to empiricism, which would hold that we can only know objects to appear in space and time after we have experienced them, Kant holds that in order for us to experience any object at all, that object must already appear to us in space and time. Thus, space and time are synthetic *a priori* ideas about the world.

However, even though the existence of objects in space and time is essential to providing us with experience of the world, those concepts do not enable us to separate distinct experiences from one another, and therefore do not explain how we make sense of the world around us. In other words, without more, the synthetic *a priori* concepts of space

⁹⁰ Id at 30-32/6-10.

⁹¹ Id at 32-34/7-13.

⁹² Id at 41-61/19-50.

and time would only provide us with an overwhelming amount of sensory data which would be relatively useless. Instead of seeing “this thing, here, now”, we would simply see “everything at once”. Kant therefore seeks to argue that certain concepts are necessary, *a priori*, for us to experience the *determinate* nature of objects and events.⁹³ Again, his argument here is lengthy and complicated, but the basic point we need to extract is that Kant holds that every proposition we make about a certain state of affairs in the world relies on one or more of the twelve “categories” he identifies. These categories are: unity; plurality; totality; reality; negation; limitation; substance/accident; cause/effect; reciprocal interaction; possibility; existence; and necessity.⁹⁴ These categories do not derive from experience, but rather have an *a priori* origin in the mind itself. Kant shows that these categories are necessary not only for understanding in general,⁹⁵ but also for our experience of objects.⁹⁶ Through the use of these categories, we come to organise the mass of data we gain through experiencing the world into particular objects and events.

These twelve categories, like the two concepts of pure intuition – space and time – constitute synthetic *a priori* metaphysical knowledge – they are independent of, necessary for and prior to any sensory experience that we might have. In short, they are true facts about our world. Importantly then, and against Hume, Kant shows that causation (amongst other things) is not merely something we “impute” to our experiences; rather, causation is actually true of those experiences.

At this point in the first critique Kant has accomplished what he set out to do, which is to show us that there is a certain kind of knowledge, which turns out to be synthetic *a priori* knowledge, which consists of concepts that we can know to be necessarily and universally true of all objects prior to our experience of them. This finding refutes the very foundation of Hume’s epistemology, in that it shows that we can have legitimate ideas about our world that need not be traced back to some form of sensory experience that we have had.

However, we must now encounter two qualifications to this knowledge. First, these twelve categories and two concepts of pure intuition fully exhaust the knowledge of metaphysics which we can gain *a priori*. Second, and most importantly, this knowledge is

⁹³ Id at 71-114/65-130.

⁹⁴ Id at 79/80.

⁹⁵ Id at 71-85/67-84.

⁹⁶ Id at 90-113/84-131.

only true of what Kant calls the “phenomenal world”⁹⁷ – the world of appearances. About the “noumenal world”,⁹⁸ which consists of the world as it is in itself, we can know nothing whatsoever.⁹⁹

Since the distinction between the phenomenal world and the noumenal world is critical to Kant’s theory, and lies at the very heart of his transcendental idealism, it is worth taking some time to explain it in more detail. The distinction is effectively one between two possible perspectives which we can adopt towards our world. First, we can conceive of the world as we represent it to ourselves – this is the phenomenal world. But we can also imagine the world-in-itself – how the world is when we are *not* representing it to ourselves. This conception of a “thing-in-itself” is what forms the basis of Kant’s noumenal world.¹⁰⁰ As stated above, Kant believes there is nothing we can know about the noumenal world – we cannot know what the world looks like when, as it were, we are looking the other way.

I will offer two examples which may help the reader to grasp these concepts. The first example which may aid us in understanding why we cannot know the world apart from our encountering of it, and how it might actually be different, is a scientific one, namely Heisenberg’s uncertainty principle. Simply put, Heisenberg postulated that it is impossible to know both the position *and* the momentum of subatomic particles at any given time – observing the one property changes the other. Heisenberg, like Kant, was trying to show that uncertainty was actually a property of the world, since, like Kant, he believed that the world changes the very moment we encounter it.

The second example, more simple and colloquial, relates to an answer to the question which is often playfully asked between friends seeking to puzzle each other: “What does the inside of a ping pong ball look like?” Of course, scientifically speaking, we know what the inside must look like, and what it must contain, but the point I am trying to make here is one concerning how we represent the world to ourselves. If we want actually to observe (or experience) what the inside of a ping pong ball looks like, we must cut the ball open. But,

⁹⁷ Kant also regularly uses the phrases “sensible world” or “world of sense”.

⁹⁸ Or “supersensible world” or “intelligible order”.

⁹⁹ On this limitation and the distinction between the two worlds in general, see Kant *Critique of Pure Reason* above note 69 at 180-191/235-268.

¹⁰⁰ I use the terms “phenomenal world” and “noumenal world” without taking sides in the debate amongst Kantians about whether these are in fact two distinct worlds, or merely two different perspectives on the same world. My own belief is that Kant’s broader argument about the possibility of freedom holds true regardless of which interpretation one adopts.

once we cut the ball open, there is in fact no longer any “inside” of the ball to observe at all. Again, this example is a simple way of grasping the notion that our minds actively structure our experiences – when we observe the world, we change it, in the sense that we cannot know how it is other than how it appears to us through the process of representing it to ourselves.

This distinction between the phenomenal world and the noumenal world is critical in Kant, because the synthetic *a priori* knowledge that he produces in the first critique – the conditions of the possibility of experience – applies only to the phenomenal world. Because it would make no sense to apply conditions of the possibility of experience to things-in-themselves which, by definition, we cannot experience in any way, this synthetic *a priori* knowledge does not apply to the noumenal world. Indeed, we cannot know anything about the noumenal world at all.

Thus, the important conclusion which we reach at this stage of Kant’s work is simply this: we know of the *phenomenal world* that causation is true. But what does that mean for freedom and morality? Does this not merely strengthen Hume’s determinism: instead of being subject to the causation that we merely *attribute* to the phenomenal world, are we now subject to the causation that *truly exists* in the phenomenal world?

The reason we are not resigned to Hume’s determinism is the result of Kant’s resolution of the third antinomy of reason.¹⁰¹ The third antinomy, which is the antinomy of freedom, arises at this point in the first critique because it is, at this stage, possible to conceive of two equally plausible, but mutually exclusive, ways of explaining the world. On the one hand, we may posit that chains of causation do not regress infinitely, and must thus eventually terminate in some uncaused cause, a first cause, which we would have to call freedom. However, this fundamentally violates the law of causation, which Kant has already shown to be an objective reality of the world of appearances.

On the other hand, we might then posit that causal chains are, in fact, infinite regressions. However, we have already seen that causal chains cannot explain all of our experiences in the phenomenal world, in particular our experience of moral obligation. In

¹⁰¹ Kant *Critique of Pure Reason* above note 69 at 270-275/444-452.

order to complete the explanation of human experience, therefore, we must assume that there is freedom.

Viewed in these terms, there is no way out of this vicious argumentative circle, and pure reason will have to remain in perpetual conflict with itself. However, Kant offers us a resolution of this antinomy, and it turns on the distinction between the phenomenal and noumenal world. Reason allows us to hold that causation is indeed a property of the phenomenal world, and that there is, in the world of appearances, no uncaused cause, whilst at the same time holding that freedom is a property of the noumenal world. Thus, if we locate freedom outside of the empirical world in the world of pure understanding, we resolve the antinomy and thus provide a nuanced explanation of the totality of our human experience.¹⁰² Kant argues that it is the resolution of this antinomy which provides us with both the possibility and necessity of supposing a noumenal world

Thus, we come to the modest, yet powerful, conclusion which Kant draws in the first critique: although we cannot know that freedom exists in the phenomenal world, we are also unable to prove that freedom does not exist. This subtle complexity often gives rise to misunderstandings of Kant's defence of freedom. Kant does not argue that freedom is a metaphysical fact. Rather, what he shows is that even though we have no experience of freedom, not all legitimate ideas are rooted in objects of experience. Thus, a concept like freedom, of which we can have no experience, might still play a legitimate role in our account of the world, provided that it is not logically impossible, which Kant shows it is not.

His point is simply this: we can have no knowledge of anything that transcends our experience, which includes the entire noumenal world. Freedom is one such concept. Thus, because we cannot experience it, we must humbly admit that there is only one thing we know about freedom for sure: we can know absolutely nothing about it. In the result, Kant argues that we cannot demonstrate that freedom *does not exist* (as Hume purports to do); nor, however, can we demonstrate that it *does exist*. What we are left with, at the end of the *Critique of Pure Reason*, is the possibility that we might be able to think of ourselves as free.

¹⁰² Id at 272-275/448-452

(iii) The Critique of Practical Reason

In the second critique, Kant seeks to push the modest conclusion of the first critique slightly further. As he explains in the preface to the *Critique of Practical Reason*, his goal in the second critique is to show that pure reason, of the nature that he explained in the first critique, can be practical in and of itself, in that it can set ends and motivate us to pursue those ends in “real life” (the phenomenal world) without recourse to empirical conditions.¹⁰³ It should be pointed out early on that, in both the first and second critiques, Kant is still dealing with the notion of pure reason.¹⁰⁴ In the first critique, Kant is attempting to delineate the ability of pure reason to comprehend the world around us. By contrast, in the second critique, Kant is attempting to understand how pure reason can determine the will, and thus be an efficient cause of action in the phenomenal world (i.e. how pure reason can be practical).

Why should Kant want to prove that pure reason can be practical; that the grounds for the determination of the will can be based on reason alone? Whilst we may not be able to know freedom to be true as a matter of pure theoretical reason, Kant believes that if he can prove that is possible for reason alone to dictate not merely the means by which the contingent ends of the will must be fulfilled, but also to dictate the ends of the will themselves, he can show the existence of a concept which is only possible if we attribute freedom to ourselves. When we set ends for ourselves according to only that which can be grasped by *a priori* reason (i.e. pure reason) alone, rather than according to our subjective and empirically-conditioned desires which we can only know *a posteriori*, we are acting from the “autonomy of the will”. For Kant, the autonomy of the will *is* freedom. Thus, if he can explain the possibility of an autonomous will and the conditions of its exercise (again, as a matter of pure practical reason and not of theoretical reason), freedom can take on an “existence” or “objective reality” in practice that it could not achieve in theory, which pushes the first critique’s “neutral” stance towards the possibility of freedom in a positive direction. In other words, if Kant’s central thesis in the second critique is right, then setting ends through reason provides evidence in favour of assuming that we are free, rather than assuming that we are not.

¹⁰³ Kant *Critique of Practical Reason* above note 70 at 13-14.

¹⁰⁴ See the introduction by Carl Friedrich in *The Philosophy of Kant: Immanuel Kant's Moral and Political Writings* at (Friedrich, C., ed) (Random House, 1993) at xlii.

With Kant's purpose in the second critique now set out, we can begin a more thorough exploration of his detailed argument. In this respect, I propose to deal with Kant's argument in an order different to that set out by him in the second critique, since I believe that the order of argument I adopt here presents Kant's thought in a more accessible light, and presents its logical progression from the *Critique of Pure Reason* more clearly.¹⁰⁵ First, I examine the conditions under which we can say that the will has been determined by *a priori* reason alone; that is, the conditions under which pure reason can indeed be practical. We shall see that the will which is determined by reason alone is a will which is subject to self-legislation through objective, universal laws. Secondly, I will jump to the argument made by Kant in the second part of the second critique, namely that it is possible for these laws, deriving as they must from the world of pure understanding (the noumenal world), to produce effects in the phenomenal world. What Kant achieves here is the harmony he achieves for pure theoretical reason in the first critique concerning the phenomenal and noumenal worlds – that it is simultaneously possible for us to think of ourselves as subject to causation in the world of appearances, and to think of ourselves as free in the world as it is in itself. Thirdly and finally, I will return to the contentions Kant makes earlier in the second critique. There, Kant explains the importance of thinking of our (noumenal) freedom as being able to affect our (phenomenal) world, since without freedom, we would have no way to make sense of our feeling that we are able to make moral choices. Indeed, the significance of these contentions, at least for present purposes, lies in the notion that, since morality is the only experience we have in which our freedom can actualize itself in the world, acting according to moral duty becomes an indispensable part of the very concept of freedom, and indeed, of our humanity.

(a) *The conditions of pure practical reason*

¹⁰⁵ I use the term "logical progression" reluctantly, since the second critique is, to a certain extent, a self-standing work which is not *merely* a follow-on from Kant's work in the first critique. Moreover, the second critique, in seeking to defend the possibility and necessity of moral action, represents the fundamental motivation underlying Kant's entire philosophical system (see Friederich, id at xlv). However, the second critique is indeed a logical progression from the first since, without the metaphysical groundwork undertaken in the *Critique of Pure Reason*, the second critique could not proceed.

Kant begins his argument in the second critique¹⁰⁶ by defining “practical principles” as propositions which determine the will (in other words, propositions which direct the will towards the achievement of a particular object or end).¹⁰⁷ When these practical principles are subjectively valid only for a particular person’s will, they are called “maxims”; when they are objectively valid for the will of every rational being, they are called “laws”.¹⁰⁸

As far as maxims are concerned, human beings have to rely on them all the time by virtue of our finitude – we are not self-sufficient in and of ourselves, and thus have needs and wants which we have to look outside of ourselves to fulfil. Our desires might be simple – say, for example, our desire to sate our thirst – or they may be complex – such as a desire to participate in cultural activities because they produce enjoyment for us.¹⁰⁹ Each time we decide to fulfil one of these desires, we are, in Kant’s language, setting ourselves an end. When we set such ends for ourselves, we use reason to determine the best means of fulfilling those ends:¹¹⁰ we may choose to quench our thirst by drinking water from the tap, or perhaps we will drink bottled water instead; we may choose to produce cultural enjoyment through attending a performance of the orchestra, or perhaps we will visit an art gallery. Whatever means we choose to fulfil our ends, reason is necessarily at play. As imperfectly rational beings, we experience this demand of reason on our actions as *imperative*: where a perfectly rational being (such as God), when faced with an end which demands a particular means, simply says “I *will* perform this action”, human beings say “I *ought* to perform this action”. We will return to the notion of imperative shortly.

For now, we should note Kant’s argument that maxims which derive from the faculty of desire in the way just explained suffer from certain shortcomings. First, even though these maxims may take on a highly sophisticated form, and even though they may employ a great deal of understanding or reason in the selection of means to achieve their ends, they are not based on pure reason alone. Rather, maxims of this kind are based on empirical conditions related to the pursuit of pleasure or the avoidance of pain. In fact, to a certain degree, one might say that we do not really set these ends for ourselves at all, as they are

¹⁰⁶ His argument begins in “The Analytic of Pure Practical Reason”, which is Book I of the second critique – see Kant *Critique of Practical Reason* above note 70 at 31 et seq.

¹⁰⁷ Id at 31.

¹⁰⁸ Id.

¹⁰⁹ Id at 34-38.

¹¹⁰ Id.

instead already given to us by nature. *We* do not decide what will please us or what our biological needs require; *nature* does.¹¹¹ Because these ends are determined by nature, and are thus squarely located in the phenomenal world, it is impossible for us to know what will please or displease us *a priori*. Instead, we can only know pleasure or pain through experience.

Thus, regardless of how much reason we use in the pursuit of maxims based on the faculty of desire, the will is not here being determined by *a priori* reason alone – such maxims do not show that pure reason (of the sort explained in the first critique, which is wholly free from empirical determinations) can be practical, since the reason involved is anything but pure.¹¹²

The second shortcoming of such maxims is that, because they seek ends which are based on empirical considerations of what is pleasurable or painful, they cannot form the basis of objective laws – ends which every human being must set for herself purely by virtue of the demands of reason.¹¹³ These maxims merely hold that “if one desires X, one ought to do Y” – however, X as an end cannot be universal and objective, since it is based on *a posteriori* knowledge of what is pleasurable or painful which, as Kant explained in the first critique, will be different for each person. Even though reason is deployed in assessing the means to the end, the end itself is not one which reason commands all rational beings to adopt. Therefore, the maxim itself can only be a *hypothetical* imperative, and once again we find that the subjective nature of such maxims means that they are unfit to be an example of pure practical reason.

The following example from the second critique provides a helpful summary of the problems of subjective maxims:

“Tell a man, for example, that he must be industrious and thrifty in youth, in order that he may not want in old age; this is a correct and important practical precept of the will. But it is easy to see that in this case the will is directed to do something *else* which it is presupposed that it desires, and as to this desire, we must leave it to the actor himself whether he looks forward to other resources than those of his own acquisition, or does not expect to be old, or thinks that in case of future necessity he will be able to make shift with

¹¹¹ Id at 34.

¹¹² Id at 38.

¹¹³ Id at 34.

little. Reason, from which alone can spring a rule involving necessity, does indeed give necessity to this precept (else it would not be an imperative), but this is a necessity dependent on subjective conditions, and cannot be supposed in the same degree in all subjects.”¹¹⁴

Broadly speaking, then, the trouble with hypothetical imperatives is that, whilst a certain action may be subjectively necessary in order to achieve a desired end, the end itself may very well be objectively contingent.¹¹⁵ Such maxims do not produce ends which are absolutely good in themselves, but rather only produce something which is good for something lying outside the will.¹¹⁶

Thus, in order for the will to be determined by reason *a priori*, and thus be objectively valid for all rational beings, it must set itself ends which are wholly independent of empirical considerations, without the presupposition of any feelings of pleasure or pain. Once a maxim is abstracted from all empirical conditions in this way, it has no content or substance (since all such content would have to be empirically derived) – what is left is the bare “form” or formula or structure of the maxim.¹¹⁷

Since this mere form of a maxim is devoid of content derived from the phenomenal world, it can be determined *a priori* by pure reason alone. Since it is conceived by reason alone, it is a ground of determination which is objectively valid for the will of every rational being – a universal legislative dictate which we are all bound to follow. Once again, of course, we experience this reason is imperative. However, unlike in the case of subjective maxims, which served merely as hypothetical imperatives, the imperative nature of the bare form of the maxim is *categorical*, since the end is one which must necessarily be willed by all rational beings. Only a categorical imperative has the objective and universal nature required for it to be classified as a “law”. As Kant explains:

“[T]hat reason may give laws it is necessary that it should only need to presuppose *itself*, because rules are objectively and universally valid only when they hold without any contingent subjective conditions, which distinguish one rational being from another. Now tell a man that he should never make a deceitful promise, this is a rule which only concerns

¹¹⁴ Id at 33.

