

T H E M O R A L L E G I S L A T U R E



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THE MORAL LEGISLATURE*

This paper is an experiment in what John Rawls recently called "Kantian constructivism". It seeks to establish a "suitable connection between a particular conception of the person and first principles of [morality], by means of a procedure of construction".¹ Yet, it differs from Rawls' similar efforts in a number of ways. The emphasis is morality generally, not justice in particular. The construction attempts to be more "realistic", especially in substituting external procedures for Rawls' "veil of ignorance". These differences are, I hope, at least suggested by substituting "the moral legislature" for Rawls' "original position".

A paper of this length necessarily imposes substantial restrictions on what can be done. Given the experiment I want to perform, much must be left undone or only suggested. What we shall end with is an outline of a conception of morality, a central idea, not anything like a full moral theory. The experiment will be a success if a charitable reader can conclude from what is said that that conception seems interestingly different from others currently available, that it seems worth further exploration.

I shall proceed in this way. Section I explains further what motivates the sort of construction proposed. Sections II-V describe the moral legislature itself, explaining as well why it makes sense to construct it as I do and how it differs from some obvious alternatives. Section VI concludes with an example of how the moral legislature might be used, the sketch of an argument for the claim that positive law cannot in general be morally obliging.

I. Dividing the Question

Moral theories divide roughly into the "critical" ("idealistic", "demanding") and the "descriptive" ("realistic", "commonsensical"). Plato's Republic provides an early example of the first sort of theory; Aristotle's Nicomachean Ethics, an example of the second. Of course, almost all moral theories are to some degree both critical and descriptive. They are all critical at least insofar as moral theory tends to systematize, Systematizing means simplifying, and even considerations of simplicity can be enough to make us change beliefs. Moral theories are also all to some degree descriptive because a moral theory must present a conception of morality sufficiently like actual moral practice to be recognizably a moral theory rather than a theory of something else.

Differences in degree are nevertheless important. Critical theories tend to work out a conception of morality on grounds more or less independent of human practice, capacities, and interests, leaving the question of what humans in fact do or say to be dealt with under the heading of "objections". That people generally do or think the opposite of what the theory says is as likely to be considered a weakness of people as a weakness of the theory. Descriptive theories, on the other hand, tend to bring in human practices, capacities, and interests early, to defend the theory by showing that it fits "what we think", and to treat any divergence from actual practice as a serious objection. If the danger of critical theory is people saying, "If that is what morality is, why bother?", the danger of descriptive theory is making impossible criticism of existing moral practice (even though such criticism

itself seems to be part of that practice). A moral theory certainly can fail to be critical enough.

The moral legislature is probably better suited to model the more descriptive theories than the more critical ones. The intuition upon which it rests is--to paraphrase the New Testament--that "morality was made for man, not man for morality."² But the moral legislature rests on that intuition only if the intuition is understood in a certain way (that is, in a way the New Testament did not intend it). That way of understanding it is (in part at least) itself a function of how we conceive the world.

If we conceive the world as including a traditional god, we might naturally gloss our paraphrase as "God made morality for the good of people; so, to determine what morality requires, ask what is good for people." So glossed, the paraphrase states the intuitive foundation of traditional natural law theories (and of some forms of utilitarianism). For such theories, the problem of moral theory is to determine the good the "original legislator" aimed at, to approximate the method by which he must have moved from that good to standards he would want to guide what people chose to do, and then to judge conduct accordingly. An eternal origin for a standard at least suggests that the standard should be the same for all time (or, at least, for as long as "human nature" remains unchanged). Human knowledge could not change such "right reason", only our understanding of what right reason is. Natural law would be a fact anyone might learn who could adopt the perspective of the original legislator and reason accordingly. Such theories tend to be highly critical.

If, however, our conception of the world does not include a traditional god, "morality was made for man, not man for morality" suggests another gloss: "People make morality for their own purposes, not for purposes of no

interest to them; so, to determine what morality requires, ask what people want done." The problem of moral theory would then seem to be understanding what morality must be to have the central place in human life we suppose it to have. Why is the moral enterprise as attractive to people as it seems to be? Trying to understand morality in that way imposes a perspective quite different from the "external" perspective one takes by asking what an original legislator would have done. Morality may still be understood as law, but it must now be understood as the analogue of other human law, not as "divine command" or "command of reason" but as a "command of society" or "framework of human cooperation". What human beings happen to think becomes much more important. The moral legislature models this second gloss of "morality was made for man".

What must morality be to be what we would contrive? That question goes back at least to the Republic (though it appears there as part of a view the Republic is supposed to refute). The question may be divided into at least three parts. One part concerns membership in the moral enterprise. Who is this "we"? Another concerns the subject of morality. What sort of contrivance is morality? What is it supposed to do? How it supposed to do it? The third part of the question concerns the procedures by which "we" would reach particular rules, practices, principles, or the like (hereafter "practices") not only recognizably on the appropriate subject but also of the appropriate sort. How should we imagine the moral legislature to decide what we suppose it to decide?

This division of our question into three parts is only for convenience of exposition. And even its convenience for that is limited. We shall not be able to answer one part without beginning to answer the next, nor always be able to

answer one without supposing a certain answer to another. Nevertheless, let us try to take the question part by part.