¹¹⁵ Id at 39.

¹¹⁶ Id at 77.

¹¹⁷ Id at 38.

his will, whether the purposes he may have can be attained thereby or not; it is the volition only which can be determined *a priori* by that rule. If now it is found that this rule is practically right, then it is a law, because it is a categorical imperative.”¹¹⁸

It is important to take note of two further aspects of a will which is determined by such an objective categorical law. First, the resultant action is not something which is merely good for some contingent end that we may or may not desire; rather, the action is absolutely good in and of itself. Secondly, we have now seen that laws of the kind just described are superior to subjective maxims in one fundamental respect. Maxims are only hypothetically or subjectively imperative, in that the ends which they will need not be willed by all rational beings. Objective laws, by contrast, are the products of pure reason alone and are thus absolutely valid for all rational beings. Such laws therefore constitute “higher desires” which rational beings are compelled to obey, even if they conflict with our subjective maxims determined by our faculty of desire (our “lower desires”). We can now understand how Kant reaches the conclusion that the determination of the will by categorical imperatives is the supreme condition of all good.¹¹⁹

“The principle of private happiness [by which Kant means the pursuit of subjective ends to fulfil our worldly desires], however much understanding and reason may be used in it, cannot contain any other determining principle for the will than those which belong to the lower desires; and either there are no higher desires at all, or pure reason must of itself alone be practical; that is, it must be able to determine the will by the mere form of the practical rule without supposing any feeling, and consequently without any idea of the pleasant or unpleasant, which is a matter of the desire, and which is always an empirical condition of the principles. Then only, when reason of itself determines the will (not as the servant of inclination), it is really a higher desire to which that which is pathologically determined is subordinate, and is really, and even specifically, distinct from the latter, so that even the slightest admixture of the motives of the latter impairs its strength and superiority . . . Reason, with its practical law, determines the will immediately, not by the means of an intervening feeling of pleasure or pain, not even of pleasure in the law itself, and it is only because it can, as pure reason, be practical, that it is possible for it to be legislative.”¹²⁰

¹¹⁸ Id at 33.

¹¹⁹ Id at 81.

¹²⁰ Id at 38.

It should be pointed out that Kant is using the terms “legislative” here to mean that, when pure reason determines the will directly, it compels us to lay down a law for ourselves which governs all our actions. Thus, Kant believes that a will which is determined by reason alone, and which is thus a truly autonomous, free will, must impose on itself “law-abidingness for its own sake”.¹²¹ This is how we come to the formulation of Kant’s famous categorical imperative: “Act so that the maxim of thy will can always at the same time hold good as a principle of universal legislation.”¹²²

Kant establishes here that we need not rid ourselves of maxims altogether, but rather that these maxims must themselves be subject to the notion of a universal, objective law. Thus, whenever we seek to adopt certain ends and choose means to pursue them, we must imagine whether, if those ends together with their chosen means were to be adopted by each rational being, the maxim would contradict itself, or the end we sought would be entirely defeated (unless were to grant an exception for ourselves).¹²³ If either of these scenarios could emerge, our maxim is prohibited.

We will see in greater detail below what sort of actions the categorical imperative commands. For now we need only appreciate that if the will is to be determined by pure reason alone (if pure reason alone is to be practical), then that will must be determined by the categorical imperative. It is only this will which is pure and autonomous, and which can thus consider itself to be a truly free will.

However, the stipulation of the conditions under which pure reason alone determines the will (and is therefore practical) only takes Kant’s argument so far. We still do not know that pure reason *can in fact* determine the will in this way. In other words, we are still left with the question of whether a pure will, determined by reason alone, can be an efficient cause of our actions in the phenomenal world. That the pure will can indeed by an efficient cause is dealt with in the next section.

(b) *The possibility of pure practical reason*

¹²¹ Paton, H.J. “Commentary and Analysis of the Argument” in Kant *The Moral Law* above note 71 at 14.

¹²² Kant *Critique of Practical Reason* above note 70 at 46. This is virtually identical to the second formulation of the categorical imperative in the *Groundwork* above note 71 at 17.

¹²³ Kant *Critique of Practical Reason* above note 70 at 42.

It will be recalled that the *Critique of Pure Reason* established that it was the two pure intuitions of space and time and the 12 categories of understanding which alone made sensuous experience possible, and thus constituted the only *a priori* knowledge we could have about the phenomenal world. About the noumenal world we could have neither *a priori* nor *a posteriori* knowledge, and we can therefore know nothing about it at all.¹²⁴ In spite of this seemingly disheartening result, the first critique did at least establish the possibility and indeed the necessity of postulating the noumenal world.¹²⁵ Thus, although the first critique establishes that causation has to be true of the phenomenal world, it simultaneously established that we had to think of freedom as a property of the noumenal world – at least as a possibility – since we would have no other way of resolving the antinomy there described. Thinking of freedom in the noumenal world was equally necessary in order to make sense of our experience of moral obligation.¹²⁶

Now, as we have already seen, the noumenal world is completely beyond any experience and is thus a world of pure reason. It becomes significant, therefore, that the universal legislative form of the maxim, which determines the truly free will, is independent of empirical conditions and is thus a product of pure reason alone. In a sense, then, this universal legislative form does not depend on the phenomenal world – indeed, it lies completely outside that world – and can be conceived entirely as a product of the noumenal world. More specifically, it is the product of rational beings who posit themselves as beings in the noumenal world, capable of using reason to derive maxims to guide their own actions. To the extent, therefore, that the categorical imperative has its basis in the noumenal world, and that this imperative is the defining basis of an autonomous will, we have some evidence that freedom really is a property of a being in the noumenal world.

What we need to consider now is how the categorical imperative transcends the noumenal world where it is conceived and comes to realise objects in the phenomenal world. We must address this question in order to explain the possibility of an autonomous will which is capable of being an efficient cause of action in the world of experience; in other words, to explain how pure reason can be practical.

¹²⁴ Kant reminds us of the result in the *Critique of Practical Reason* above note 70 at 59.

¹²⁵ Id at 60.

¹²⁶ Id.

To find the answer we must return once again to the *Critique of Pure Reason*, which showed us that the antinomy of freedom could only be resolved if we regard ourselves as subject to causality in so far as we are beings in the phenomenal world, but also as free beings in the noumenal world. Kant summarises this result in the second critique:

“[A]s it is absolutely impossible to find in experience any example in accordance with this idea [of freedom], because amongst the causes of things as phenomena, it would be impossible to meet with any absolutely unconditioned determination of causality, we were only able to defend our supposition that a freely acting cause might be a being in the world of sense, in so far as it is considered in the other point of view as a *noumenon*, showing that there is no contradiction in regarding all its actions as subject to physical conditions so far as they are phenomena, and yet regarding its causality as physically unconditioned, in so far as the acting being belongs to the world of understanding, and in thus making the concept of freedom the regulative principle of reason.”¹²⁷

Kant's explanation of the influence of (noumenal) reason on (phenomenal) events turns on this dual perspective of human existence. Kant argues that, in so far as we are dealing with the ability of reason to cause actions, we are dealing with the principle of causation in general. This may seem problematic, since causation was proved *a priori* to be a property of the phenomenal world, since it makes the empirical experiences of that world possible. Since we can have no empirical experiences in or of the noumenal world, it is difficult to think how that world may tie into a notion of causation.

However, it is precisely because causation was determined *a priori* – independently of experience – that the laws of causation can be transposed between the phenomenal and noumenal worlds. The laws of causation (similar to the universal legislative form of maxims) are devoid of empirical content – thus it is at least theoretically possible for causation to exist in the noumenal world (however difficult it maybe for us to think about causation in the absence of worldly phenomena). As a result of this non-empirical origin of the notion of causality, we are entitled to use our understanding of it in the phenomenal world as the “type” or mode for our understanding of it in the noumenal world. We are entitled to do this since we would merely be applying to the system of the noumenal world

¹²⁷ Id at 66.

the *form* of law in general – we can do this because laws are identical in form regardless of what they derive their determining principles from.

Using phenomenal causation as our mode for understanding in this way, the freedom of our autonomous will in the noumenal world can become the cause of actions in the phenomenal world. Those actions cannot, as we know, be explained in the phenomenal world by freedom, since everything in the world of experience must be explained in terms of a preceding cause; however, because the *a priori* nature of causality renders it so universal, we are able to take the determining principle of that causality and place it outside of the phenomenal world, in freedom.

This dual view of human action, with one foot in the world of experience and the other in the world of pure reason, now allows us to understand how the phenomenal world may contain the possible effect of a categorical imperative derived by a free will rooted in the noumenal world. It is in this way that our reason can become an efficient cause of events in the phenomenal world. Kant suggests that we test the causal transference from the noumenal to the phenomenal by asking ourselves the following question: “ask yourself whether, if the action you propose were to take place by a law of the system of nature of which you were yourself a part, you could regard it as possible by your own will.”¹²⁸ Thus, although we may have to explain our actions in one sense – the phenomenal sense – as subject to causation, we must ask whether it is possible for us to at least think of our free will as having been part of the causal chain. If we can, Kant holds that we have a right under pure practical reason to attribute free will to ourselves in respect of that action.

This is how the freedom we have in the noumenal world can possibly serve as a regulative ideal for our actions in the phenomenal world. To sum up what we have seen so far, we might be free; and if we might be free, then we might be able to imagine ourselves as rational beings in a supersensible world capable of laying down a law for ourselves and others on the basis of our reason alone. Why we should *want* to lay down such a law for ourselves is explained in the section which follows.

(c) *The need for pure practical reason*

¹²⁸ Id at 89. This bears resemblance to the third formulation of the categorical imperative in the *Groundwork*.

Kant's argument in the second critique turns on a complex interplay between the notions of freedom and morality (or the moral law). Once Kant establishes that the will can be autonomous – that reason alone is capable of dictating ends – he argues that human beings have a duty to comply with such dictates. This experience of a duty to act in accordance with reason is what Kant describes as the moral law. He believes that it is our consciousness of being subject to moral duty that first gives rise to the thought that we are free beings.¹²⁹ Kant provides us with the following example:

“[N]o one would ever have been so rash as to introduce freedom into science, had not the moral law, and with it practical reason, come in and forced this reason upon us. Experience, however, confirms this order of notions. Suppose someone asserts of his lustful appetite that, when the desired object and the opportunity are present, it is quite irresistible. [Ask him] – if a gallows were erected before the house where he finds this opportunity, in order that he should be hanged thereon immediately after the gratification of his lust, whether he could not then control his passion; we need not be long in doubt what he would reply. Ask him, however – if his sovereign ordered him, on pain of the same immediate execution, to bear false witness against an honourable man, whom the prince might wish to destroy under a plausible pretext, would he consider it possible in that case to overcome his love of life, however great it may be. He would perhaps not venture to affirm whether he would do so or not, but he must unhesitatingly admit that it is possible to do so. He judges, therefore, that he can do a certain thing because he is conscious that he ought, and he recognises that he is free – a fact which but for the moral law he would never have known.”¹³⁰

Kant is arguing here that every human being will have had at least one life experience in the course of which they have elected, or at least thought it was possible to elect, to resist that which would be pleasurable to them in the name of doing the right thing.¹³¹ Thus, it is this bare feeling that we can be moral which first starts us questioning the nature of our own freedom. Indeed, the experience of moral duty is the only experience we can have which could begin such a line of questioning, since no other kind of experience we have could cast any doubt at all on the deterministic thesis.

¹²⁹ Kant *Critique of Practical Reason* above note 70 at 45.

¹³⁰ Id at 45-46.

¹³¹ Id.

Now, whilst it is morality that first opens our eyes to freedom, it is freedom which is the fundamental premise of morality. This is indicated by Kant in an important footnote in the second critique:

“[F]reedom is the *ratio essendi* of the moral law, while the moral law is the *ratio cognoscendi* of freedom. For had not the moral law been previously distinctly thought in our reason, we should never consider ourselves justified in assuming such a thing as freedom, although it be not contradictory [i.e. not logically impossible, in terms of the first critique]. But were there no freedom, it would be impossible to trace the moral law in ourselves at all.”¹³²

In Kant, this is the moment of the necessity of freedom. When we posit ourselves as intelligent beings in the noumenal world capable of determining our causality through the determination of self-laws by way of pure reason alone, we are affirming the truly free will. It is this transcendental freedom alone which can unleash moral possibility in our world.

Freedom, conceived as the autonomous will, becomes the regulative ideal of reason – through reason, we abstract ourselves from all our conceptions of what will give us pleasure or avoid pain (in short, from what will make us happy) and lay down a rational law for our conduct, which is the moral law, and with which we must comply absolutely. In Kant’s words, the moral law takes us from a *mere* autonomy of the will (which would be freedom in a simply negative sense) to a positive notion of freedom:

“This independence [of empirical conditions, i.e. the autonomous will] is freedom in the negative sense, and this self-legislation of the pure, and therefore practical, reason is freedom in the positive sense. Thus the moral law expresses nothing else than the autonomy of the pure practical reason; that is, freedom; and this is itself the formal condition of all maxims, and on this condition only can they agree with the supreme practical law.”¹³³

We have now reached the goal that was promised much earlier in this paper. Having reviewed Kant’s epistemological and metaphysical defences of the possibility of freedom, and having seen how the possibility of our freedom allows us to regulate our conduct according to the moral law, we can draw two final, and incalculably important, conclusions

¹³² Id at 14.

¹³³ Id at 49.

about Kant's view of freedom. First, in contrast to much of classical liberal thought, it is in fact possible to regulate what is morally right under the principle of freedom *alone*, since freedom is no longer conceived as merely the absence of constraint. Indeed, freedom incorporates within its very concept fidelity to the moral law; there is thus no need to limit the "unbridled" free will through the use of other values, most notably equality. Instead, freedom is automatically limited by the conditions of its own exercise. For example, many political philosophers believe that sexual harassment legislation involves a compromise between a man's "freedom" and a woman's right to be treated with equal respect and concern. For Kant, the notion that a man's freedom includes the notion that he is entitled to degrade and objectify women, and that his freedom thus needs to be limited by a principle external to freedom, is patently absurd. Kant does not think that such a man is behaving like a free person at all; Kant thinks he is behaving like an animal. Kant would view sexual harassment legislation not as limiting the man's freedom, but in fact, as expressing it.

The second significant conclusion of Kant's thought is that, ultimately, he believes that the moral law is the only way in which we can express whatever freedom we might have – no other experience requires or justifies the concept of a free will at all. Thus, it is only by acting in accordance with our moral duties that we can meaningfully express ourselves as free beings; and since free will is all that could possibly separate us from animals, and is thus the only basis on which we can establish the idea that human beings have dignity, and infinite worth, moral behaviour is a prerequisite for the very attribution of dignity. In the end, Kant believes there is something more important than simply being "happy", and that is being human.

(iv) The Categorical Imperative: What Must We Do?

We have seen thus far that if human beings are to enjoy any kind of meaningful freedom at all, we must direct our will in accordance with moral duty. The task we have now before us is to elucidate further what the content of this moral duty actually. In particular, we must explore the content Kant gives to our duty through his various formulations of the categorical imperative in the *Groundwork*.

By way of introduction, we should note that there is in fact only one categorical imperative: "Act only on that maxim which you can at the same time will that it should become a universal law."¹³⁴ It is from this single source that Kant derives the further formulations of the categorical imperative throughout the *Groundwork*, which he does in order to give content to what is in essence a rather abstract principle.

What we know about the categorical imperative so far as that, first, it is not conditioned on anything empirical, and is thus empty of material content. All that it contains the bare necessity that our maxims must comply with the universal law as such. Secondly, we have seen above that the concept of a universal law commands that maxims we pursue should at least not be self-contradictory or self-defeating, nor should maxims only be able to avoid such consequences by creating exceptions to the rule for an individual (such an exception again leads to a contradiction within our own will: that we should will that our maxim hold true for every rational being as a universal law, and at the same time hold that we should be exempt from it).¹³⁵

In the *Groundwork*, Kant moves on from this principal formulation of the categorical imperative to suggest a second formulation: "Act as if the maxim of your action were to become through your will a universal law of nature."¹³⁶ Kant derives this formulation because he wants our free will not only to be locked up inconsequentially in the noumenal world, but to govern our actions in the phenomenal world. However, it will be recalled that actions in the phenomenal world must be subject to the principle of cause and effect, as well as to other physical laws of nature. It is for this reason that Kant develops the second formulation of the categorical imperative, so that we impose our freedom on the causal necessity governing the world around us. He is able to do this since, as we have seen, the bare form of a law contains no empirical content, and can thus be transposed from the phenomenal to the noumenal world and back again.¹³⁷

In this formulation, we are encouraged to imagine that the maxim of our proposed action were to become an actual law of nature. Kant believes this is helpful in the analysis of whether our maxims will conflict or defeat themselves, since, in Kant's view, we never

¹³⁴ Id at 46.

¹³⁵ Kant *Groundwork* above note 71 at 57-58.

¹³⁶ Id at 52.