II. Who is a Member of the Moral Legislature?

There can be no morality without one or more moral agents. That seems uncontroversial. A society of bees or wolves, for example, however well-organized and peacable, cannot be a "moral community". Why? Because such a society lacks moral agents. Morality is an aspect of what moral agents, and only moral agents, do.

It also seems uncontroversial that the class of moral agents includes only rational agents. We do not, that is, think of infants, the insane, or the like as beings capable of cooperating in a moral practice as moral practice (rather than, say, as game, threat system, habit, or the like). So, insofar as morality is a human contrivance, those contriving it must be rational agents. Because it seems equally uncontroversial that the moral community consists of more than rational agents (for example, infants and the insane), the moral legislature, the body we are to imagine contriving morality, is not necessarily the whole moral community. The moral legislature is only the morally active part.

We must be careful what we read into the requirement that the moral legislature should include only rational agents. The rational agents we are to imagine contriving morality are (as much as possible) to remain what they actually are when they engage in moral (or immoral) conduct. They are to keep their appetites, interests, purposes, knowledge, intellectual dispositions, even their individual prejudices, insofar as doing so is consistent with choosing rationally. Because we wish to understand morality as a human contrivance, as a contrivance of the poor empirical

beings who actually keep promises, condemn thefts, and give to charity, we should understand the requirement of rational agency so as to make the members of the moral legislature as much like actual moral agents as possible (consistent with our theoretical needs). What then is a rational agent?

If there is to be a morality, those subject to it must be able to make it their common practice. By "practice", I must, of course, mean more than "instinct", "habit", or "pattern". A moral practice is something rational agents make their practice. At least some of those participating in the practice, the "moral agents", must be able to understand the practice as something to be participated in or not as they decide. They must also be able to understand such decisions as something to be made according to the weight of reasons. They must, in short, be able to understand the practice in question as a rational practice (rather than, say, a biological response like breathing or an amusement which, like a hobby, one needs no reason to participate in).

But rational agents must not only be rational in this intellectual way. They must also be rational in their agency. Each must be able to act more or less as he decides. Rational agents must be able to coordinate their conduct with others engaged in the same practice, maintain that resolve for a long time, and formulate the practice well enough to teach it, resolve misunderstandings, and consider changes. That seems the least rational agents must be able to do if they are to have a morality (in anything like the full sense in which we have a morality).

A rational agent may, of course, not do what he can do. He may fail to act rationally for any number of reasons including inattention, mistake, confusion, and lack of time or motive for full deliberation. A "rational choice" is a choice a rational agent would make under reasonably good

conditions of choice (that is, under conditions excluding inattention, mistake, and so on), not the choice a rational agent would invariably make whatever the conditions. Rational agents do tend to make rational choices even under ordinary conditions, but that is only a strong tendency. Because rational agency is a capacity, such agency is not equivalent to any particular sequence of actual choices. A "rational agent" may fail to choose rationally rather often before we have reason to doubt his rationality.

Most adult humans satisfy these minimum conditions for rational agency (and much we consider insanity, immaturity, or senility consists in failing to satisfy one or more of them). But, it seems, humans are not the only beings who could satisfy them. Some nonhumans, not any nonhumans we actually know about but some we imagine (for example, the "Martians" of science fiction), seem as capable of satisfying those condition as we do. Is that counter-intuitive? I think not. Such imagined beings, however different genetically, seem to share our moral status, when they do, (in part at least) because they too are rational agents in at least the minimum sense I have suggested. Science fiction thus seems to show that "agent" rather than "human" better describes those rational beings without which we cannot conceive morality. It is (in part) being a rational agent, not just being a rational human thinker, rational human feeler, or the like that makes one someone who can contribute to there being any moral enterprise at all.

It is, however, not only being a rational agent that is relevant to our having a moral practice but being a rational agent of a certain kind. The moral legislature cannot include even all rational agents. Dead rational agents, though once members of the moral legislature, cannot be members now. Being dead, they are no longer agents, no

longer able to support or undermine moral practice. Future generations are also not members of the moral legislature. Since they do not yet exist, they cannot contribute to our moral practice. They will be members of the moral legislature some day but not until their day. Every member of the moral legislature (today) is our contemporary.

So, the membership of the moral legislature is time-relative. That, I think, is not too surprising. More surprising is that the membership must also be "space-relative", "power-relative", "communication-relative", "interest-relative", and even "common sense-relative". Not all rational agents contemporary with us are necessarily members of "our" legislature (or of any other). That may seem surprising. Being a living rational agent seems to be all we require of a being to treat it as a being much like us. Yet, if we are to have a model of "the moral enterprise" as we know it, we must exclude some living rational agents from the moral legislature (though not necessarily from the category of "beings much like us"). These rational agents will be of at least two kinds, those that are too far away and those who are not enough like us. Excluding the second kind is more controversial than excluding the first. So, let us begin with the first.

Imagine beings who are so far from us that they are in no position (significantly) to affect what we do or to be (significantly) affected by what we do. Such beings cannot, as a matter of (imagined) fact, cooperate with us. They cannot participate in the same practice we do (though they can have a similar practice of their own). They cannot make it easier or harder for us to have a morality. Their moral practices need not refer to us, nor ours to them. We live in "different moral worlds". And so long as we do, we need not take such beings into account when formulating our moral practice (nor need they take us into account when

formulating theirs). There is no point to including such faraway beings in the moral legislature. Morality as such is not necessarily a single form of life.

Next, imagine rational agents who, though close at hand, still cannot harm or help us in any way (say, because they are too diffuse or too slow); or who, though they can help or harm us, cannot communicate with us well enough to coordinate their conduct with ours; or whose interests are so different from ours that, though we can communicate with them, there is no joint practice we and they could have an interest in having. Such beings, however much moral agents, would not be beings who could (or, at least, would) contribute to our moral enterprise as their own (though they might have a moral enterprise of their own). We would have nothing to fear from them that a common moral practice could prevent, nothing to hope from them that a common moral practice could achieve. We would not have the same reason to take them into account in formulating our moral practice that we have for taking into account those who can contribute to that practice as we do. They would not be "one of us".

Last, imagine beings who, though rational, able to communicate with us, and sharing our interests, differ radically from us in their conception of how the world works. For example, imagine some otherwise rational agents who believe that (all appearances to the contrary notwithstanding) whether people will die is not something people can control. Such rational agents would, we might say, lack "common sense". Common sense (in this context) would consist of a set of beliefs, attitudes, or the like which, though rationally permissible, is not rationally required. Common sense is "sense" insofar as reason allows the belief, attitude, or the like in question; "common",

insofar as some community of rational agents shares it. Common sense is always relative to some community.

So, suppose the rational agents we are imagining not only believe in "fate" but take that belief seriously enough to choose their moral practice accordingly (as most putative believers among us do not seem to). To such rational agents, prohibiting killing could not seem the self-evidently necessary practice it seems to us. For them, death would be something that sometimes happens "through us" but never "because of us". Though they would take as much interest as anyone else in prohibiting killing did they believe it possible to prevent deaths by so doing, they could not in fact take such an interest given their belief in fate. "Why prohibit killing?" they might reason. "Death will come when it will, whatever we do. The prohibition is useless for its intended purpose, but it would invite those who do not believe as we do to keep us from doing some things we enjoy doing, for example, shooting at one another. Therefore, we ought to oppose this prohibition."³

No doubt beings with a few "weird beliefs" like this (which they took seriously) might, if otherwise rational, still be accommodated within the moral legislature. They might, for example, be willing to prohibit killing in return for some other practice. They would, though somewhat lacking in common sense, still be "reasonable" (that is, be beings with enough common sense to permit general cooperation). But beings with too many such beliefs would, however rational, not be beings with whom we could cooperate on anything much like morality as we know it. They could not be, morally speaking, "one of us".

Membership in the moral legislature thus seems to require "common sense" as well as rational agency, ability to communicate with one another, and so on. We must all believe in roughly the same laws of cause and effect, the

same connection between agents and actions, the same structure of agency itself. We must recognize one another as rational agents with roughly the same powers and interests. If we did not share this common sense, we might, though sharing everything else, still not be able to share a common practice. Behind a common moral practice, there must be a shared conception of the world.

For convenience, we shall often use "common sense" in a somewhat wider sense, that is, as including (beside the appropriate beliefs) the interests and ability to communicate necessary for a common moral practice and "reason" to include both common sense (in this wide sense) and rationality.

III. Some Worries About Membership

Many moral theories avoid fracturing morality, as I have just done, by building much more into the concept of rationality than I have. Such a theory might, for example, suppose rationality to commit a being to a single principle of induction, a certain policy toward risk, a special conception of the good, and so on, thereby making rationality more or less equivalent to a certain common sense. Such theories rule out in advance the possibility that common sense might (like geometry) consist of a set of mutually exclusive conceptions of the world, each with its advantages and disadvantages, each as rational as any other, and each superior to any nonrational alternative. Against such theories stands the testimony of anthropology and history. Seemingly rational people have had disturbingly crazy views on most topics important to life, organized life accordingly, and lived to praise the consequences. So, since I have yet to see a decisive proof that rationality entails a certain common sense, I prefer to leave open the

possibility that it does not and get what unity there is in moral practice more modestly.

Because the moral legislature is supposed to help us understand why morality (as we know it) has the form it has, we need not, I think, rule out the possibility of other moralities. We need only explain why the existence of such alternatives is not something moral agents inhabiting "our moral world" need be concerned with. The explanation is that those whose sense of the world differs too much from our own would have insufficient reason to cooperate with us in the practices we think necessary to do what we want morality to do. We would be equally unwilling to cooperate with them in what they think necessary. They would look upon our moral enterprise as someone's else's undertaking, not theirs, just as we would have to think of them as, well, "not us". Each would find the "morality" of the other more or less opaque, something that can perhaps be understood, but only as an outsider, an anthropologist, understands alien practices.