¹³⁷ See above. See also Kant *Groundwork* above note 71 at 52.

see such principles in nature. For Kant, nature constitutes a true system in which various natural laws interact in absolute harmony with one another. His desire to synthesise our approach to the moral law with our approach to natural law is driven by the teleology he espouses in the final critique – the *Critique of Judgment* – in which he seeks to unify reason and free will with the natural order. That discussion, however, is beyond the scope of this work and need not detain us further. What we need, for present purposes, to take out of this second formulation of the categorical imperative is the mere invitation to imagine the law we lay down for ourselves as somehow part of the broader system of nature: what would happen if we acted on our maxim with the same natural necessity that governs the rest of the phenomenal world; if our maxim was implanted as a natural instinct that all human beings would be inclined to follow? What would be the result? Would our maxim further the overarching harmony that we see in nature as regards the cooperation of all its laws, or would it produce a degenerative chaos that is, by definition, unlike the harmony that we observe in nature?

In the result, this formula of a universal law of nature makes explicit a further requirement for our maxims which was already implicit in the first formulation: the ends we set ourselves must further a *harmony of purposes* in human interaction.¹³⁸

¹³⁸ It should be pointed out here that this is not simply a glorified version of the social contract. Of course, Kant was heavily influenced by Rousseau, but there are critical differences between the categorical imperative and the social contract. Most importantly, they begin from fundamentally different conceptions of humanity. The social contract views people essentially as self-interested animals, animals who are only willing to relinquish their entitlement to do whatever they want if it is in their own interest to do so. The categorical imperative, in stark contrast, begins from the perspective that freedom is both something less and more than the complete absence of constraint, and that human beings can bear responsibilities towards others not because of expectations relating to pleasure or pain, but simply because they know that (moral) reason requires it of them. The difference, then, is that the categorical imperative is premised on the idea that we can be more than just rats in a gutter, scrambling to find the next piece of bread, which is itself a powerful symbolic ethical statement about human beings and what aspirations we can legitimately hold out for ourselves. Another critical difference between the social contract and the categorical imperative is that the social contract can never fully escape utilitarianism, in that it can only survive for as long people continue to expect to derive benefit from remaining true to it. It is this precise feature of the social contract which encourages people to make exceptions for themselves – if you can get away with not adhering to the terms of the contract while everyone else blindly obeys it, then you have made yourself materially better off (i.e. better off in the only way that matters to utilitarians) and have not ruptured the social contract in the process. The categorical imperative, on the other hand, is opposed at its foundations to utilitarianism, and every material motive is a failure to live up to its demands. A third and final difference lies in a criticism often leveled at the social contract doctrine from a wide variety of philosophical schools, and that is that political morality cannot be built in one fleeting contractual moment. The categorical imperative recognises that political morality is an ongoing process of dialogue and reflection between each other and within ourselves.

Kant then proceeds to derive a third formulation of the categorical imperative, which leads to our duty, as he famously expresses, to treat each human being as an end in itself. In order for an end to qualify as objectively good and valid for all rational beings (and thus be suitable for a universal law as described in the principal categorical imperative) it must have an absolute, unconditioned value, not a value which is relative, subjective or contingent on empirical conditions.¹³⁹ Our humanity is one such end. It is by virtue of our humanity that we have free will, since this is the distinguishing feature of human beings from the rest of nature; and it is by virtue of our free will that we can abstract ourselves from all the conditioned value of the world and set ends for ourselves through reason alone.¹⁴⁰ Kant understands this ability to be of infinite worth, which cannot rationally be sacrificed or traded for something else. This ability is what gives us our 'dignity' which, in Kant's specific use of the term, simply means that humanity has no price – it has a value which is absolute, infinite and utterly unique.¹⁴¹ And since our humanity has this infinite value, untainted by empirical conditions, it is worthy of being called an end in itself.

Thus, we arrive at Kant's third formulation of the categorical imperative: "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."¹⁴² This formulation follows from the principal formulation of the categorical imperative because the latter formulation bids us act in accordance with a universal law valid for all rational beings as such; that is, to adopt unconditioned, universal ends which all human beings, by virtue of reason alone, should consider binding upon themselves. Kant shows that humanity itself as one such unconditioned, universal end, such that reason commands us to postulate humanity as an end in itself. In terms of the principal formulation of the categorical imperative, this means that our maxims cannot be valid if they would in some way contradict or defeat humanity in our own person or in the person of any other.

This third formulation, which I will henceforth call the mandate to respect the dignity of all others, is a shining moment in Kant's work which has endured as the catch-phrase of

¹³⁹ Kant *Groundwork* above note 71 at 63-66. See also Wood, A "Human Dignity, Right and the Realm of Ends" in *Dignity, Freedom and the Post-Apartheid Legal Order* (Barnard-Naude, A.J., Cornell, D. and Du Bois, F., eds) (Juta: Cape Town, 2008) at 48-49.

¹⁴⁰ Kant *Groundwork* above note 71 at 77-79.

¹⁴¹ Wood above note 139 at 49.

¹⁴² Kant *Groundwork* above note 71 at 66-67.

the universal human rights project since at least the Universal Declaration of Human Rights, the founding principle of which is the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.¹⁴³ The importance of the third formulation is that we have, for the first time in Kant’s work, taken the categorical imperative decidedly out of the abstract and given it meaningful content capable of ready application to human affairs. Of course, this is not ‘content’ in the sense that we are drawn once again to polluting duty with worldly inclinations; rather, it is the unconditioned content of our own reason around which we are capable of mobilising our ethical aspirations.

In the *Groundwork*, Kant provides us with useful examples of the application of the mandate to respect the dignity of all others. First, and quite obviously, Kant argues that we are prevented by this formulation of the imperative from killing others.¹⁴⁴ When we kill another, we destroy their humanity in the most total way imaginable; thus, the maxim of our action results not in the preservation of humanity, as required by the mandate to respect the dignity of all others, but instead defeats it. Thus, killing clearly does not treat others as ends in themselves, and we thus have an absolute moral duty not to do it.

In a somewhat different vein, Kant argues that respecting the dignity of others means respecting the capacity of human beings to adopt ends for themselves which they have freely and rationally chosen, and avoiding having ends imposed on them by others. Thus, when we lie to someone in order to trick them into pursuing an end that we seek for ourselves, but that they would not share if they were apprised of the relevant facts, we are once again defeating humanity: we have seriously undermined them as ends in themselves since we have deprived them of a meaningful opportunity to set their own ends in accordance with their will alone.¹⁴⁵ In the result, if human beings are to cooperate in the pursuit of ends, these must be ends which do not conflict with the categorical imperative, and in so far as they do not conflict with this imperative, must be ends which each human being involved would freely adopt himself.¹⁴⁶

¹⁴³ See the preamble to the Universal Declaration of Human Rights (1948).

¹⁴⁴ Kant *Groundwork* above note 71 at 67.

¹⁴⁵ Id at 67-68.

¹⁴⁶ See also Kant *Critique of Practical Reason* above note 70 at 109.

Kant believes we are capable of deriving further important duties by combining the mandate to respect the dignity of all others with the second formulation of the categorical imperative, which, as we saw earlier, bids us to act on those laws which harmonise purposes in the way that we see purposes harmonised in nature. As an example of such a duty Kant gives us the duty to develop our talents: to neglect this duty is compatible with the “maintenance” of our humanity (i.e. it does not defeat humanity as such), but it does not promote or further the advancement of our humanity.¹⁴⁷

After having offered a “formula of autonomy”¹⁴⁸ – which is in essence a reconstruction of the principal categorical imperative to emphasise that both our dignity and moral duty stem from a law which we ourselves make – Kant presents us with the final formulation of the categorical imperative: “Act as if you were through your maxims a law-making member of a kingdom of ends.”

This formulation of the categorical imperative is the formulation which most expressly instructs us to use our reason to transcend the phenomenal world and imagine ourselves as beings in the noumenal world where we are subject (hence ‘kingdom’) to the ends we set ourselves in accordance with a universal law. In this kingdom, we are duty-bound to treat ourselves and other human beings as ends in themselves; however, the concept of ‘ends’ in this kingdom extends to personal ends and aspirations which each person may set himself (so long as these ends do not violate the notion of a universal law).¹⁴⁹

It is the formulation of the kingdom of ends which summarises for us the importance and applicability of Kant’s conception of freedom, and of the categorical imperative in particular, to the establishment of a meaningful political morality. It is only in the noumenal world, in the kingdom of ends, where we can posit ourselves as beings subject only to the autonomy of our own will, and therefore as free. However, this freedom is not wild and unconstrained – rather it compels us to adopt duties towards others which are objectively and universally binding on us. In this way, and contrary to much classical liberal thought, we can see that freedom is not merely one moral value among many (equality, human dignity, etc) which we must continually balance by sacrificing one to the other, even as we

¹⁴⁷ Kant *Groundwork* above note 71 at 69.

¹⁴⁸ Id at 69-71.

¹⁴⁹ Id at 74.

lack an overarching principle which can direct us in this task. Instead, freedom itself is the very regulative ideal of morality.

B. Kant's Ambiguous Commitment to Morality as Law

Now that we have a better idea of what Kant thinks morality requires of us, we must grapple with a question which is not only central to the Kantian project, but to legal philosophy in general: should actions which are morally right be enforced through the law? As we will see shortly, Kant's answer to this question is ambiguous and the subject of much debate amongst Kant scholars.

Kant's ambiguity concerning the relationship between morality and the law is rooted in a deep tension within his own vision of how human interaction can come to be structured. The one side of this tension lies in a fundamental feature of Kant's moral philosophy: in order for us to consider an action to be moral, it must be performed purely from the motive of wanting to do the right thing.¹⁵⁰ As soon as we perform an action because we expect some pleasure out of it, or because we assume that not performing it will result in some harm to us, we are not, in Kant's view, acting morally at all. Instead, we have gone right back to where we started – acting upon subjective, empirical conditions which are not valid for all rational beings as such. Thus, Kant states:

“The essential point in every determination of the will by the moral law is that, being a free will, it is determined by the moral law, not only without the cooperation of sensible impulses, but even to the rejection of all such, and to the checking of all inclinations in so far as they might be opposed to that law.”¹⁵¹

The notion of duty now has a twofold requirement: not only must our maxims comply with the *objective* moral law, but the *subjective* motive for acting on such maxims must be nothing other than a “reverence” for the law¹⁵² – to act on any motive besides this reverence is merely to act arbitrarily under the veil of principle.

¹⁵⁰ Kant *Critique of Practical Reason* above note 70 at 92-110; Kant *Groundwork* above note 71 at 14-16.

¹⁵¹ Kant *Critique of Practical Reason* above note 70 at 93.

¹⁵² *Id* at 102.

Kant recognises, of course, that his hope of human beings acting always and only out of respect for the law is quite utopian. He notes that we are imperfectly rational, and as a result we can never be wholly free of our desires and inclinations.¹⁵³ For Kant, therefore, a perfect moral disposition is “not attainable by any creature”.¹⁵⁴ He does argue, however, that this moral disposition is the ideal which “we should strive to approach, and in an uninterrupted but infinite progress become like to.”¹⁵⁵ Perfect moral behaviour, then, is the destination towards which we must walk, not because we know we will get there, but because we know we are getting closer. In getting closer, we assert our freedom and our humanity in the only meaningful way we can, and in that there is infinite value.

All of this, however, speaks only to one side of the tension in Kant’s political morality referred to earlier. The other side of the tension lies in Kant’s acceptance that a legal system is central to any modern state, and that such legal systems are fundamentally and foundationally coercive, which motivate legal subjects to comply with their dictates primarily through the threat of sanction. But if there is some relationship between law and morality, which I believe Kant also accepts, then it is at least one possible, and indeed plausible, interpretation of Kant that human beings may be coerced by the law to perform morally right actions.

The difficulty with this interpretation is that it seems severely to undermine Kant’s clear and rigid commitment to doing the right thing for the right reason. As indicated above, this tension in Kant is not merely a superficial one, which can in fact be finally resolved if only one has recourse to the more fundamental and more clearly stated principles in his work; the tension is, in my view, inherent. In what follows below, however, I will seek to resolve this tension, not with the goal of finding the true answer, but rather with a view to advancing an interpretation of Kant which is defensible in terms of his broader work and aligned with his overall project. On the interpretation I advance, Kant’s philosophy does indeed defend the possibility of using the law as a tool for the enforcement of morally right actions.

¹⁵³ Id at 104.

¹⁵⁴ Id

¹⁵⁵ Id.

The interpretation begins from the key distinction Kant makes between moral duty and legal duty. This distinction is not the subject of interpretive dispute, and appears most clearly in the *Critique of Practical Reason*, where Kant says the following:

“What is essential in the *moral worth* of actions is that the moral law should directly determine the will. If the determination of the will takes place in conformity indeed to the moral law, but only by means of a feeling, no matter of what kind, which has to be presupposed in order that the law may be sufficient to determine the will, and therefore not for the sake of law, then the action will possess *legality* but not *morality*.”¹⁵⁶ (My emphasis.)

Similarly, Kant refers to this distinction as the difference between “having acted *according to duty* and *from duty*” – the former can produce legality even if inclinations are involved in the determination of the will; only the latter can lead to actions being described as having moral worth.¹⁵⁷ The former concerns what can be called the notion of right (“*Recht*” in German), while the latter concerns ethics.

Thus far in this paper we have been preoccupied with Kantian ethics – how individuals come to regulate their own actions through the use of reason. The concept of right is something quite different (though similarities between the two immediately become apparent). It has the following key features. First, right is exclusively concerned with the external relations amongst human beings,¹⁵⁸ that is, with the social, political and other interactions that characterise modern communities. Second, freedom is the regulative ideal of right, in that right refers to “limitation of each person’s [external] freedom so that it is compatible with the freedom of everyone, insofar as this is possible in accord with a universal law.”¹⁵⁹ Thus, there is at least some overlap between the way in which right is determined and the determination of moral duty. The third key feature of right is it is

¹⁵⁶ Id at 92.

¹⁵⁷ Id at 102, and see also 179-180.

¹⁵⁸ Kant, I. “On the Proverb: That May Be True in Theory, But Is of No Practical Use” in *Kant Perpetual Peace and Other Essays* (T. Humphrey trans.) (Hackett Publishing, 1983) (hereinafter “Theory and Practice”) at 71/289-290. References to this work are in the format A/B, where A is the page number in the Humphrey collection of essays while B is the page number in Volume 8 of the edition of Kant’s work in *Kant’s Gesammelte Schriften*, hrsg. Königliche Preussischen Akademie der Wissenschaften, Walter de Gruyter & Co., Berlin and Leipzig, 1904.

¹⁵⁹ Kant *Theory and Practice* above note 158 at 71/289-290.

something much greater than 'law' or 'laws', referring instead to an overarching system of legislation, as well as to the rational foundation of that legislation.¹⁶⁰

Allen Wood is amongst the more notable proponents of the argument that right and ethics, whilst both stem from Kant's notions of moral legislation, are in fact two "fundamentally distinct spheres".¹⁶¹ More specifically, they are distinct in that they each have a separate rational basis; importantly, Wood believes that only ethical duties are truly grounded in the categorical imperative.¹⁶² Whilst I agree with Wood that ethics and right are indeed distinct concepts, I disagree with him to the extent that he suggests that the categorical imperative has no role to play in the determination of right. My own view is that the categorical imperative, even if it is not the founding basis of right, must at least play an interpretive role in the determination of our duties of right.

That the categorical imperative can determine right is supported by the following three contentions. First, as we have seen above, ethical action has both a subjective and objective component. The objective component essentially consists in compliance with the categorical imperative; the subjective component consists in complying with the categorical imperative for the sole motive of wanting to do the right thing. Failing to comply with the subjective component, however, still produces what Kant calls "legality". Thus, when we comply with the requirements of the moral law, even if we are being coerced into doing it, we are still doing something important, and, at least partially, ethical. Of course, no one is going to pat us on the back and tell us that we're good people for having done it – in Kant's words, we can hardly claim that our actions are "morally worthy" – and we should indeed continue to strive to develop our own moral worth. However, Kant would certainly recognise that society is better off if we can at least get way there – if we can at least get to the point where our actions objectively accord with the mandates of the categorical imperative.

This is in line with the way we think about the law already. When the law commands us, for example, pay money to someone in exchange for a good or service that we have duly

¹⁶⁰ Wood above note 139 at 54-55.

¹⁶¹ Id at 54. See also Wood, A. *Kant's Ethical Thought* (Cambridge University Press, 1999) at 322-323; Wood, A. "The final form of Kant's practical philosophy" *Kant's Metaphysics of Morals: Interpretive Essays* (Timmons, M., ed.) (Oxford University Press, 2002) at 5-10.

¹⁶² Wood above note 139 at 57.

received in terms of a contract, and we in fact do pay the money, no one considers that we have done anything of special moral significance, even assuming that such payment is in accordance with our moral duty. However, few would contest that we have *done the right thing*. It may be that we would have performed the action even in the absence of a law compelling us to do so, purely because we thought it our moral duty to do so; it may be that, regardless of the intervention of the law, our first reason for acting was not that the compulsion of the law, but rather because we thought it important to act morally. All this, however, is only relevant to our moral worth as persons: something decidedly individual and inner, and which is the project of solely our own will. My motive for acting, however, has nothing to do with whether I have acted rightly, as Wood himself recognises.¹⁶³

Therefore, if the rightness of our actions can be judged in accordance with the objective component of acting ethically, and the objective component of acting ethically entails compliance with the categorical imperative, it must follow that our duties of right are to be determined with reference to the demands of the categorical imperative.