For any moral agent, there is only one morality, his own, the others being "mere positive morality", "mores", or the like. This, I think, explains (at least in part) why ethical relativists so often seem amoral. Even to speak of "our morality" is to speak as if it were only one among many, to speak, that is, as if one did not recognize one's own morality as making a unique claim, a claim no other can make without itself becoming, for the speaker, morality itself. Yet, unless one recognizes one's own morality as making such a claim, one does not recognize it as morality at all. One takes the point of view of the outsider for whom even that practice is only positive morality. One speaks in a way consistent with not understanding what morality is.

Since I do not want to give the impression that I look at morality from the outside (since I do not), I shall (as much as possible) hereafter speak of "morality" rather than of "our morality" and of "the moral legislature" rather than of "our moral legislature". I hope this way of speaking will prove satisfactory.

Morality (that is, "our morality" or any other)--and so the moral legislature ("ours" or any other)--seem to rest upon a rich factual unity, a community much more potent than the very weak bond all rational agents can share. So, it may be that even in the world as we know it, some rational agents, say, in Borneo, are not members of the moral legislature. That admission invites one of two objections to the approach I am taking. On the one hand, it might be objected that I am clearing the way for the worst sort of provincialism. I am proposing a model of moral theory that would allow us to discount the moral opinions of people like those in the distant jungles of Borneo. On the other hand, it might also be objected that I am opening the way to moral relativism of the most uncritical sort. If such distant peoples live in another moral world, what right can we have to tell them what they may do, for example, by insisting (as we have) that they give up headhunting? How can our moral practices take precedence over theirs?

That these two objections seem to point in opposite directions suggests that, in opposed ways, both miss the same strength in the model I am proposing. What might that strength be? I think it is this. I have opened the way for discriminating between people "like us" and people who are "not like us". But we regularly do make such discriminations. For example, we do not consider the existence of headhunting in Borneo, however moral such a practice seems to the headhunters there, as relevant to the claim that headhunting here would not be morally wrong.

Indeed, we generally find invocation of such distant practice or opinion rather disconcerting in this context (as we would not find it in an argument concerned with whether we should allow people in Borneo to hunt each other for heads). We have a sense that some boundary of argument has been crossed, some fallacy committed. We also do not find such invocations convincing--except when used to refute claims about a "universal human nature".

That we regularly discriminate in this way is, of course, not enough to make the model's doing so a strength. The discrimination must be proper too. I think it is. So long as we are concerned with what our practice should be, not with what that of headhunters in Borneo should be, pointing out that "we are we" and "they are they" appeals to a relevant difference between "us" and "them". Their opinion concerns what they are supposed to do, not what we are supposed to do. Their opinion registers their evaluation of the benefits and burdens of a certain practice for them, not of ours for us. If we do not share with them a single common sense (as we well may not), their opinion (and practice) may, once fully explained and defended in their terms, seem simply foolish in ours (as ours may seem in theirs).

Many ways of thinking about morality require us to view these headhunters of Borneo either as merely benighted (for example, because they do not see the effects of their conduct as we do or because they do not see its obvious immorality) or as somehow threatening the legitimacy of our moral practice (because there is a significant division of opinion among rational agents). One strength of thinking about morality as I am proposing is that it requires neither. The headhunters need not be benighted, provided their moral legislature permits headhunting. But that their moral legislature permits headhunting does not mean that

"ours" does (or should). If our moral world is not theirs (or theirs ours), they cannot be members of "our" moral legislature (or we of theirs).

To say that the headhunters of Borneo (or the diffuse beings we imagined earlier) are not members of the moral legislature is, of course, not to say that they are not members of "our moral community" (that is, beings toward whom we may have moral duties). If they are within our power, we can have moral duties toward them (duties beyond that of mere noninterference). For example, we might have a duty to protect them from harm. If so, we might have a "humanitarian" duty to prevent their headhunting ("for their own good"--as we conceive it), with a corresponding right to outlaw headhunting and send in troops to make them obey. We are not morally obliged to tolerate their practice just because they are not members of the moral legislature (or because they approve the practice for reasons they consider good).

Limiting membership in the moral legislature in the way I propose means that the headhunters of Borneo may not be "full-fledged members" of "our" moral community. Whatever part they come to have as objects of our practice would have to be won by an argument different from that for our moral status (for example, an argument appealing to our sympathy for them). The argument would have to be one we (as members of the moral legislature of this moral community) would find convincing. Their moral status would be analogous to that of children, animals, and the like whom we protect because we care what happens to them rather than because they are contributing members of our moral enterprise.⁴ They could correctly view us in the same way (for example, when we visit among them). We can understand them but only if we understand them as different from us.

The relativism of the moral legislature is perhaps more troubling when the question is what morality requires when moral worlds collide and begin to merge, for example, because of invasion and subsequent acculturation. There may be a time when there are neither "two moral worlds" nor "one", a time when much can be done with a clear conscience that a later generation may look back on with a mixture of incomprehension and horror. The moral legislature does not provide a ready-made body of moral practice to follow in such a situation, only a method for working out such a practice, if one is possible. Part of working out such a practice is deciding who is capable of cooperating in a common practice of the appropriate sort. Where people know little of one another, they may seriously underestimate one another's capacity for cooperation, relegating to the category of "immature", "mere animals", or the like many who are as capable as any of full cooperation. The actual membership of the moral legislature would then be controversial. The controversy would be over an ordinary fact: Can we cooperate with them in practices of the appropriate sort? Are they enough like us for that? But, while the controversy lasts, working out a common practice would be impossible. Such a period of confusion might be thought of as a partial "moral interregnum", a time when certain acts may be morally indeterminate because they are morally permissible supposing a certain membership for the moral legislature but morally impermissible supposing a larger membership about which there is not yet agreement among the rational agents who can agree.