My second contention is that duties of right do not, as Wood suggests, stem from the existence of a social fact. Wood states:

“What matters for right is only that people do accept a system protecting external freedom according to universal law, whatever might be their reason for doing so – which might be theological, or utilitarian, or the Hobbesian thought that without the coercive systems of right, human life would be nasty, brutish and short.”¹⁶⁴

If Wood is right, then Kant is really doing nothing more than preempting a contention which would later be made by H.L.A. Hart, namely that that what counts as a legal duty is to be determined by reference to an existing social fact of a rule of recognition.¹⁶⁵ However, Kant does not, in my view, found his notion of *Recht* on the fact of social acceptance. In *Theory and Practice*, Kant does indeed accept that a civil constitution (used there as an expression of *Recht*) resembles many other pacts that human beings make with one another, in that it stems from some social fact of agreement. It is, however, “essentially different

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ Hart, H.L.A. *The Concept of Law* (Oxford University Press: Oxford, 1997).

from all others in what it founds.”¹⁶⁶ This is so because the agreement which founds a constitution is not merely a hypothetical social fact – a contingent end which we just so happened to desire at the time – but is rather an end which *must* necessarily be willed by all rational beings in virtue of the demands of reason.¹⁶⁷ The end, which is nothing less than the “supreme formal condition of all other external duty”, is the harmonization of freedom in accordance with a universal law.¹⁶⁸ If this seems familiar, it is because it is the exact end which the categorical imperative bids us will in respect of our ethical duties.

The third and final reason for interpreting right in line with the categorical imperative is that right expressly protects external freedom. In order to determine what this freedom entails, we have no choice but to return to Kant’s understanding of freedom as he developed it at least in the first two critiques and the *Groundwork*, where (as we have seen) freedom is intrinsically linked to the categorical imperative. If right protects external freedom, and freedom is acting in accordance with the categorical imperative, then right must mean the legal externalization of our moral duties under the categorical imperative.

Thus, it is my view that our duties of right (legal duties within a constitutional framework), like duties of ethics, must be determined in accordance with a universal law of freedom, namely the categorical imperative. I believe that this interpretation is true to Kant in two important respects. First, Kant was at least partly sceptical of his own ambition for all humanity independently recognizing the importance and worth of acting in accordance with the moral law, let alone spending many hours of quiet reflection attempting to ascertain the content of that moral law:

“It cannot indeed be denied that in order to bring an uncultivated or degraded mind into the track of moral goodness some preparatory guidance is necessary, to attract it by a view of its own advantage, or to alarm it by a fear of loss; but as soon as this mechanical work,

¹⁶⁶ Kant *Theory and Practice* above note 158 at 71/289.

¹⁶⁷ Id at 71-72/289, where Kant states:

“Uniting many for some (common) end (that they all *have*) is a property of all social contracts; but as an end in itself (that each of them *ought to have*) and, consequently, as an end that is an unconditioned and primary duty with respect to every external relation in general among men . . . this union is met with only in society, and then only insofar as it finds itself in a civil state.”

¹⁶⁸ Id at 71/289-290.

these leading strings, have produced some effect, then we must bring before the mind the pure moral motive".¹⁶⁹

Here, Kant expressly accepts (albeit begrudgingly) that his ambitions for humanity may depend on first coaxing people into moral action through the promise of reward or threat of sanction. His hope is that once people begin undertaking moral action (regardless of the initial motivation for doing so), they will come to realise that morality is important over and above the pleasure or pain it promises, and will take responsibility for the personal development of their own dignity.

Secondly, by the time Kant comes to write *Perpetual Peace*, he seems to have reached such a point of despair concerning the possibility of human beings ever following the dictates of their own reason and treating each other in a morally acceptable way, that he lumps a large number of nations into the category of the "degraded mind":

"[Consider] the inhospitable conduct of civilized nations in our part of the world, especially commercial ones: the injustice that they display towards foreign lands and peoples (which is the same as conquering them) is terrifying. When discovered, America, the lands occupied by the blacks, the Spice Islands, the Cape, etc., were regarded as lands belonging to no one because their inhabitants were counted for nothing. Foreign soldiers were imported into East India under the pretext of merely establishing economic relations, and with them came the subjection of the natives, incitement of various nations to widespread wars among themselves, famine, rebellion, treachery, and the entire litany of evils that can afflict the human race."¹⁷⁰

In the result, I believe that the interpretation of Kant that I have advanced here, concerning his thoughts on the relationship between ethics and right, is both defensible in terms of his writing as well as true to the fundamental drive underlying all of his work: that there is hope for humanity to be better than it is, and that there is some way of actualizing this hope in reality. This path lies in identifying our duties under the categorical imperative, realizing them in legislation, and harmonizing them in accordance with the regulative ideal of freedom.

¹⁶⁹ Kant *Critique of Practical Reason* above note 70 at 180.

¹⁷⁰ Kant, I. "Perpetual Peace" in Kant *Perpetual Peace and Other Essays* (T. Humphrey trans.) (Hackett Publishing, 1983) at 119/359.

In the next section of this paper, I turn to Hegel in order to reinforce these themes. Hegel's conception of freedom, though different from Kant's, emphasises both the moral conditions inherent in the very exercise of the free will as well as the need to externalize this moral freedom in the world. However, before leaving Kant, it is perhaps pertinent to summarise the value of his work for this paper. Kant teaches us that freedom is possible for us, but it is a gift which comes with baggage: exercising freedom meaningfully does not mean doing whatever you want whenever you want to do it; rather, freedom is automatically limited by the conditions of its own exercise, in that it bids us act in accordance with our moral duties. Kant derives our moral duties from the categorical imperative, which, in its most important formulations for our purposes, mandates us to respect the dignity of all others and to harmonise our purposes through self-legislation in the imagined kingdom of ends. Finally, it is my view that Kant gives us licence to make the mandate of dignity the foundation of our system of right – as the common thread running throughout our system of legislation as well as its grounding principle.

These conclusions are of monumental importance for the direct horizontal application of the Bill of Rights. Horizontal application, insofar as it makes legal duties out of the ethical duties that we owe each other, would not be seen by Kant as an invasion of personal freedom. Rather, Kant would hold that acting in compliance with these duties is the only meaningful way that we can exercise our freedom, and thereby affirm the dignity of our humanity. Moreover, if the mandate to respect the dignity of all others is indeed the overarching principle in which our legal system (system of right) must ground itself, then direct horizontality, in affirming human dignity, is not only permissible within such a system, it is, in fact, fundamental.

VI. HEGEL AND THE OBJECTIVE REALISATION OF FREEDOM

As stated earlier in this paper, Hegel has two important contributions to make to the project of direct horizontality. First, Hegel adds to Kant's conception of the ethical relation by explaining that the freedom of subjects necessarily consists in the mutual recognition of and by other self-conscious subjects. The consequence of this mutual recognition is that, through enabling the independence and freedom of others, who are in a sense mirrors for our own self-consciousness, we ourselves become more independent and free. This provides us with a rational philosophical foundation for thinking about direct horizontality which is complementary and additional to the foundation already offered to us by Kant; that is, Hegel gives us yet another reason why committing ourselves to the upholding of reciprocal ethical duties between persons through horizontality is both a profound expression and demand of freedom.

Second, and unlike Kant's ambiguity on the relationship between *Recht* and the moral law, Hegel provides us with a sound explanation of how we move from the sphere of ethical right into the sphere of legal right, insofar as he contends that the continuous rational unfolding of the concept of freedom must necessarily result in the actualisation of freedom in our external relations.

The outline of this section of the paper, therefore, is as follows. First, since Hegel's philosophical thought must be located within his systematic philosophy (in that his entire philosophy purports to be a rationally self-contained argument from premise to conclusion), I will provide a brief outline of Hegel's philosophy – in particular of his famous dialectical method – as it progresses from the *Phenomenology of Spirit*¹⁷¹ to *Outlines of the Philosophy of Right*.¹⁷² Second, I will explain Hegel's argument concerning relationships of mutual recognition between independent self-consciousnesses by working through his “master and slave dialectic” in the *Phenomenology*. Finally, drawing on the conception of civil society which Hegel elucidates in *Philosophy of Right*, I will argue that relationships of mutual recognition must necessarily be the foundation of *Recht* in any modern constitutional state.

¹⁷¹ Hegel, G.W.F. *Phenomenology of Spirit* (Miller, A.V., trans.) (Oxford University Press, 1977) (hereinafter “*Phenomenology*”).

¹⁷² Hegel, G.W.F. *Outlines of the Philosophy of Right* (Knox, T.M., trans.) (Oxford University Press, 2008) (hereinafter “*Philosophy of Right*”).

A. Outline of Hegel's Dialectic

We must begin by acknowledging Hegel's debt to Kant. As the founder of the German Idealist movement, it was Kant who first recognised the need for a truly rational modern philosophy capable of explaining how free beings come to experience the world. Hegel's own work seeks to contribute to this project. However, Hegel begins the *Phenomenology* by criticising Kant for failing to live up to his own radical ambitions for rationality.¹⁷³ The accuracy of his criticisms are not relevant to this paper; what is relevant, though, is Hegel's particular criticism that Kant's commitment to the development of a philosophy which is not based on empirical presuppositions is undermined by his own assumption of the duality between subject and object; in other words, that there is something so different between a subject and an object that we can only know how the object appears to us, and that any knowledge of the truth of the object (its actuality or its being-for-itself) is impossible for us.¹⁷⁴ Hegel wants to show that this is not the case, and thereby bring us to the position of "absolute knowing".¹⁷⁵ Absolute knowing occurs when we realise that we can indeed know the truth of the world (the world as it is in itself) through our own thought. This corresponds to an important notion which we will encounter later on in this section, namely the notion of the Absolute 'I'. The Absolute 'I' is Hegel's way of expressing the belief of a singular self-consciousness that the truth of the world resides within its own thought, that it alone is the essential being which alone embodies absolute knowledge.

In order to get us to the point of absolute knowing, Hegel's systematic philosophy therefore begins by abandoning the assumption of dualism and, taking the conscious subject as the very least that it can be thought to be, relentlessly develops more complex understandings of the subject-object relationship through the logical progression of his dialectic.

Since Hegel's dialectical mode of reasoning is of vital importance to his philosophy, and indeed plays out incessantly throughout the *Phenomenology* and *Philosophy of Right*, it is worth saying something here about how it works. Hegel begins his first argument in the *Phenomenology*, and each argument thereafter, with a particular supposition about the nature

¹⁷³ Hegel *Phenomenology* above note 171 at ¶50.

¹⁷⁴ As we have seen, this is precisely what Kant does argue: our metaphysical knowledge is entirely limited to objects as appearances; we can know nothing at all about objects as they are in truth.

¹⁷⁵ His account of absolute knowing appears in the final chapter of the *Phenomenology* above note 171 at ¶788ff.

of the conscious subject. He then shows that this supposition contains within in itself a contradiction: in particular, Hegel shows that there is a contradiction between *what* the subject knows of its object (the thesis) and the *way in which* it claims to know it (antithesis).¹⁷⁶ In order to resolve this contradiction, Hegel offers a revised, more complex supposition of consciousness (the synthesis) which was already implicit within the previous flawed supposition.¹⁷⁷ However, this new supposition turns out, once again, to entail a contradiction, which must be resolved through yet another revision. This admirable and unyielding logical progression is present from the very beginning of the *Phenomenology* to its very end. The same is true of the *Outlines of the Philosophy of Right*.

Now that we know something of Hegel's goals in the *Phenomenology* and his means of pursuing them, we are in a position to attempt a brief overview of his argument in that work. Hegel begins the *Phenomenology* by stating that consciousness, stripped down to its bare core, postulates that knowledge consists of a subject experiencing an object that is not itself.¹⁷⁸ The very least that this experience can involve is that our approach to the object must be immediate (or unmediated), consisting in simply apprehending the object rather than comprehending it.¹⁷⁹ Under this form of consciousness, which Hegel calls "sense-certainty",¹⁸⁰ an object is only a "this", "here", "now", which is not distinguished from other objects by labelling it with unique qualities and attributes.¹⁸¹ Hegel then asks whether the object is in truth what sense-certainty claims it to be.¹⁸² He shows that it is not, since there is a contradiction inherent in the notion of sense-certainty itself – if an object is merely an absolutely universal "this", "here", "now" it would be impossible to experience it as *an* object at all. Indeed, if sense-certainty is right, then the entire world would simply consist of a mass of indistinguishable objects which would all be perceived at once and not at all. And yet, this is not what sense-certainty claims to know of the world; rather, it claims to experience particular objects. Sense-certainty must therefore be missing something; given

¹⁷⁶ Dudley above note 73 at 152-154.

¹⁷⁷ This is what is known as Hegel's "immanent critique".

¹⁷⁸ Hegel does not argue that the conscious mind experiences itself as going through all these stages; nor does he present these evolutions of the conscious mind as a strict chronology. Hegel is merely showing that each proceeding stage of consciousness is a *logical* product of the first.

¹⁷⁹ Hegel *Phenomenology* above note 171 at ¶90.

¹⁸⁰ Id at ¶91.

¹⁸¹ Id at ¶91 and 95.

¹⁸² Id at ¶94.

what we claim to know (*an* object), we must revise our conclusions about the way we claim to know it. Consciousness must mean something more than we originally supposed.

Thus, in order for consciousness to experience particular objects at all, it obviously cannot do so in the unmediated way proclaimed by sense-certainty, but must instead “mediate” the object by attributing to it particular properties which make it distinguishable from other objects.¹⁸³ This brings us to a new form of consciousness – “perception” – in which consciousness perceives particular objects through attributing to them simultaneously a multiplicity of properties which make them unique.¹⁸⁴

Once again, however, there is an inherent contradiction within the notion of perception. On the one hand, the object is a united whole which brings to together a number of properties; on the other hand, it is merely a collection of these different properties which continue to have independent existence.¹⁸⁵ Thus, while perception can explain how we distinguish a particular object from others, and how we identify its unique properties which allow us to make that distinction, it does not explain how these properties come to be united under one object.¹⁸⁶ In the result, we arrive at the contradiction inherent in the notion of perception: consciousness claims to be experiencing objects as a unity, but the way which in which consciousness claims to know this – through the mere attribution of properties to objects, i.e. perception – cannot explain this unity.

Therefore, we must revise our idea of how consciousness comes to know this unity. In a complicated section of the *Phenomenology* entitled “Force and Understanding”, Hegel shows that the revised form of consciousness now claims to experience objects effectively by postulating the existence of an intelligible order of things (Kant’s noumenal world) beyond the phenomenal world, in which the tension between unity and diversity that the consciousness experiences of objects as they appear is in fact resolved at some deeper, inner level.

¹⁸³ Id at ¶110.

¹⁸⁴ Id at ¶111-113. Hegel uses salt as an example: “salt is a simple Here, and at the same time manifold: it is white and *also* tart, *also* cubical in shape, of a specific gravity, etc. All these many properties are in a single simple ‘Here’, in which, therefore, they interpenetrate And, at the same time, they do not affect each other in this interpenetration. The whiteness does not affect the cubical shape, and neither affects the tart taste, etc.; on the contrary, since each is itself a simple relating of self to self it leaves the others alone, and is connected with them only by the indifferent Also.” (at ¶113).

¹⁸⁵ Id at ¶113. See also Findlay’s analysis in Hegel *Phenomenology* above note 171 at 510.

¹⁸⁶ Id at ¶117-128.

Once again, however, consciousness cannot know this supersensible nature of objects in the way it claims to know it, namely through experiencing objects outside of itself. Instead, consciousness must realise that this conjecture concerning the intelligible world is simply a manifestation of its own inner workings. All along we have thought that the unity of the objects that we experience is a property of the objects themselves, when in fact this unity is a product of our own consciousness which we simply impute to the object. Thus, consciousness discovers that the true nature of objects is not locked up within objects themselves; rather, the true nature of objects is contained within consciousness itself. In short, the world is what we make of it. Thus, the contradiction inherent in “Force and Understanding” is resolved when consciousness recognises that, in order to know the truth of objects, it must know itself. In knowing itself, mere consciousness now becomes *self-consciousness*.

We are now at the beginnings of the Absolute ‘I’. Consciousness has realised that the truth of the world lies within consciousness itself, and we are therefore starting to see the identity of subject and object, or absolute knowing.

The remainder of the *Phenomenology* is, in one sense, an elaborate tale of the terrible lengths to which self-consciousness will go in order to protect its notion of the Absolute ‘I’, in order to preserve its self-certainty that the truth of the world lies within it, and it alone. At each stage of this tale Hegel will show us that, in attempting to execute these terrible deeds, self-consciousness is behaving in a self-defeating and contradictory way, and that it must move towards more complex explanations of its own understanding of itself in order to resolve these contradictions and become a fully rational and free self-consciousness.

An important part of this rational evolution of self-consciousness appears in Hegel’s famous “master and slave dialectic”, to which we will now turn.

B. Relationships of Mutual Recognition

The master/slave dialectic picks up at precisely the point in the *Phenomenology* where consciousness becomes self-consciousness through the achievement of self-certainty: it knows that the truth of all objects is contained within itself. Self-consciousness has gone through a process in which it has searched for the truth of the world by looking outside of

itself to the world of objects, only to return to itself through those objects, and to recognise that this process of attempting to know objects in fact brings it to know itself. Self-consciousness therefore continues to confirm its own self-certainty through the “negation” of objects, by which Hegel means the understanding of and performance of acts on objects.¹⁸⁷ When I eat a piece of bread, drive a car, build a house or read a book, I am confirming my mastery of those objects; I know myself to be the knower of objects. At this point, in Hegel’s words:

“[s]elf-consciousness is . . . simple being-for-itself, self-equal through the exclusion from itself of everything else. For it, its essence and absolute object is ‘I’; and in this immediacy, or in this [mere] being, of its being-for-itself, it is an individual. What is ‘other’ for it is an unessential, negatively characterised object.”¹⁸⁸

It should be noted, however, that the negation of objects turns out to be a short-lived gratification. Eating a piece of bread, for example, is not an enduring moment of recognition of my mastery of my world. Instead, it is rather fleeting. In order to continue affirming myself as the master of all things, therefore, I have to eat another piece of bread. And another, and another. Indeed, because of the inherent finitude of the activity of negating objects, I must negate objects ceaselessly in order to continue confirming my fragile sense of self-certainty.¹⁸⁹

Having set out this new form of self-consciousness, Hegel stages a confrontation between self-consciousness and a new object, the likes of which it has not encountered before: a second self-consciousness in the form of another being. Initially, the first self-consciousness experiences this other being as yet another object for negation – it has no reason to expect that this being should respond any differently to other objects it has experienced, which is to say it has no reason to expect that the object will respond to its acts of negation *at all*.¹⁹⁰ As is to be expected, of course, when self-consciousness attempts to negate this being as it would another object, it finds that the object does not simply lie inanimate before it, waiting to be consumed. Rather, the object does indeed respond: when

¹⁸⁷ Id at ¶186.