There is an obvious affinity between the proposed model and Hobbes' state of nature. The criteria for membership in the moral legislature both generalizes and modifies Hobbes' explanation of why "all men" (that is, "we") are "by nature equal" (that is, members of the moral legislature). One's

membership in the moral legislature is not (as it at least seems to be in Hobbes) contingent on each rational agent's being able to kill any other. But it is contingent on each rational agent's power. The power to help make a practice of the appropriate sort underwrites each agent's standing as full-fledged member of the moral community. Those who lack such power end up as children, the insane, the senile, animals, or the like.

IV. What is Morality?

We have, in the course of answering our first question, begun to answer the second. To explain why the moral legislature should consist only of certain rational agents, we had to say something about what sort of contrivance morality is. Among the things said was that morality is "a practice". A practice is a complex of rules, principles, permissions, roles, offices, and the like. But it is more than that. A practice (an actual practice) is such a complex realized in conduct. We can, of course, speak of "an ideal practice", "a possible practice", or the like abstractions, just as we can speak of a possible or ideal income. But we should not confuse one with the other. A possible or ideal practice is no more a practice than a possible or ideal income, however large, is something we can spend (except "possibly" or "ideally"). If morality is a practice we contrive, it must actually (if only roughly) be realized in our conduct. If not, what we contrived would be no more than a possible or ideal moral practice, a blueprint for a morality. Whatever claim such a "practice" can have on us ("possibly" or "ideally"), it is not the claim morality actually has.

We may then distinguish between "morality as it is" and "morality as it should be". Morality is what the

moral legislature makes it. Morality should be what the moral legislature should make it. Every proposal for change of moral practice will involve a claim that morality should be different from what it is. That claim cannot be an ordinary moral claim (on pain of implicitly claiming that morality is not what it is). So, the should of moral change is not the ordinary should of morality. Though both are "prescriptive", they do not prescribe in the same way. The should of morality reports what morality prescribes. It prescribes to moral agents as agents of morality. The should of moral change, in contrast, prescribes to moral agents as makers of morality. That should must rest on considerations beyond those of ordinary morality.

Nonetheless, the claim that morality should be different from what it is is, if correct, a moral claim of some sort. It will, that is, be supported (in part at least) by the sort of reasons that support existing moral practice. All such reasons are, I think, best thought of as "morality-making" reasons, while ordinary moral reasons (for example, "This is wrong because this is lying and lying is wrong") are "morality-reporting". If morality is a practice the moral legislature makes, moral judgments must be factual judgments (though only in the sense that legal judgments are). They must report the resolves of the moral legislature or conclusions derived from those resolves.

Thinking of moral practice in this way may explain the appeal of "moral sense" or "intuitionist" theories of morality. Moral agents are as certain to have an "inward knowledge" of morality as native speakers are certain to have such a knowledge of their language, or as a lawyer is certain to have a sense of the law. And, just as some native speakers have a "better ear" for grammar or syntax than others, and some lawyers a better sense for the law

than others, so some moral agents may have more insight than others. Where the intuitionists may have gone wrong is in thinking that this "inward knowledge" is of some "non-natural property". If grammaticalness or lawfulness are natural properties, then so is moralness. Of course, for most of this century, many moral theorists would probably have thought all three properties non-natural. What is important, however, is not so much the classification of properties as natural or non-natural as making sense of our knowledge of them however classified. Thinking of our "inward knowledge" of such properties as the habit of mind practitioners normally develop by participation in a practice seems to me to keep most of what the intuitionists wanted to say without making morality inexplicable.

Thinking of morality as a practice also suggests a way of getting around the is-ought problem. Morality understood as a practice is an "is", but it is an "is" consisting of "oughts" (that is, rules, principles, and so on), just as language and law are. Of course, morality has an aspect neither language nor law seems to. Morality is "categorical" while these other ought-systems do not seem to be. That is, to recognize some rule, principle, or the like as a part of morality is (at least) to recognize it as something that we cannot rationally refuse to consider, whatever our purposes happen to be at that moment. Any model of morality should explain that.

All practices (all actual practices) impose burdens. There are rules to be followed, principles to be applied, roles to be occupied, and so on. Insofar as any practice is burdensome, we do not engage in it without good reason. That seems as true of moral practice as of any other. So, if rational agents are to have sufficient reason to cooperate in contriving (and maintaining) a moral practice,

the practice must offer each expected participant something he cares about enough to accept the burden the practice necessarily imposes. Let us call "a help" anything which would serve some purpose a rational agent cares about (insofar as it would do that) and "a harm" anything which diserves such a purpose (insofar as it does). Given the burdensomeness of moral practice, morality-making reasons must refer to helps and harms over which the rational agents in question (individually or collectively) have some control. Morality must, all things considered, (at least seem to) help^{each moral agent} more than it harms^{him} if it is to be what rational agents would contrive.

Though morality-making reasons thus seem necessarily related to the purposes of rational agents, they are not necessarily so related only to facts about the self-interest of rational agents. There does not seem to be anything irrational about caring for someone beside oneself (nor does such interest seem against common sense, though it may be against some possible common sense). There is not, it seems, anything irrational even about caring for someone else more than one cares for oneself. What perhaps is irrational (and certainly against common sense) is not to care for oneself at all.

Morality-making reasons also need not be limited to interests in self or others. Insofar as we care about simplicity, beauty, or the like for their own sake, considerations of simplicity, beauty, or the like will be relevant to what we make morality. Morality-making reasons are limited only by what interests the members of the moral legislature.⁵

Morality, we have also said, is a common practice, a cooperative activity. Morality does not, in other words, consist only of doing certain acts whatever anyone else does. Our reasons for acting morally depend in part on what

we expect each other to do. This is one way morality differs from prudence. I have as much reason to be prudent, perhaps more, if others are not (though what acts will be prudent in a particular situation depends in part on what others may do). I do not, however, have as much reason to be moral if too many others are not. It is not only that what is moral may change (though that is sometimes all that happens). It is also that sometimes the category itself loses application. Morality degenerates into mere prudence. That, I take it, is what Hobbes means when he claims that nothing in the state of nature is just or unjust.

Though morality is necessarily a common practice, the practice in question need not depend for its rationality on each agent involved doing exactly what she is supposed to do. Indeed, it would (except perhaps among angels) be unwise to adopt any complex practice that required every participant's full cooperation in order to make it worth participating in. The benefits of having a morality must be sufficient to make up for the burdens, even allowing for a substantial amount of failing to do what morality requires. There are many ways to achieve that level of participation. We might distinguish three: (what we might call) "the strategy of rules", "the strategy of principles", and "the strategy of ideals". Let us begin with the first.

The strategy of rules is strict morality. There are certain rules (for example, "Don't kill" or "Keep your promises"). The rules may have specific exceptions (for example, "except in self-defense"). Rules and exceptions either apply or do not apply. If an act violates a rule (without coming under an exception), the act is morally wrong and, unless excused, is subject to punishment proportioned in some way to the wrong done. The strategy of rules works best when the acts required or forbidden are relatively easy to do (for example, keeping promises one has

made) or relatively easy to avoid (for example, killing). This strategy seems best suited for maintaining that minimum of order without which morality would not be worth having.

The strategy of principles is more flexible. There are "principles" (for example, "Help those in need") which are to have a certain weight in one's deliberations. Principles cannot be violated, only given less weight than they deserve. All else equal, following such principles is morally good and not following them morally bad (rather than morally right or wrong). Because moral principles cannot be violated, they cannot control conduct in the way moral rules do. Acts they govern cannot speak for themselves in the way acts governed by rules can. For example, if you fail to help someone in need (say, by ignoring the pleas of a beggar), I have, without knowing how you decided what to do, little reason to conclude that you acted badly. The principle of helping those in need does not require you to help everyone in need or even anyone ever. All it requires is that you give due weight to the need of others. Your failing to help in any particular circumstance can only raise a weak suspicion of acting badly, a suspicion you can dissolve by pointing out that even giving due weight to the need in question, other considerations we all recognize as legitimate (for example, your own need or previous good works) outweigh it.⁶

Because principles cannot be violated, they do not lend themselves to punishment in the way rules do. They can nevertheless be enforced. For example, if I conclude that you did not give due weight to another's need, I may point that out (that is, blame you). I (and everyone else) may also be entitled to treat you in a way which would otherwise be morally bad, for example, by giving your need less weight than would otherwise be appropriate. Principles seem best

suited for that part of morality which helps to make life decent (rather than merely possible).⁷

The strategy of ideals is even more flexible than the strategy of principles. A moral ideal is a morally good state of affairs (for example, the happiness of mankind or the absence of injustice). Moral ideals may be beyond human power to achieve. Certainly many are beyond the power of any one moral agent to achieve. A moral agent who does not aim at a moral ideal does not fail to do what he should do (much less, what morality requires of him). His conduct need not be blameworthy in any way (as it would be if he violated a moral rule or failed to give due weight to a moral principle). Moral ideals define the supererogatory. They are what it is morally good to aim at (so long at least as one does nothing morally wrong or bad). But moral ideals are not the same as ideal morality. They are part of actual morality, supported by actual praise, deference, and other rewards. The strategy of ideals serves moral practice by encouraging attitudes, efforts, or institutions which are likely to help maintain morality. The moral legislature adopts the strategy of ideals by providing rewards for those who try to implement an approved ideal. Such provision might take the form, for example, of a principle that, all else equal, the needs of "saints" take precedence over the needs of ordinary people.