¹⁸⁸ Id at ¶186.

¹⁸⁹ This section of the *Phenomenology* clearly has the potential to form a searing critique of advanced capitalism. Indeed, Karl Marx owes much to his engagement with this aspect of Hegel’s work.

¹⁹⁰ Hegel *Phenomenology* above note 171 at ¶186.

it is pushed, it pushes back. In fact, its response bears striking resemblance to features which self-consciousness recognises in itself.¹⁹¹

This realisation – that there may be another self-consciousness like itself, another Absolute ‘I’ – has the potential radically to shatter the self-certainty which self-consciousness has only recently achieved for itself. This single self-consciousness initially perceived that the truth of the world was present only in it, that it was the lone embodiment of the absolute knowing, and that it must continue to confirm this perception through the negation of objects. Now another self-consciousness has appeared on the scene, a self-consciousness which resists negation, and which potentially also embodies absolute knowing.¹⁹² This destabilisation and anxiety is not something which self-consciousness, at this stage, is willing to suffer.

Of course, this anxiety is also being experienced simultaneously by the second self-consciousness, which also thought, prior to the encounter, that absolute knowledge existed only within itself. Both self-consciousnesses now perceive that there is only one way that each can raise “their certainty of being for themselves to truth”,¹⁹³ and that is to destroy the other self-consciousness. If the other self-consciousness ceases to exist, then what remains is only one self-consciousness, one Absolute ‘I’, which must then, necessarily, be the sole embodiment of absolute knowing (since there will no longer be an other within which absolute knowing might exist). In the result, the two self-consciousnesses come to engage in a battle of life and death, each staking their own existence in the name of preserving their self-certainty.¹⁹⁴

This life and death struggle continues until one self-consciousness has an important realisation. It recognises that this battle is an exercise of the utmost futility, since in death, self-consciousness ceases to exist at all.¹⁹⁵ It understands that self-consciousness is in fact tied to life. Thus, to risk death in the name of proving one’s own self-consciousness is a decidedly fruitless venture. There is indeed some meaning in remaining alive, and thereby

¹⁹¹ Id at ¶186-187.

¹⁹² Id at ¶187.

¹⁹³ Id at ¶187.

¹⁹⁴ Id at ¶187.

¹⁹⁵ Id at ¶188.

preserving the existence of self-consciousness, even if that existence is something less rewarding than an existence which embodies the full truth of the world.¹⁹⁶

The self-consciousness which recognises the futility of this battle therefore submits, and lays itself at the mercy of the reigning self-consciousness. Having trembled at the fear of its own demise, it is now willing to do anything to stay alive. However, the reigning self-consciousness does not follow the life and death battle through to its grim conclusion, and terminate the existence of the submissive self-consciousness. Instead, it recognises that there is something important to be gained for itself in keeping the other alive – it recognises that, if the other ceases to exist, there is no longer any proof that the reigning self-consciousness is indeed the master of all worldly objects. In the absence of the other, the reigning self-consciousness is faced once again with its prior world of exclusively inanimate objects, and the fleeting recognition involved in consuming them, with no record of the great triumph it has achieved for itself in conquering another self-consciousness. It sees something in the conquered self-consciousness which is of great value: a form of recognition which can last over time.

Thus, the reigning self-consciousness elects to keep the other alive, but only as a thing to do its bidding. Thus, the other retains only enough of its self-consciousness in order for the reigning self-consciousness to take joy in being recognised by it as the only embodiment of absolute knowing, but not enough of its self-consciousness to deprive it of its new state of thinghood.¹⁹⁷ Thus, these two beings come to—

“exist as two opposed shapes of consciousness; one is the independent consciousness whose essential nature is to be for itself, the other is the dependent consciousness whose essential nature is simply to live or to be for another. The former is the lord, the other is bondsman.”¹⁹⁸

In other words, the being which consists only recognizing the reigning self-consciousness, has become the slave, while the reigning self-consciousness, which now consists primarily in being recognised by the other, has become the master. Only the master

¹⁹⁶ Id at ¶189.

¹⁹⁷ Id at ¶190.

¹⁹⁸ Id at ¶189.

is now an independent self-consciousness, while the slave is little more than an object, dependent on the master for its existence.¹⁹⁹

The master now reduces the slave to negating objects on its behalf – the slave ‘does’ everything for the master, while the master ‘does’ nothing other than watch the slave do things for him.²⁰⁰ In this moment, the master still believes that this confirms his self-certainty and independence.

It is here that several contradictions in self-consciousness become apparent. First, since the slave has been reduced to mere thinghood, she can give the master no more meaningful recognition than can any other object – genuine recognition can only follow from an independent self-consciousness, of which the slave has now all but been deprived.²⁰¹ The master begins to realise, therefore, that in objectifying the slave, he has in fact objectified himself.²⁰² Secondly, prior to the encounter between the master and the slave, the master confirmed his self-certainty through the negation of objects. The master has now lost this most basic assertion of independence, delegating it instead to the slave, on whom the master has become dependent to negate objects in his behalf.²⁰³

In the result, the master sees that the form of independence which he fought for has really become a form of dependence. On the other side of the contradiction, the slave begins to realise that she is not as dependent as she previously thought. First, she comes to understand that the master is indeed dependent on her for her recognition of him – she begins to understand that there must remain something within her that is still independent self-consciousness or “pure being-for-self”.²⁰⁴ Secondly, through her work, the slave imbues the objects she creates with her being-for-self which, in those objects, achieves a level of permanence. Her experience of fearing death in the life and death struggle with the master has brought her to give new meaning to her negation of objects.²⁰⁵ For her, they are no longer mere empty moments of recognition; rather, by negating them into a new reality – by negating leather into shoes, metal into tins, wood into furniture – the slave sees that the

¹⁹⁹ Id at ¶190.

²⁰⁰ Id at ¶190.

²⁰¹ Id at ¶191.

²⁰² Id at ¶192.

²⁰³ Id at ¶195.

²⁰⁴ Id at ¶194.

²⁰⁵ Id at ¶194.

value of her self-consciousness is actualised in new objects that she has created, and to which she has added worth. She sees in the independent object her own independence; her self-consciousness is no longer opposed to otherness²⁰⁶

As a result of these contradictions, the master and the slave come to realise that self-consciousness must mean something more than they had originally supposed, and they must reform their notions of absolute knowing. Of course, the master/slave dialectic is only one part, and an early part at that, of the unfolding of Hegel's much larger dialectic of self-consciousness, which he continues to develop for the remainder of the *Phenomenology*. However, already at this point we gain an insight into one of the most important features of an independent self-consciousness: it now *necessarily* consists in recognising another independent self-consciousness, and being conscious of being recognised in turn as having an independent self-consciousness of one's own. Mutual recognition has become the defining condition of self-identity.²⁰⁷

This is significant for the project of direct horizontality. Like Kant, Hegel shows us that our own individuality only becomes meaningful when it is present within a properly constituted community composed of relationships of reciprocal recognition.²⁰⁸ Moreover, because Hegel's concept of independence or freedom emphasises the internal, horizontal relationships between citizens, rather than the mere formal equality as between the individual and state,²⁰⁹ he provides us with a powerful reason for pursuing radical substantive equality through direct horizontality. Thus, like Kant, Hegel shows us that freedom (understood as relationships of reciprocal recognition) can be a regulative ideal in legal interpretation.²¹⁰ I return to the significance of this below.

C. Freedom as Law

Hegel's *Philosophy of Right* is similar to the work of Immanuel Kant that we have explored above, in that it seeks to develop a philosophical account of the meaning of freedom. The

²⁰⁶ Id at ¶195-196. See also Findlay's analysis in Hegel *Phenomenology* above note 171 at 522.

²⁰⁷ Cornell, D. "Two Lectures on the Normative Dimensions of Community in the Law" 54 (1986) *Tennessee Law Review* 327 at 330.

²⁰⁸ Id at 331

²⁰⁹ Id.

²¹⁰ Id.

methodology used by Hegel is, of course, different to Kant's, in that the *Philosophy of Right* proceeds along the same dialectical lines as we see in the *Phenomenology*: Hegel begins with the absolute minimum conception of what freedom can be, and by exposing the contradictions inherent within that conception, develops a new, more complex notion of freedom. The significance of the *Philosophy of Right* for this paper is that it demonstrates a clear progression from the arbitrary freedom of the will to the demand for ethical action (as mutual recognition between subjects) to the actualisation of ethics within the legal system. It is therefore of critical relevance to the project of direct horizontality, and it is for this reason that I undertake an analysis of it here.

Hegel begins the *Philosophy of Right* with the most basic conception of freedom possible, and that is the ability of the self-conscious 'I' to abstract itself from "every restriction and every content . . . presented by nature, by needs, desires, and impulses"²¹¹ and think purely of itself. When the will's self-determination consists only in this complete abstraction from every determining empirical condition, we have what Hegel terms "negative freedom".²¹² Negative freedom is synonymous with the neoliberal view of freedom as the absence of constraint – that being free means being free to do as we please without any restrictions imposed on us by the world around us (including by other people). However, Hegel notes that whatever negative freedom means to wills as its object can only ever be an abstract idea, and therefore the only effect this idea can have in the world is destruction.²¹³ Simply put, when this freedom turns to actual political practice, its only desire is to reduce all limitations on itself to nothing – "[o]nly in destroying something does this negative will possess the feeling of itself as existent."²¹⁴

The redeeming moment of this kind of freedom is that, just as easily as the will abstracted itself from worldly determinations, so too can it place itself in them once more.

²¹¹ Hegel *Philosophy of Right* above note 172 ¶5.

²¹² Id at ¶5.

²¹³ Id.

²¹⁴ Id. Hegel cites the Terror of the French Revolution as an example of the destructive power of negative freedom: "For instance, during the Terror of the French Revolution all difference of talent and authority were supposed to have been superseded. This period was an upheaval, and agitation, an intolerance of everything particular. Since fanaticism wills an abstraction only, nothing articulated, it follows that, when distinctions appear, it finds them antagonistic to its own indeterminacy and annuls them. For this reason, the people during the French Revolution destroyed once more the institutions which they had made themselves, since any institution whatever is antagonistic to the abstract self-consciousness of equality."

In so doing, it posits itself as something with determinate existence.²¹⁵ In affirming a desire, I am not forsaking my ability to abstract from it again – what I have is the *choice* to affirm a particular desire or not.²¹⁶ Thus, Hegel understands that at least part of the idea of freedom is freedom of choice.²¹⁷

However, whilst freedom of choice is part of freedom, it is not the whole truth of freedom. Although freedom of choice contains the *formal* element of being able to choose whether to affirm a particular desire, it does not itself determine the content of that desire.²¹⁸ In Stephen Houlgate's words: "We can, indeed, freely choose to do what we please; but we do not freely determine what pleases us – nature does."²¹⁹

In the result, freedom of choice turns out to be a form of significant dependence on nature. The only way for the will to escape this dependence is to turn back on itself; to take for its object not some desire whose content is imbued by nature, but rather its own capacity to will.²²⁰ Rather than affirming a worldly desire, the will must affirm the freedom of the will itself – its freedom must become its own object.²²¹ In so doing, it becomes "the free will which wills the free will."²²²

This is the critical turning point in Hegel which lays the basis for his argument that freedom must objectively realise itself in the world around us. At the very beginning of the *Philosophy of Right*, Hegel explains that if we are truly to gain knowledge of a concept, we must understand it not only in the abstract, but also in its determinate existence (the shapes it assumes in the course of its actualisation in the external world).²²³ If we seek only to understand a concept outside of its determinate existence, we are for Hegel merely engaging in fanciful conjecture about something completely irrelevant.

Thus, now that freedom has become the object or concept which the will wishes to know, the will must necessarily seek to actualise that concept in the world, and to understand those actualisations. Hegel terms this process of understanding a concept

²¹⁵ Id at ¶6.

²¹⁶ Id at ¶7.

²¹⁷ Id at ¶15.

²¹⁸ Id.

²¹⁹ See Houlgate's introduction in Hegel *Philosophy of Right* above note 172at xxi.

²²⁰ Id at ¶22-24.

²²¹ Id at ¶27.

²²² Id.

²²³ Id at ¶1.

together with its actualisation as “Idea”; therefore, in understanding freedom and its actualisation, we understand freedom as “Idea”. Freedom as “Idea”, Hegel proclaims, is precisely the same thing as right (*Recht*),²²⁴ understood as the existence of the free will made determinate (or taking on an external existence).²²⁵ The system of right, then, is the realm of freedom made actual.²²⁶

In the result, having developed the notion of the free will that has its own freedom as its object, and having explained that this entails knowing freedom in its actuality, Hegel proceeds to develop his account of right, beginning from the most basic external manifestation of freedom (abstract right) to more complex manifestations, culminating in the emergence of the state. I propose to move briefly through each of these determinations of right, until we get to the point where Hegel shows us how freedom must achieve objective realisation in the law.

Knowing one’s self as a free will at first means *only* knowing *one’s self* as a free will.²²⁷ This simple relation of the free will to its individual self is what, in Hegel’s view, gives one “personality”.²²⁸ As a personality, we have met the basic condition required to be a bearer of rights in the first place – personality therefore constitutes the basis of formal or abstract right.²²⁹ Already at this stage we see Hegel echoing Kant in that Hegel begins coupling the exercise of personality with responsibility (albeit in a limited way, since this is still an early point in his conception of freedom): we are commanded to respect the capacity of others to bear rights, as well as what that capacity entails.²³⁰

Now, since a person must translate his freedom into an external sphere in order for it to be “Idea”, personality overcomes its pure inwardness or being-for-itself initially through the possession of things, as possession of things is the first and most immediate way that

²²⁴ Id at ¶1 and 29.

²²⁵ Hegel is obviously very close to Kant here, in that we saw above that Kant defines right as the realm of external freedom. It will be remembered that right is something much greater than merely individual laws, or even *the* law, and encompasses the interlinking system of legislation together with the rational basis for that legislation.

²²⁶ Id at ¶4.

²²⁷ Id at ¶35.

²²⁸ Id at ¶35.

²²⁹ Id at ¶36.

²³⁰ Id at ¶36 and 38.

freedom can manifest itself in the world.²³¹ The realisation of freedom in an external thing, albeit in such a crude manner, is Hegel's rationale for the ownership of property.²³²

This abstract right to property entails other rights, namely the right to contract for the alienation of that property,²³³ as well as to be free from personal wrongs done to ourselves or our property.²³⁴ However, this right to be free from wrong does not guarantee that one will, in fact, be free from wrong – although the concept of right commands respect, it is a matter of chance whether individuals will actually respect it or act in contravention of it.²³⁵ Abstract right is not, therefore, beyond the stage of arbitrariness, and therefore remains at the mercy of wrong which undermines right itself.²³⁶ Thus, the authority of right must be restored through punishment of wrongdoers.²³⁷ However, freedom has not yet manifested itself in the form of a legal system backed by state-sanctioned force, and in the absence of such conditions, punishment can only take the simple form of pure revenge.²³⁸ Of course, since revenge is unchecked by anything else, this revenge may produce yet more wrongs.²³⁹

Thus Hegel shows that abstract right yields only the partial truth of freedom. His insight is that whilst the demand for justice in abstract right manifests itself as unruly revenge, what is missed is the more foundational fact that the free will is seeking justice *as such*; the form which it happens to take for the moment is irrelevant. The free will now realises that what is being willed is essentially the restoration of right, the protection of the capacity to bear rights as such. The will now comes to have its own personality (not just its capacity to will) as its object.²⁴⁰

The other moment in this realisation is that, once again, we see free will – not only the free will which has perpetrated the crime but also the free will which is the victim – as having something inherently dependent about it. On the one hand, free will is bound to respect the personality of others, but on the other hand, whether it actually does so is dependent on external empirical factors. The result is that a freedom which is merely

²³¹ Id at ¶41 and Addition, and ¶44-46.

²³² Id at ¶41 Addition.

²³³ Id at ¶72-81.

²³⁴ Id at ¶82-102.

²³⁵ Id at ¶81.

²³⁶ Id.

²³⁷ Id at ¶101.

²³⁸ Id at ¶102.

²³⁹ Id at ¶103.

²⁴⁰ Id at ¶104.

externalised in the possession of property is a rather fragile form of freedom indeed – if your freedom is locked up inside a thing, and that thing is stolen, then so too have you been robbed of your freedom. Given that the occurrence of crime is a matter of empirical contingency, the will must find some way to protect itself from that contingency, and ground its freedom in something more permanent and less finite. This it can do if it no longer allows itself to be determined by its environment, but only by itself, by its own principles which it freely gives to itself.²⁴¹ Thus, it turns away from the external world and returns to itself once again. In willing its own personality, it perfects the flaws present in merely abstract right, in that “[n]o one can break in upon this inner conviction of humanity, no violence can be done to it”.²⁴² The will which now recognises freedom as rooted in the will’s self-determination through reason becomes the moral will.²⁴³

With the manifestation of the moral will, the person now becomes a subject.²⁴⁴ However, once again, this new concept of freedom must achieve determinate existence if it is to be “Idea”,²⁴⁵ it must seek to actualise its new object (which is its own self-determination) in the world.²⁴⁶ In particular, the will must see its self-determination in everything action that it undertakes.²⁴⁷ This requires three things: first, that the content of the action shall be determined entirely by the will itself, for which I am therefore entirely responsible; second, that the value of the action I undertake shall be determined by reference to the motive I give myself for undertaking it; and third, that the content I give to my action through reason shall be the absolute end sought by my will (the good).²⁴⁸

This last aspect of the moral will resonates with Kant’s conception of the moral duty. Like Kant, Hegel thinks that what is “good” or “right” or “moral” is the realisation of freedom in the world (freedom being understood, of course, as intimately linked to an evolving conception of self-determination and responsibility).²⁴⁹ Thus, Hegel states the following:

²⁴¹ Id at ¶106 Addition.

²⁴² Id at ¶106 Addition.

²⁴³ Id at ¶105.

²⁴⁴ Id.

²⁴⁵ Id at ¶107.

²⁴⁶ Id.

²⁴⁷ Id at ¶107 Addition and 110 Addition and 113.

²⁴⁸ Id at ¶114 and Addition.

²⁴⁹ Id at ¶129.

“For the subjective [moral] will, the good and the good alone is the essential, and the subjective will has value and dignity only insofar as its insight and intention accord with the good. . . . [i]t *ought* to make the good its aim and realise it completely”.²⁵⁰ (My emphasis.)

Thus, it is the right of the moral will to judge as good whatever the will recognises as a valid externalisation of freedom.²⁵¹ Herein, however, lies the contradiction within this new conception of the will, which is going to lead us to the ethical will and ultimately to the concept of *Recht*. The contradiction is that, whilst the will determines as good anything which it views as such, it has no objective criteria available to it to determine whether what it wills is *in truth* good or not. In other words, the key feature of the moral will is that its object is the manifestation of good in the world; however, in claiming that it has the last word on what counts as good, the moral will has “infinite formal self-certainty”²⁵² and is in fact capable of justifying great evil.²⁵³

In the result, Hegel develops a new form of freedom on the basis of the partial truth implicit in the moral will. The partial truth is that, although the moral will as yet has no basis on which to determine the objectivity of the good it seeks, what is important is that the moral will recognises that it *must* will the good, i.e. what is good in and for itself, objectively considered.²⁵⁴ Thus, once again, the will has a new object – namely, it must will freedom in the form of the objective good. And once, again, in order to become “Idea”, this new conception of freedom must be actualised in the world. Thus, Hegel writes:

“Ethical life is the Idea of freedom in that, on the one hand, it is the living good – the good endowed in self-consciousness with knowing and willing and actualized by self-conscious action – while, on the other hand, self-consciousness has in the ethical realm *its foundation* in and for itself and *its motivating end*. Thus ethical life is the concept of freedom developed into the existing world and the nature of self-consciousness.”²⁵⁵ (My emphasis.)

²⁵⁰ Id at ¶131.

²⁵¹ Id at ¶132.

²⁵² Id at ¶137.

²⁵³ Id at ¶135. Hegel praises Kant for making the link between duty and rationality, but criticises him for not providing any content to duty. He states that the mere requirement that our actions comply with a universal law is an abstract formalism whose “criterion of non-contradiction is productive of nothing, since where there is nothing, there can be no contradiction either.” The accuracy of Hegel’s claims in this regard is beyond the scope of this paper.

²⁵⁴ Id at ¶137 and 141.

²⁵⁵ Id at ¶142.

Therefore, in order to escape the tyranny of absolute subjectivity, the ethical order gives itself stable content (meaning content which is not only stable in the sense of being objective, but also stable in that it lasts over time and supersedes the finitude of individual life) by creating distinctions within itself – namely, laws and institutions – which give determinate character to the concept of freedom.²⁵⁶ These laws and institutions, however, are not an alien imposition on the subject – rules and authorities to which the subject owes unwavering allegiance. Rather, the subject “bears witness to them as its own essence”;²⁵⁷ it “stands related to them as to the substance of his own being”;²⁵⁸ it follows them because it sees them as the rational and necessary manifestation of its own freedom.

In the result, ethical life, or *Sittlichkeit*, consists of actualising in the external world laws and institutions which are the necessary manifestations that freedom must take if it is to be true freedom. We will go on to see what these laws and institutions are shortly. For the moment, however, cognisance must be taken of the powerful link Hegel is making between exercising freedom meaningfully and being subject to ethical duties. Because Hegel is clearly and explicitly taking the leap about which Kant seems at least partially hesitant, namely making ethical right the foundation of legal right, I quote the following passages at some length. First, Hegel explains that it is in duty where humanity is truly liberated:

“The bond of duty can appear as a restriction only on indeterminate subjectivity or abstract freedom, and on the impulses either of the natural will or of the moral will which determines its indeterminate good arbitrarily. The truth is, however, that the individual finds his liberation: first, liberation from dependence on mere natural impulses and from the depression which as a particular subject he cannot escape in his moral reflections on what ought to be and what might be; secondly, liberation from the indeterminate subjectivity which, never reaching reality or the objective determination of action, remains self-enclosed and devoid of actuality. In duty the individual liberates himself so as to acquire his substantial freedom.”²⁵⁹

Like Kant, Hegel argues that it is only in the self-determination of our actions in accordance with duty that we find true freedom. Unlike Kant, however, Hegel sees that this

²⁵⁶ Id at ¶144.

²⁵⁷ Id at ¶147.

²⁵⁸ Id at ¶148.

²⁵⁹ Id at ¶149.

duty must take on an objective reality outside of our conscience if it is to escape arbitrariness and, more importantly, if it is to have a profound impact on human affairs. In the light of this, Hegel goes on to emphasise that the absence of constraint is an utterly barren view of freedom:

“Duty is a restriction only on the arbitrary will of subjectivity. It stands in the way only of that abstract good to which subjectivity adheres. When we say: ‘We want to be free,’ the primary meaning of the words is simply: ‘We want abstract freedom,’ and every institution and every organ of the state passes as a restriction on freedom of that kind. Thus duty is a restriction not on freedom, but only on freedom in the abstract, i.e. on unfreedom. *Duty is the attainment of our essence, the winning of affirmative freedom.*”²⁶⁰ (My emphasis.)

Here, Hegel accepts that abstract or negative freedom, understood as the absence of constraint, is certainly a kind of freedom, and in a sense, is part of the larger picture of freedom. However, as we have seen all along, it is only a *partial truth* of freedom. We have seen the emptiness of freedom when it is left at that infant stage of its development, and we therefore need a fuller conception of freedom, a freedom which is not only negative, but positive in that it actively structures, regulates and *builds* freedom in our world. This freedom, which, unlike negative freedom, can arrive at a positive accomplishment of something, is necessarily founded on duty.

Finally, Hegel explicitly holds that legal right must be grounded in the ethical if it is to serve as a motivation for human action and achieve actuality:

“The unity of the subjective [will] with the objective good in and for itself is ethical life, and in it we find the reconciliation which accord with the concept [of freedom]. Ethical life is more than the subjective form and the self-determination of the will; in addition it has as its content the concept of the will, namely freedom. *The spheres of right and morality cannot exist independently; they must have the ethical as their support and foundation*, for right lacks the moment of subjectivity, while morality in turn alone possesses that moment, and consequently both right and morality lack actuality by themselves.”²⁶¹ (My emphasis.)

We saw in Kant that freedom, as the categorical imperative, forms the basis of our ethical duties, but that he is ambiguous as to whether and in what way it is the *basis* of right.

²⁶⁰ Id at ¶149 Addition.

²⁶¹ Id at ¶141 Addition.

I argued that Kant could be interpreted as holding that ethical right is the foundation of legal right, but certainly those words do not come from his own pen. In contrast, Hegel goes where Kant did not, by expressly arguing that right is founded on the ethical manifestation of freedom.

As was stated above, having shown that freedom must be actualised in our laws and institutions, Hegel goes on to show the necessary forms that this freedom must take. He begins with the actualisation of freedom as family life, and then shows that this necessarily leads on to civil society, which has three key features: first, it consists of the mediation of need and the satisfaction of the individual through his work and through the work and satisfaction of the needs of all others (which Hegel calls the “system of needs”); second, it contains the actuality of freedom in the form of the administration of justice; and third, provision against contingent deviations within the system of needs and the administration of justice through the establishment of the police and the corporation.²⁶² It is the second of these features with which we are concerned here, since it relates to the concept of right.

Hegel explains that what is right in itself – what is objectively required by freedom – becomes law when it is posited into objective existence, which consists of right being made determinate and known for consciousness through laws.²⁶³ The content of right is reduced to its simplest form and thus given specific determinacy and actuality, in accordance with the requirement of “Idea” in respect of the unfolding and actualization of a concept.²⁶⁴

Hegel argues that making a law is much more than the mere expression of a rule of behaviour valid for everyone; of significantly greater importance is that the law is a crystallized, determinate expression of what we know to be the content of right.²⁶⁵ He anticipates, however, accusations of totalitarianism and moral absolutism by accepting that there may arise a discrepancy between what is objectively right and the actual content of the law.²⁶⁶ Part of Hegel’s answer to these accusation is a firm duty that he places on legal

²⁶² Id at ¶188.

²⁶³ Id at ¶211.

²⁶⁴ Id.

²⁶⁵ Id.

²⁶⁶ Id at ¶212.

scholars to “study given determinations of right”, thus arguing that ethical philosophy is not separate to but intrinsically part of the study of law.²⁶⁷

Hegel believes that subjects must follow the laws and institutions of ethical life, including the law, because they are objective expressions of what the freedom of subjects must be.²⁶⁸ In this regard, Hegel thus sets up a dialectical relationship between citizens and the law. On the one hand, the starting point of our relationship to laws and institutions should be one of trust, since we see them as the necessary embodiment of our freedom. On the other hand, however, this trust is not blind trust – we must continually engage in public intellectual²⁶⁹ dialogue with legislators and each other in order that we continually refine our concept of right, bring our laws into line with it and thereby come closer to the truth of ourselves. When laws stop being objective expressions of our ethical freedom, trust is no longer appropriate,²⁷⁰ and rebellion against such laws is not off the table.

Thus, Hegel finally shows us that relationships of mutual recognition, as the necessary manifestation of our free will, *must* be the foundation of *Recht* in any modern constitutional state. The power of this conclusion for present purposes is that Hegel shows us that direct horizontality, itself an expression of the ethical duty to recognise the freedom of others and to assist them in coming to as full an expression of their freedom as possible, is not only a permissible step for the law to take; rather, it is a step which the law must take if it is to be *Recht* and thereby objectively realise our freedom in the world around us.

In this next section of this paper, I proceed to give a fuller account of what direct horizontality is and how it operates, after which I explain horizontality in the context of the Constitution’s mandate to respect the dignity of all others.

²⁶⁷ Id.

²⁶⁸ See above.

²⁶⁹ Hegel *Philosophy of Right* above note 172at ¶314-316.

²⁷⁰ See Houlgate’s introduction in Hegel *Philosophy of Right* above note 172 at xxviii.

VII. DIRECT HORIZONTALITY AND THE MANDATE OF DIGNITY IN THE SOUTH AFRICAN CONSTITUTION

I want to begin by agreeing with Sprigman and Osbourne that “*Du Plessis* is not dead”.²⁷¹ I would, however, add the qualification: “but it should be.” It will be recalled that *Du Plessis v De Klerk* was the case in which the Constitutional Court made its first, and to date its most definitive, pronouncement on direct horizontality, holding that the Bill of Rights in the interim Constitution was not of direct horizontal application, but that the common law involved in private legal relationships would nevertheless be developed in accordance with the spirit, purport and objects of the Constitution. The result has been that the case has loomed large over the horizontality discourse ever since, and most academics begin their analysis with an investigation of its findings.

In my view, *Du Plessis* is a thoroughly unhelpful place at which to begin an analysis of horizontality. This is so not least because it consists of six different judgments, none of which deal with direct horizontality in a comprehensive and systematic way, and all of which conflate and distort concepts which ought to be kept clearly distinct.²⁷² Moreover, the case was decided in terms of the interim Constitution, and all of its findings turn heavily on a textual interpretation of the unique provisions of that document. Needless to say, the final Constitution differs from the interim Constitution in significant respects, the most important of which is that the final Constitution includes a provision which expressly states that the Bill of Rights binds natural and juristic persons.²⁷³ The final Constitution also contains other provisions which obviate many of the concerns raised in *Du Plessis*.²⁷⁴

²⁷¹ Sprigman, C. and Osbourne, M. “Du Plessis Is Not Dead: South Africa’s 1996 Constitution and the Application of the Bill of Rights to Private Disputes” (1999) 15 *SAJHR* 25

²⁷² For a useful overview of these judgments and their shortcomings, see Klare, K.E. “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 at 179-187.

²⁷³ Section 8(2) of the Constitution.

²⁷⁴ These concerns included: (i) courts being unable to develop remedies which would follow from a direct horizontal application of rights (see *Du Plessis* above note 64 at para 53); (ii) courts tying the hands of the legislature by giving content to rights; (iii) courts being unable to limit rights by way of the common law in the same way that the limitations clause enables them to limit rights when legislation is involved (see *Du Plessis* id at 55). The final Constitution deals with all of these concerns, first by way of section 172, which gives the courts extensive powers to make any order which is just and equitable. The Constitutional Court has subsequently held that such remedies include awarding constitutional damages (see *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) and *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC)) and putting the legislature on terms to draft legislation within a specified time period where the issues involved are policy-laden and better suited to the democratically elected arms of government (see *Minister of Home Affairs and Another v Fourie*

It is also unhelpful, I think, to begin with a rich definition of what direct horizontality means or should mean, and reason backwards from there. This approach is likely to alienate an audience from the start, since direct horizontality has come to mean many different things for many different people. Of course, everyone agrees that it has something to do with individuals bearing duties in terms of the Bill of Rights, but after that the field rapidly parts ways. In particular, there are two different approaches to direct horizontality that I would like to address in this paper. First, for some people direct horizontality means that the content of the duties which individuals bear must be derived from rights themselves, rather than from legislation or common law which has been merely influenced by such rights. The second approach uses the term to mean that litigants must be able to found a cause of action, and be given remedies, solely on the basis of the Bill of Rights alone. These people are motivated either by the concern that, sometimes, there will be no positive law at play in the case and yet it requires a just resolution through the law; or by the concern that allowing litigants to circumvent “lawyers’ law” and to rely directly on their rights in the Bill of Rights enhances access to courts in a country where this is desperately needed.

As I aim to show below, direct horizontality incorporates both these approaches. However, as I also hope to show, it does not incorporate them both at the same time or in the same way. Understanding where and how they fit in with the overarching concept of horizontal application itself is crucial to fulfilling the aims sought by each approach and to developing a sensible constitutional jurisprudence.

In the result, when it comes to direct horizontality, I think the most useful place to start is with the text of the final Constitution itself. Such an analysis turns mainly on an interpretation of the relationship between section 8 and section 39(2), an interpretation to which I turn in the next section.

A. What is Direct Horizontality Anyway?

and Another (Doctors for Life International and Others as Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) and *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC)). Secondly, the final Constitution addresses these concerns by way of section 8(3)(b), which provides for the limitation of horizontally-applied rights by way of the common law.

Before beginning my analysis of section 8 and 39(2) of the Constitution, it is worth setting out some issues relating to constitutional interpretation on which there is (or should be) general consensus.

First, section 8 of the Constitution has to mean *something*. More particularly, section 8(3)(a) has to mean something *different* to section 39(2). Even the most ardent formalist or positivist must accept that each provision in a piece of legislation has to make some unique contribution to the overall legislative scheme in order to give effect to the intention of the legislature. No section of a statute should be interpreted as being redundant.²⁷⁵

Secondly, everyone should agree that all law²⁷⁶ and conduct in South Africa must be consistent with the Constitution in order for it to be valid. Section 2 of the Constitution could hardly state this in clearer terms.²⁷⁷ Thirdly, and related to this point, in order to test whether law or conduct conforms to the Constitution, content must first be given to the Constitution in order to establish a standard against which the validity of law and conduct can be judged. Whilst this is not explicitly stated in the Constitution, it must be implied by virtue of logical necessity – the establishment of criteria is logically prior to the application of such criteria. Thus, before we can know whether positive law promotes or violates rights, we have to know what those rights protect.

It is against this relatively uncontentious background that I set my analysis of sections 8 and 39(2). I seek to show that section 8(2) of the Constitution establishes what I have thus far called “direct horizontality”, in contrast to direct horizontal *application*. It is my view that section 8(2) mandates a court – in circumstances where one private party alleges that another private party’s reliance on the common law is in violation of the Bill of Rights – to determine the content of the rights involved, explain their interrelationship, and thereby come to give content to the duties imposed by the Bill of Rights on private parties. Once this is established, section 8(3)(a) determines how these duties are to be applied in the particular dispute, which includes the options of either indirect or direct horizontal *application*. Since, on this view, the source of indirect horizontal application is to be found in

²⁷⁵ See *Khumalo* above note 68 at para 32: “We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.”

²⁷⁶ Including legislation, the common law and customary law.

²⁷⁷ Section 2 of the Constitution provides: “The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

section 8(3)(a), and not in section 39(2) as is generally supposed, one has to make something of the latter section. Thus, I aim to show what meaningful role section 39(2) can play in our constitutional jurisprudence.

I turn now to my analysis of these two sections. Let us begin with section 8(2) of the Constitution, which provides as follows:

“A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.”