I have presented these three strategies as if they were more or less independent. They need not be (and often are not). Because compliance with moral practice is likely to be only partial, morality should (and does) make provision for responding to failure to conform. Some of these provisions work within a particular strategy. For example, the rule against killing includes an exception for self-defense. The exception has the same all-or-nothing character as the rule itself. They both belong to the same

strategy. Sometimes, however, the provision for partial compliance adopts a different strategy.

Consider Kant's example of a lie to a would-be murderer. The murderer comes to my door seeking his victim who, unknown to him, is in my house. He asks me whether I know where she is. To remain silent or to answer the murderer truthfully would make the murder almost certain. But to tell the murderer what I believe to be false, would be lying. The moral rule against lying may not (as, I believe, ours does not) include an exception for lies in a good cause. So, such lies violate the rule against lying. But various principles could mitigate the effect of that rule in such a case as this. The principles of punishment could proportion punishment to take account of the motive of the actor or the amount of undeserved harm the act does (which, in my case, should be none at all). And other principles might (as they certainly seem to) make it morally good to protect the innocent.

So, if I refuse to lie, I could not do wrong but I may still fail to give due weight to the principle of protecting the innocent. My act would be morally right but morally bad. If, on the other hand, I do lie (for the right reasons), my act would be "technically" morally wrong and deserve token punishment (and might make me liable to compensate any innocent parties for resulting damage). But, lying in such circumstances (for the right reason and accompanied by appropriate penitence) could also be morally good. Morality could leave me to choose between the technically morally right and the morally good.⁸

Such strategies (and others), however different from one another, have one purpose: to help make a practice moral agents have enough reason to participate in enough of the time to provide the basics of a common life. Morality, we noted earlier, seems to make a claim on every moral agent

that every moral agent recognizes (or, at least, should recognize insofar as he is rational). The claim morality makes must then be one that any rational agent (sufficiently close, contemporaneous, and so on) can recognize by weighing reasons he himself recognizes as good. The claim must depend on the balance of morality-making reasons favoring each agent's general participation. Morality cannot demand too much of any agent if it is to be rational for him to recognize morality as having a claim on him; nor can it demand too little if it is to provide the basics of a common life. Let us call the minimum morality must ask of rational agents for there to be a moral practice "support".

Supporting morality must, I think, include helping to enforce moral practices against others (by blaming, by helping to punish, and so on), appearing to follow moral practice oneself (for example, by doing as morality requires or at least taking care to make one's not doing so as inconspicuous as possible), and endorsing moral practice (which is why hypocrisy truly is "a tribute vice pays to virtue"). So long as the moral practice being supported is not itself unreasonable, supporting it will seldom be against anyone's interests. For example, one reason not to appear to be doing wrong is that making oneself conspicuous makes punishment likely. Each moral agent can ordinarily support morality because it serves his purposes to do so--if almost everyone else does the same and he has good reason (the practice before his eyes) to believe almost everyone else is doing the same.

We can now distinguish between "actual morality" and "ideal morality" in a way making clear the difference between the claims they make. We might define (actual) morality as that practice (or set of practices) every rational agent actually capable of mutual cooperation supports (in part at least) because every such agent has

sufficient reason to support it (all things considered). Ideal morality, in contrast, might be defined as a possible practice every rational agent capable of mutual cooperation would, after consideration of all alternatives but ignoring the costs of changing over, prefer everyone supported instead of the present practice (even if each is also willing to support the present practice while others do the same). Though there can be only one actual morality, there could, it seems, be several quite different ideal moralities.

The reason ideal morality cannot have the claim on us actual morality has should be evident from the definitions. Actual morality is an existing morality. An ideal morality is one that would have beat out the existing morality in fair competition. But the fair competition did not occur (perhaps because, at the time the morality took shape, the ideal morality had not yet been thought of or because prior practice gave the present morality a distinct advantage). Now the costs of changing over make the ideal morality "too idealistic". To follow an ideal morality, whatever anyone else in fact does, could well be personally disastrous and morally outrageous. Following an ideal morality may also be irrational. Because the good to be achieved by having a certain proposed morality must depend (in large part at least) on its being achieved as a morality (that is, as a common practice), acting on an ideal morality when almost no one else does may not even serve the good that would justify the practice.

The categoricalness of (actual) morality may be understood as a concommitant of assuring minimum support. Because moral practice is (by definition) a practice each supports (at least in part) because reason requires it, moral agents, whatever their particular interests happen to be, should (and generally will) recognize morality as doing

what they want done. A moral agent might still rationally tell himself, "I shall be immoral whenever it serves my interests", but he will have no reason to tell himself, "I don't care whether this moral practice goes on or stops now." He will have an (all things considered) interest in maintaining it. Ideal morality cannot be categorical in this way.

But what if a rational agent nevertheless concluded that morality as it is is not something he can support? There are (at least) two possibilities. One, by far the more likely, is that the agent in question sees things differently not because of any discovery his fellow moral agents can share but because he has changed in some important way. He has ceased to be "one of us". He may still be able to follow our practices but not with the understanding he had before and so with many more mistakes. Very likely he will seem to lack common sense or to be "behaving strangely". He has ceased to be a moral agent.