Section 8(2) states in no uncertain terms that the rights in the Bill of Rights impose duties on individuals. Of course, the section recognises an obvious point, which is that individuals do not bear duties in the same way as the state, and not necessarily in respect of all rights – whether they bear duties, and the extent of those duties, depends on the nature of the right involved. The section clearly provides, however, that the Bill of Rights demands direct horizontality. In the light of this demand, the task section 8(2) imposes on courts is to: (i) determine which rights are implicated in a dispute between two private parties; (ii) elucidate the content of the implicated rights, and whether the law or conduct in question lies at their core or their periphery; and (iii) conduct a balancing exercise in respect of these competing rights to ascertain the concrete duties (and their limits) which the Constitution imposes on private parties in a given context. Importantly, a court is mandated to undertake this task irrespective of whether the dispute involves legislation, common law, customary law or, as we shall see below, no law at all. On this construction of section 8(2), in disputes between two private litigants the Bill of Rights is *always directly horizontal*. In fact, in respect of section 8(2), it really makes no sense to speak of direct or indirect horizontality at all. Section 8(2) simply means that rights *are* horizontal.

Once the rights in the Constitution have been given substance in terms of section 8(2), and a standard has been set against which the validity of the law or conduct in question can be judged, a court can then proceed to a full-scale analysis of whether the law or conduct meets constitutional requirements. In the event that the law fails to give effect to constitutional demands, section 8(3)(a) comes in to play, which provides:

“When applying a provision of the Bill of Rights to a natural or juristic person in terms of [section 8(2)], a court—

- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right”.

The first thing to note about this section is that its wording reinforces the interpretation I have given to section 8(2) – section 8(3)(a) only comes into the picture once it has already been determined that a right in the Bill of Rights *applies*. Section 8(3)(a) proceeds to explain how the right must be *applied*,²⁷⁸ and it is only at this point where a discussion concern the *direct or indirect application* of the rights becomes relevant at all. Section 8(3)(a) is clearly concerned only with the remedies which flow from the direct horizontality of human rights, and which is why I have asserted that it is only this particular feature of horizontality which concerns its application. The section sets out the stages of a court’s analysis in this regard.

First, a court must determine whether existing legislation gives effect to the implicated right. Secondly, and in the event that legislation does not give effect to that right, the court must determine whether existing common law is capable of being developed in order to give effect to that right. This is what is commonly understood as *indirect horizontal application*.²⁷⁹ Thirdly, if a court finds that neither legislation nor the common law is capable of giving effect to constitutional demands, then the court would be required to create fresh common law on the basis of the substantive right alone. This is what I believe should accurately be termed *direct horizontal application*.

The interpretation I am advancing above in respect of section 8(2) and section 8(3)(a) is precisely the interpretation adopted by O’Regan J in *Khumalo*.²⁸⁰ She begins her judgment in that matter by setting out the rules and principles of defamation law,²⁸¹ after which she

²⁷⁸ This is precisely the approach adopted by O’Regan J in *Khumalo* above note 68 at para 31: “Once it has been determined that a natural person is bound by a particular provision of the Bill of Rights, section 8(3) then provides that a court must apply and if necessary develop the common law to the extent that legislation does not give effect to the right.”

²⁷⁹ *Du Plessis* above note 64 at 40, 60 and 62. This is the description generally offered in respect of indirect horizontal application. My difficulty, as will become clear below, is that the description is generally sourced from section 39(2) of the Constitution (which commands development of the law in line with the spirit, purport and objects of the Bill of Rights), and not from section 8 itself (which commands development on the basis of substantive rights).

²⁸⁰ *Khumalo* above note 68.

²⁸¹ *Id* at paras 17-20.

analyses the ambit of the right to freedom of expression, and explains the tension that exists in defamation cases between that right and the protection of human dignity.²⁸² Having giving substance to the right to freedom of expression, the protection of dignity and the balance that ought to be struck between the two, O'Regan J concludes that the right to freedom of expression is of "direct horizontal application":

"Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution."²⁸³

As a result of her foregoing analysis, O'Regan J puts herself in an excellent position to judge the validity of the common law (set out earlier in the judgment) against what she has determined to be the demands of the Bill of Rights. All this, in my view, is the terrain of section 8(2). As it turns out, O'Regan J held that the common law gave adequate expression to the balance which had to be struck between the rights at play, and she did not therefore have reason to engage in the more detailed mechanics of section 8(3)(a). But the possibility existed, of course, that the common law may have fallen short of constitutional demands, in which case section 8(3)(a) would have required O'Regan J to give effect to those demands through legislation, a development of the common law, or the creation of a fresh common law remedy by *directly applying* the rights in question.

The result of my interpretation of sections 8(2) and 8(3)(a), and which I believe is supported by the reasoning in *Khumalo*, is that these two sections deal exclusively and, above all, *exhaustively* with horizontality, with each forming a critical but conceptually distinct part of the overall analysis. If this is so – in particular, if it is correct that indirect horizontal application stems from section 8(3)(a) – then one is left with a seemingly redundant section 39(2), since it is this section which has been seen to embody indirect horizontal application in the past.

However, the section is not in fact redundant. In my view, it plays a significant role in the development of constitutional jurisprudence, one which is not only conceptually distinct

²⁸² Id at paras 21-28.

²⁸³ Id at para 33.

from indirect horizontal application, but one which is also significantly broader. Section 39(2) states as follows:

“When interpreting *any* legislation, and when developing the common law or the customary law, *every* court, tribunal or forum *must* promote the spirit, purport and objects of the Bill of Rights.” (My emphasis.)

The difference between section 8(3)(a) and section 39(2), I believe, is clear. Section 8(3)(a) applies to a much more limited range of disputes than section 39(2), in that section 8(3)(a) applies only to disputes where a private party alleges that one of her constitutional rights has been violated by another private party. It is only in such a case where horizontality is implicated. Section 39(2), by contrast, applies to a much broader range of legal disputes; in fact, it applies to *every* legal dispute concerning the application of legislation, common law or customary law and which does not implicate horizontality.²⁸⁴ In terms of this section, every time a court makes a legal pronouncement – whether the case involves the state or private persons, whether it involves legislation, common law or customary law – it is *mandated* to promote the “objective normative value framework” of the Bill of Rights.²⁸⁵ This contention is underscored by the Constitutional Court’s groundbreaking decision in *Carmichele*,²⁸⁶ where the Court held as follows:

“It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately.”²⁸⁷

The Court held further that—

“[o]ur Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. . . . The influence of the fundamental constitutional values on the common law is mandated by

²⁸⁴ Which is effectively every possible legal dispute except those where the law is silent and direct horizontal application must operate to provide a cause of action and remedy – see below.

²⁸⁵ See *Carmichele* above note 47 at para 54.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at para 39.

section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.”²⁸⁸

Thus, for example, in any delictual action requiring an assessment of “wrongfulness”, a court must determine what is “wrongful” by reference to the overall scheme of the Bill of Rights. When a court is considering whether a particular contractual provision is contrary to public policy, this too must be informed by the “spirit, purport and objects” of the Bill of Rights. When a court is faced with having to interpret a particular piece of legislation, it is mandated to give that legislation an interpretation which is consistent with constitutional values. In each case a court considers, it must scrutinize the record for hidden constitutional violations which may have been overlooked by legally unsophisticated parties.²⁸⁹

These are mere examples of the broader point that section 39(2) mandates all courts at all times to make an affirmative contribution to the ongoing project of building a synchronised constitutional jurisprudence.²⁹⁰ Thus, section 39(2) in fact means something quite different to indirect horizontal application – instead, it commands courts to take heed of the Constitution in every case they hear, and to participate actively in the evolving process of making the law more rational, constitutional and ethical.

B. From Spirit to Substance

The interpretation of section 8 and section 39(2) that I have advanced above provides a useful framework within which to analyse the validity of the two approaches to direct horizontality set out earlier, approaches which explain the particular needs of justice which direct horizontality is expected to fulfil.

The first broad category of pro-horizontality arguments seeks the development of substantive law which gives content to rights in the Bill of Rights, and particularly to the duties imposed by those rights on private persons. These arguments claim that this is necessary in order to build a synchronised body of constitutional jurisprudence which does justice to each section of the Constitution within its overall architecture, and which gives

²⁸⁸ *Id* at para 54.

²⁸⁹ *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 69; *Carmichele* above note 47 at paras 33-39.

²⁹⁰ See *Du Plessis* above note 64 at para 167 per Mokgoro J.

citizens meaningful guidance as to what conduct is expected of them. It is argued that a firm embrace of direct horizontality is the only meaningful way this can be achieved.

This view is put forward most forcefully by Stu Woolman in two recent articles. In *The Amazing, Vanishing Bill of Rights*,²⁹¹ Woolman offers two key arguments in support of direct horizontality. First, he argues that an analysis of the substantive provisions of the Bill of Rights in terms of direct horizontality is logically prior to the determination of whether law or conduct is inconsistent with those provisions.²⁹² On the basis of recent decisions of the Constitutional Court,²⁹³ Woolman claims that this logical process is not being followed by the Court. Instead, the Court is getting things “back to front” by first analysing the common law and then holding, on the basis of vague reasoning in terms of the “spirit, purport and objects” of the Bill of Rights, that the common law is already in line with what the Constitution requires.²⁹⁴ He asserts that this process not only lacks analytical rigour, but speaks of an outcomes-driven jurisprudence which provides no meaningful guidance as to the duties which the Constitution imposes on private persons.²⁹⁵

Second, Woolman argues that continual reliance on section 39(2) not only fails to give content to rights, but also renders section 8 completely redundant. In fact, if all of the Court’s analysis takes place in terms of the values enshrined by section 39(2), it is not just section 8, but rather the entire Bill of Rights, which is side-lined.²⁹⁶ This leads Woolman rightly to ask: “Why even have a Bill of Rights?”²⁹⁷

In order to demonstrate the need for direct horizontality, and to provide meaning to section 8, Woolman adopts the following approach to the constitutional architecture. First, he contends that section 8, which embodies direct horizontality, serves to derive general rules from the rights contained in the Bill of Rights and uses them as the standard against which the validity of law or conduct is judged.²⁹⁸ By contrast, the purpose of section 39(2),

²⁹¹ Woolman, S. “The Amazing, Vanishing Bill of Rights” (2007) 124 *SALJ* 762.

²⁹² *Id* at 769 and 777.

²⁹³ Woolman cites *Barkhuizen v Napier* 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC), *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies And Another, Amici Curiae)* 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) and *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC).

²⁹⁴ Woolman above note 291 at 763, 767, 768 and 781.

²⁹⁵ *Id* at 762-763.

²⁹⁶ *Id* at 771.

²⁹⁷ *Id* at 770.

²⁹⁸ *Id* at 769.

which Woolman equates with indirect horizontal application, is to engage law and conduct which do not require a vindication of any rights in the Bill of Rights.²⁹⁹

Given the interpretation of section 8 that I have adopted above, it is no surprise that I think Woolman is absolutely right in his interpretation of section 8(2). I also agree with the conclusions he draws in respect of the improvements in judicial reasoning which will follow from that interpretation. In this regard, his most powerful point is that by resorting to the section 39(2) in each and every instance, and by restricting its reasoning to vague statements which allow the Court to operate completely free of the text, the Constitutional Court is avoiding meaningful legal and ethical reasoning in totality.³⁰⁰

Woolman supports this contention with reference to the Court's judgment in *Masiya*.³⁰¹ A more recent case, *CUSA v Tao Ying Metal Industries and Others*,³⁰² serves only to enhance his conclusion. The case concerned a dispute between a company in Botshabelo and the union representing some its workers as to whether the company was obliged to pay the minimum wages set out in the a bargaining council agreement or whether it had been validly granted exemptions from this obligation.

Put simply, the case could only result in one of two possible outcomes: either the company would be forced to pay minimum wages (including a number of years worth of back-pay), with the likely result that the company would go bankrupt and the workers would lose their jobs; or the company would remain financially sound at the cost of the workers' wages. A peripheral but important aspect of the case concerned which of these outcomes complied better with the Constitution's value system, over which there was stern disagreement between the majority and the minority. Ngcobo J, for the majority, upheld the minimum wage, and stated as follows:

"In my view, the meaning preferred in this judgment accords better with the values of our Constitution. This is so because, on the facts of this case, a labour regime that enabled the greater exploitation of black people in the homelands as part of the apartheid scheme, to

²⁹⁹ Id at 769, 776 and 777.

³⁰⁰ Id at 771. Woolman echoes his call for giving content to rights in Woolman, S. "Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on *Barkhuizen*" (2008) 125 *SALJ* 10.

³⁰¹ Above note 293.

³⁰² Above note 289.

the detriment of the workers in these areas, would, on the employer's interpretation, be kept in force for longer than the interpretation preferred in this judgment."³⁰³

In her minority judgment, O'Regan J disagreed that this outcome could so easily be said to accord with constitutional values:

"With respect, this argument ignores the undisputed facts on the record before us. Those facts make plain that when the leather industry required leather companies in Botshabelo to pay the wages provided for in its main agreement and did not issue exemptions, all the leather companies in Botshabelo closed, with the devastating consequence of job losses. . . . In the light of the intervention by the Department of Labour, it seems likely that the exemptions were granted to avoid further job losses in Botshabelo. In my view, the one-sentence argument relied upon by Ngcobo J ignores this complex economic and social background. This Court should be slow to base its reasoning on such arguments, particularly when they have not been raised either by the union or the employer, and when they are likely to mask complex social and economic realities, possibly with harmful consequences, such as job losses."³⁰⁴ (Footnotes omitted.)

These contrasting findings raise a number of interesting points concerning the relationship between section 8 and section 39(2). First, the case indicates the necessity of giving content to the "spirit, purport and objects" of the Bill of Rights in terms of section 39(2). Avoiding this means that section 39(2) becomes capable of "floating so free of the text", as Woolman argues, that it can be used to justify completely divergent outcomes. Secondly, and even more importantly, the case highlights the need for analytically rigorous substantive reasoning when it comes to conforming the law to the Bill of Rights. This case is interesting because, even if people agree that the ideological framework of the Constitution is progressive/post-liberal, socialist and radically egalitarian, that framework does not provide a clear resolution even in respect of the general direction of the case's outcome. Is it in line with the spirit, purport and objects of our Constitution for companies to be allowed to escape minimum wage? Or do the spirit, purport and objects of the Constitution require that minimum wage be enforced at all costs, even if that means job losses? These are difficult questions to answer, since, in Cornell's words, they "ultimately cannot be separated from the contest over competing visions of who we are and what we

³⁰³ Id at para 103 per Ngcobo J.

³⁰⁴ Id at para 148 per O'Regan J.

might become.”³⁰⁵ In the near future, we can only expect that the Constitutional Court, and indeed the lower courts, will have to face an increasing number of these tough questions. In order to ensure that they are well-answered, the courts will need a clear, well-articulated substantive jurisprudence to guide them.

In the result, I would readily align myself with Woolman’s call for a dramatic overhaul of judicial reasoning in line with direct horizontality. My main disagreement with Woolman, however, is the approach he adopts towards indirect horizontal application. First, I disagree that the purpose of indirect horizontal application is to engage law and conduct which do not require a vindication of any rights. As I have argued above, indirect horizontal application is an applied instance of the overall horizontality of the Bill of Rights, thus making it one possible and indeed useful way of providing a remedy to claimants when the existing positive law does not effectively vindicate their rights. Secondly, by imposing indirect horizontal application on section 39(2), his argument limits the much broader and more powerful role which that section has to play in our constitutional jurisprudence over and above horizontality.

Thirdly, my view is that section 39(2) is not merely the next stage after direct horizontality in the logical process or rights application; it is in fact part of an entirely separate process altogether. Thus, one does not resort to section 39(2) only once direct horizontality has failed; not least because, on the interpretation I have advocated above, direct horizontality can *never fail* in a dispute between two private parties which implicates existing positive law.³⁰⁶ Moreover, section 39(2) is a self-contained interpretive injunction which mandates all courts to promote constitutional values at all times, whether horizontality is implicated in the dispute or not. Of course, as both Woolman and I agree, the values in section 39(2) must be given substantive content if it is to make that process meaningful; and, in giving section 39(2) substantive content, courts may well have to deal with the substantive aspects of the rights in the Bill of Rights in order to form a cogent assessment of what the “spirit, purport and objects” of the Constitution really are. Whilst this has the hallmarks of a horizontality inquiry, it is a separate process for different

³⁰⁵ Cornell above note 207 at 331.

³⁰⁶ Even when there is no positive law, in the sense discussed below, section 39(2) will never operate to provide a solution that could not otherwise be reached through direct horizontality.

disputes, and is carried out on the terms of that section alone, rather than drawing its mandate from section 8.

My final disagreement with Woolman is that he implies that the language in section 39(2) is not only be interpreted vaguely by the Constitutional Court, but that the values in the section are in fact necessarily vague and cannot give rise to substantive content in the same way that the rights in the Bill of Rights can when they are interpreted through section 8(2). Once one accepts that rights are susceptible to meaningful reasoning, which Woolman does, then it cannot be contended that values are not. It is no easier to give content to phrases such as “everyone has inherent human dignity”, “everyone is equal before the law” or “everyone has the right to have access to adequate housing” than it is to flesh out substantive content to the values enshrined by the “spirit, purport and objects of the Bill of Rights”. In both cases courts must face up to the challenge of engaging in meaningful ethical reasoning; in both cases courts do not have a choice but do so.

C. When the Law Runs Dry

The second broad category of pro-horizontality arguments seeks to develop fresh causes of action and fresh remedies for litigants by relying directly on the rights in the Bill of Rights. The argument concerning fresh causes of action generally postulates the existence of unjust social interactions which implicate no positive law at all, and which cannot therefore come before a court because they cannot disclose a conventional cause of action. Thus, direct horizontality must operate in order to allow such litigants to found a cause of action by relying directly on an alleged infringement of their rights.³⁰⁷

The argument concerning fresh remedies is relevant to the mechanics of section 8(3)(a) as I have set them out above. The essence of the argument is that in some legal disputes, there will either be no positive law at all to develop by way of indirect horizontal application, or the positive law will simply be incapable of such development. Thus, the only way to redress an infringement of a right in these circumstances is to create a new common law remedy sourced directly in the implicated right itself.

³⁰⁷ There is a more subtle and powerful version of this argument which holds true even when there is existing positive law. I deal with it below.

Although these arguments are sometimes advanced separately, they stem from the same concept and arise in the same factual scenarios. The arguments are related because if there is no positive law on which to found a cause of action, there will obviously be no positive law to give expression to the infringed right, and therefore no positive law to develop. Therefore, a court which creates a new cause of action through horizontality will inevitably also have to create a new common law remedy on the same basis.

Moreover, the arguments are inseparably related because in cases where positive law is indeed implicated in the dispute, and thus provides a cause of action, a court will never be faced with the problem of having to create a new remedy. This is so because the courts have generally held, and I think rightly so, that the principles of the common-law are flexible and open-textured, readily capable of being developed in line with the Constitution. These open-textured principles, combined with the broad powers to “make any order which is just and equitable” given to courts by section 172 of the Constitution, mean that a court will rarely, if ever, have to fashion a new constitutional remedy when the common law is already implicated.³⁰⁸

The preceding paragraph should make it clear that the problem concerning the creation of fresh remedies is more perceived than real. Section 8(3) and section 172 together ensure that a court will not be short of the tools necessary to find a just and equitable resolution to any case that comes before it. The real problem, then, is to find a way to trigger the law such that a dispute can even come before a court in the first place. It is this problem to which Johan van der Walt has paid sustained attention in his writings on horizontality.³⁰⁹ Initially, and in the wake of *Du Plessis*, Van der Walt was a strong proponent of the view

³⁰⁸ As a last resort, section 172 is so broad that, read with section 8(3)(a), it does indeed allow courts to create new remedies. See, for example, *Fose* above note 274 and *Modderklip* 274, which discuss and in the latter case award “constitutional damages”. See also *Fourie* above note 274 and *Nyathi* above note 274, where the Court has identified constitutional violations in areas which are complex or policy-laden, and has thus put the legislature on terms to remedy the defect whilst still respecting the role of the democratically elected arms of government. I would submit that the concerns regarding remedies which are raised in *Du Plessis* in the context of direct horizontality should be considered in the light of the absence of an equivalent to section 172 in the interim Constitution.

³⁰⁹ Van der Walt, J. “Justice Kriegler’s Disconcerting Judgment in *Du Plessis v De Klerk*: Much Ado About Direct Horizontal Application (Read Nothing)” (1996) 4 *TSAR* 7 32 at 735-736 (hereinafter “*Much Ado About Nothing*”); Van der Walt, J. “Perspectives on Horizontal Application: *Du Plessis v De Klerk* Revisited” (1997) 12 *SAPL* 1 (hereinafter “*Perspectives*”); Van der Walt, J. “Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga” (2003) 19 *SAJHR* 517 (hereinafter “*Carmichele Saga*”); Van der Walt, J. “Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation Between Common-Law and Constitutional Jurisprudence” (2001) 17 *SAJHR* 341.

that not all social relations were legal relations. Relying on Wesley Hohfeld,³¹⁰ Van der Walt argued that not all social interactions are legal interactions; thus, any injustice stemming from such non-legal social interactions could not attract the attention of a court, because there would be no existing positive law on which to found a cause of action.³¹¹ In order to remedy this problem, Van der Walt argued that direct horizontality has to allow litigants to rely on the rights in the Bill of Rights alone.³¹²

Importantly, Van der Walt has subsequently revised his view, and now believes that all social relations are indeed legal relations.³¹³ If he is right – and I think he is – this has a significant impact on the way we think about the role of direct horizontality in founding causes of action.

Van der Walt, in his *Perspectives on Horizontal Application*, claims to have misunderstood Hohfeld's analysis of legal relations, and on a proper reading thereof, he is of the view that all social relations are in fact founded in legal relations. On van der Walt's new construction, it is not only the "law which prohibits" (laws framed in terms of rights and obligations) which can serve as a springboard into the legal system. Rather, and contrary to his previous view, one can also base a claim on the "law which permits" (the exercise of personal liberties which the law allows through its failure or refusal to regulate them). This contention is echoed by Karl Klare, who argues against—

"the untenable assumption that power dynamics in the private sphere of ordinary relationships exist apart from and unbuttressed by law. How is it that a landlord can 'privately' refuse to let a flat because of the prospective tenant's race? The landlord can do that because, and only because the applicable legal regime permits her to do so. The landlord 'invokes' the law to enforce her bigotry from the outset, because had the common law not reflected a social decision to permit racial discrimination, she could not lawfully practice it."³¹⁴

The correlation between social relations and legal relations is further emphasised by the comments I made earlier in this paper in respect of Luhmann's work. Luhmann shows that

³¹⁰ Hohfeld, W. "Some fundamental legal conceptions as applied in legal reasoning" 1913 *Yale Law Journal* 26.

³¹¹ Van der Walt *Much Ado About Nothing* above note 309 at 735-736.

³¹² *Id* at 736.

³¹³ Van der Walt *Perspectives* above note 309.

³¹⁴ Klare, K.E. "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 at 185.

the boundary of the legal system, whilst it is always rigidly maintained, is unconstrained as to where it is drawn. Since the legal system need not conform to any overarching objective principles, there is no limit to what can and cannot be law.³¹⁵ Ultimately, the law is everywhere, both when it is present as positive law and where it is implicated by its absence. Thus, the state's failure to protect its citizens from the human rights violations in the private sphere delegates to private parties the power to inflict harms on each other that it does not bestow in other contexts.³¹⁶ This is a consequence for which the law must ultimately take responsibility.

Therefore, by way of a preliminary conclusion, there are no cases in which a claimant cannot implicate the law to a degree sufficient to found a cause of action in a court. This dramatically diminishes the need for direct horizontality to play a role in creating causes of action from human rights. However, what this does highlight is the role which the Bill of Rights must play in fostering a judicial approach to civil procedure which is accommodating of the broader notion of causes of action suggested by Van der Walt and Klare.

As it so happens, Van der Walt takes up the relationship between horizontality and civil procedure in his later work.³¹⁷ He was prompted in this regard by the Constitutional Court's decision in *Carmichele*, in which it was held that section 39(2) mandated courts to develop causes of action (in that case, a cause of action in the law of delict) in line with the Constitution. Van der Walt argues that Du Plessis failed to make explicit how the development of the common law was to take place in cases where existing common law did not provide the claimant with a cause of action. He takes issue, in particular, with Kriegler J's judgment in that matter, in that his judgment he "invokes the existence of a social sphere in which fundamental rights could be violated without the Constitution providing a remedy" to the victims of such violation.³¹⁸ The effect of Kriegler J's judgment is that "unless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please", with the result that the "whole gamut of private relationships is left undisturbed."³¹⁹

³¹⁵ This point is echoed by Van der Walt in *Carmichele Saga* above note 309 at 536.

³¹⁶ Balkin, J. "Deconstruction's Legal Career" (2005) 27 *Cardozo Law Review* 719 at 728.

³¹⁷ Van der Walt *Carmichele Saga* above note 309.

³¹⁸ *Id* at 535.

³¹⁹ *Du Plessis* above note 64 at para 135.

Van der Walt argues, however, that the effect of *Carmichele* to place all private human rights violations within the reach of the law. If a defendant is prevented from arguing that an alleged human rights violation discloses no cause of action – by virtue of the fact that, in the light of *Carmichele*, causes of action and exceptions to them attract the horizontal application of the Constitution – then there is indeed no violation of human rights by private actors that cannot be litigated before a court.

This then resolves the concern about whether or not direct horizontality is needed to ensure that victims of human rights violations are not locked out of the courtroom. The answer is that horizontality is not needed, since, as a result of *Carmichele*, the work in this regard is in fact being done by section 39(2), which dictates that courts “must remain vigilant” and “not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights.”³²⁰ This they must do “whether or not the parties in any particular case [even] request the court to develop the common law under section 39(2).”³²¹ This mandate fosters a judicial environment which approaches human rights claims in an accommodating, open-minded way, which does not judge cases on whether they have triggered conceptual legal limits, but instead postulates that there is merely a “simple threshold of seriousness that the case must meet in order to be heard by a court.”³²² Once the case has attracted the attention of the court on its merits, it is then that direct horizontality in terms of section 8 will work its magic, if necessary.

Whilst I believe that this answers the majority of Van der Walt’s concerns about direct horizontality, there is a more nuanced version of his argument which I would like to conclude by dealing with. This argument once again stems from the intersection between constitutional law and procedural law. At the end of his article *Much Ado About Direct Horizontal Application*, Van der Walt offers one last compelling reason to allow litigants to found their claims directly on the Bill of Rights. He states:

“If the remedies against the infringement of fundamental rights are to be restricted to those available in common law and legislation, however thoroughly they may eventually come to address all the possible infringements of human rights in our society, these remedies will once again become part and parcel of the intricacies of substantive law, that

³²⁰ *Carmichele* above note 47 at 36.

³²¹ *Id.*

³²² Van der Walt *Carmichele Saga* above note 309 at 520.

is, lawyer's law. The common and even illiterate person . . . will no longer have a simple set of highly publicized legal rights that he or she can easily understand to safeguard him [or her] against the abuse of others. The many who are bound not to have access to lawyers are likely to be ignorant of the protection the law affords them."³²³

What Van der Walt is arguing, then, is that direct horizontality should operate to allow litigants to found their claims purely on alleged violations of human rights, regardless of whether or not existing positive law is capable of bringing a just solution to the dispute. This is an effective way, he thinks, for poor, legally unsophisticated litigants to defend their right. To anyone who understands the immense difficulties surrounding access to courts in South Africa (which difficulties include the inability to afford costly legal fees, a short supply of free legal assistance and a complicated system of civil procedure which makes self-representation virtually impossible) the necessity and urgency of Van der Walt's proposition could not be more apparent.

However, this issue is substantially more complex than it at first appears, and the constraints of this paper do not permit me to address it fully here. Therefore, I will restrict myself to the following remarks. Insofar as direct horizontality could assist in enhancing access to courts, I believe that this aspect is fully covered by the expansive and accommodating approach to causes of action which he advocates subsequent to *Carmichele*. However, the truth of the matter is that the real problem of access to courts runs far deeper than the substantive law on which litigants must plead their claims. As mentioned above, self-representation (which is what Van der Walt envisages in the passage just quoted) faces a far greater obstacle in the form of complicated, intricate and scattered rules of civil procedure which sometimes betray even the most experienced legal professionals. Moreover, even once the costs of retaining a lawyer are dispensed with, there are all sorts of other financial and administrative hurdles which face litigants when seeking to represent themselves. All of these issues must be addressed urgently through public policy. Even those people, like me, who think that virtually every social problem has a legal solution, must concede that these constitute genuine instances of problems for which the resolution does actually lie outside of the law.

³²³ Van der Walt *Much Ado About Nothing* above note 309 at 740-741.

D. To Dignity Horizontally

It is my view that the Constitution does not merely embody a profound commitment to dignity; rather, the Constitution grounds itself and therefore all South African law in a moral *Grundnorm* which calls on us to respect and promote the dignity of all others. To understand why this is so, one must understand two unique aspects of the revolution which took place in South Africa in 1994.

First, the revolution was primarily legal in nature. That is, it was not characterised by one regime simply overthrowing another by force, and occupying the power vacuum left in its wake. Instead, every detail of the transition from apartheid to democracy was governed from start to finish by the law, and in particular the interim Constitution (which was later replaced by the final Constitution). The second unique aspect was that this legal revolution was not merely a formal one – we were not left with a Constitution stipulating only the formal procedures by which laws have to be passed in order to be valid and minimal requirements for executive compliance. Rather, we were left with a Constitution containing a historically unprecedented array of comprehensive human rights. Moreover, section 1 of the final Constitution expressly states that the Constitution (and therefore, by virtue of section 2, all South African law *and* conduct), and in fact South Africa as a state, is grounded in the interrelated principles of dignity, equality and freedom. The unambiguous wording of section 1 makes it clear that South Africa's Constitution is neither a procedural one, nor one whose ends can be served through an interpretation based on soft positivism. Quite the contrary – the Constitution's acknowledgement that it is itself grounded in dignity, equality and freedom shows us that what is required in any interpretation of the Constitution and South African law is for the law to transcend itself, and to ground itself in the concrete ethical principles which were wholly absent from apartheid law and broader society.

Indeed, this point is enhanced by the interpretation which has been given to section 10 of the Constitution, which states: "Everyone has inherent dignity and the right to have their dignity respected and protected." It has been suggested that this section be interpreted such as to separate two aspects: that which comes before the "and" ("[e]veryone has inherent dignity"), and that which comes after ([everyone has] the right to have their dignity

respected and protected”).³²⁴ Under this interpretation, the statement “everyone has inherent dignity” is rooted in a moral conception of humanity and personality that I have defended through the use Kant and Hegel.³²⁵ The importance of the separation is that the entire constitution is rooted in a moral *Grundnorm*, and it is that *Grundnorm* which is the basis for a holistic interpretation of all the clauses, not only in the Bill of Rights, but of the entire Constitution. Therefore, interpretation of the Constitution should not only be thought holistically, so that no part of it is rendered redundant, but each aspect of the Constitution must ultimately seek integrity to the mandate of the substantive revolution, which is that the dignity of each human being must be respected.

What I have attempted to argue earlier in this paper is that section 8, and indeed section 39(2), are not simply sections of the Constitution that direct constitutional interpretation and applicability. More than that, these sections are part of an aspirational ideal of legality, inseparable from the idea of dignity in which the entire Constitution is rooted. Thus, arguments for and against horizontality are not simply arguments about the application of the law. Rather, how one interprets section 8 and section 39(2), as mandated by the substantive revolution and the principle of dignity, lies at the very heart of the defence of the our Constitution. Ultimately, if the Constitution aspires to ground itself in dignity, and section 8 and section 39(2) are the mechanisms through which the Constitution implements that vision in the law, then it must follow that section 8 and section 39(2) are inseparably tied to dignity, and indeed freedom. In a profound sense, then, section 8 and section 39(2) seek to guarantee the integrity of the substantive revolution, as these clauses mandate that courts review all laws in the light of the new political morality, to which this nation now must aspire if it is to truly move beyond the horrific legacies of apartheid.

However, the very idea that freedom can be established as the basis of the Constitution seems to present a paradox, at least if one defines freedom in neoliberal terms as the absence of constraint (specifically of moral obligations). Moreover, to the degree that freedom and dignity imply that morality is not only part of law, but is in fact the founding principle of law, those who are still trapped in the throes of soft positivism can only scoff at this prospect. Indeed, if it has been suggested that modern philosophy is still trying to flee

³²⁴ See Ackermann above note 58; Cornell above note 58.

³²⁵ Of course, it could also be defended through ubuntu – see Cornell above note 58.

the shadow of Hegel,³²⁶ then certainly modern legal thought is still trying to flee the shadow of H.L.A. Hart. I dare not suggest which is staging the more successful escape attempt. What I will suggest, however, as I have tried to show in this paper, is that these correlative Hartian views of law and freedom are irrational, empty and are in fact contrary to the richer notions of freedom espoused in the works of Kant and Hegel. Indeed, when we lay down a rational law for ourselves and others in virtue of which we strive for the ideality of relationships in which we mutually respect each other's dignity, only then are we meeting the demands of the highest aspirations for a modern constitutional state and indeed of our own humanity. We in South Africa are fortunate enough to have a Constitution which expressly commits to these exact kinds of relationships.

³²⁶ Cornell, D. "Post-Structuralism, the Ethical Relation, and the Law" (1987) 9 *Cardozo Law Review* 1587 at 1588.

VIII. CONCLUSION

In this paper I have attempted to show that the uniquely legalised nature of oppression in the apartheid state is the very cause of the systemic material disadvantage which continues to plague contemporary South Africa. Indeed, while apartheid as formal system of governance in South Africa is over, its effects persist and perpetuate in the form of the unacceptable socio-economic circumstances faced by the vast majority of South Africans, coupled with systemic discrimination and an entrenchment of pre-democracy power relations. Thus, the single greatest challenge for the legal profession in this country is to take advantage of our new Constitution and to use it to further the realisation of social justice for South Africa's most marginalised people.

In order for us to succeed in this challenge, we must find a way for the law to transcend itself and ground itself in a positive commitment to upholding ethical duties between individuals which are sourced in the principles of freedom and dignity. Through the work of Kant and Hegel, we see that our freedom is not simply a fact, or a mere entitlement which comes unencumbered by responsibilities. Rather, our freedom is only a possibility, but it is this possibility which places on each rational being to act in such a way that continually expresses the possibility of our free will in the only meaningful way we can; that is, by laying down an objective, universal moral law for ourselves and others which commands us to respect the dignity of all others. However, the insight of Hegel in particular is that the full rationalization and actualization of our freedom in the world only takes place when we objectively embody the moral law in our legal institutions, and so come to move from mere legality to the notion of *Recht*.

Once we accept, contrary to soft positivism and neoliberalism, that the law not only embraces morality, but is in fact principally founded on it, we can understand that direct horizontality is not only a permissible means of promoting social justice in the law; it is, in fact, crucial to the project of social justice, and is rationally demanded by any constitutional state which aspires to an aspirational legality rooted in the fundamental principles of dignity.

It is my hope that this paper will reinvigorate debate not only about the direct horizontality of human rights, but even more importantly, about our current failure to live up to the mandate of the substantive legal revolution embodied by our Constitution, and how we might be able to aspire towards a more ethical and just vision of South Africa.

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