The other possibility is that he has discovered something, a reason which, once presented to his fellow moral agents, would lead them to transfer their support from "this morality" to his "realistic alternative". Because such an alternative would have to be preferable to existing practice taking into account the costs of changing over, it may not be an ideal. But, if it is preferable in this way, existing practice is no longer morality but mere positive morality. Anyone who "listens to reason" can see that.

Of course, ordinary proposals for moral change are not like that. The proposer does not propose substituting one morality for another but proposes changes that are more or less consistent with "the spirit", if not "the letter", of existing practice. The difference is like that between revolutionaries and reformers. The "moral revolutionary"

cannot look upon existing practice as his; the "moral reformer" does. His arguments for change will, in general, rely on morality-reporting reasons (for examples, moral ideals) in a way the arguments of the moral revolutionary cannot).⁹

V. The Procedures

Near the end of Section IV, I defined "morality" as that practice every rational agent actually capable of mutual cooperation supports (in part at least) because every other such agent has (all things considered) sufficient reason to support it too. That definition suggests that the moral legislature should make its decisions by unanimous vote. A vote for a proposal (in the moral legislature) is equivalent, we might say, to support of the corresponding practice (if others support it too). Nothing should be a moral practice which not all moral agents can rationally support.

Unanimity may, however, seem an unnecessarily unrealistic requirement for our model. Requiring unanimity on important questions is (it might be thought) likely to lead to no legislation at all in any large body composed of people much like us (as I intend the moral legislature to be). To get unanimity in the moral legislature, I shall (it may seem) have to deprive my legislators of so much of their individuality that they will not be much like us.

This is an important objection, but a curiously mistaken one. Consider, for example, the medieval Polish Republic. Here was a country of many millions of people, with a legislature of several hundred thousand nobles each of whom had veto over what could be done. While old laws remained in effect until changed, a new law could be adopted only with the consent (or abstention) of every legislator.¹⁰

The procedures of that legislature differed in many details from those of the moral legislature, but not in requiring unanimity to legislate. So, the requirement of unanimity is so far from being unrealistic that it has in fact been realized in the legislative of a large state.

But, it will be said, what a state! The Polish Constitution is a notorious failure and the cause most often cited is the "liberum veto", that is, the unanimity requirement itself. Still, for our purposes, that is irrelevant. The Polish legislature did have trouble reaching decisions, especially as outside powers began to interfere by bribing members. The methods by which that unanimity was achieved were also not always appropriate for the moral legislature. (For example, when there was a need to decide quickly, a small minority was sometimes made to consent by threats or force.) But in none of this does the Polish Republic seem, through most of its history, to have been much worse off than, say, medieval England. The Polish legislature reached agreement often enough to keep Poland a major power in Eastern Europe for several hundred years.¹¹

Of course, our concern is morality, not a proposed political constitution. That makes the faults of medieval Poland only distantly relevant to our project. Most of the legislation of the Polish Republic concerned taxes, election of the king, war, and other matters likely to divide people even if they share a common sense (and even without outside interference). The moral legislature, on the other hand, is concerned with the practices about which rational agents sharing a single common sense are most likely to agree, that is, those practices making a decent life together possible. That the Polish Republic worked at all is therefore important evidence of the realism of the moral legislature while the Republic's problems have little bearing.

We should also remember that the moral legislature is supposed to be an analytical model of morality, not a mere description of what actually happens. A certain lack of realism is the price of analysis. No objection should be raised to such "unrealism" so long as it is kept to a minimum and what there is of it contributes to understanding what is modeled. I believe the unanimity requirement satisfies those conditions.

But, I must admit, it does that at some cost. Adopting the unanimity requirement creates a dilemma. We could assume that the members of the moral legislature are exactly like us and decide under conditions exactly like those under which we do in fact decide moral questions. But, if we assume that, we shall have to admit that most of what we take to be morality would not make it through the moral legislature. Given what we know of our fellow moral agents, it seems reasonable to expect that, on almost any question, there will be at least a few dissenters (like those whom the medieval Poles would force to consent when the rest already had). The moral legislature would then be of relatively little use as a model of morality as we know it.

That is one horn of the dilemma. The other avoids making the moral legislature relatively useless in this way by assuming that the members of the moral legislature, unlike those of the Polish legislature, necessarily act rationally (when legislating). I see no reason not to take this horn. I say this for two reasons.

First, assuming rational voting seems to model something important in actual moral reasoning. We distinguish between moral dissent which counts and moral dissent which does not. If "one of us" can rationally oppose a certain practice, we take seriously the question of its morality (even if we do not find his arguments decisive). If, however, such an agent can only oppose the practice irrationally, say, by

fallacious arguments or by deceiving himself, we are likely to dismiss his dissent much as we would the dissent of a headhunter in distant Borneo. Such dissent seems to go on "outside the moral legislature".

Second, combining the assumption of rational action (in the legislature) with the unanimity requirement amounts to saying that, for a practice to be a moral practice, each moral agent must be able to give it his rational support whatever his own rational plans may be and that reason must leave no (rational) choice but to give that support. I see no reason not to say that. Given the tendency of rational agents to act rationally, we can think of the assumption of rationality as building into our model the limit towards which actual moral practice tends. And, given how little we mean by "support", the assumption that reason can require such support seems to be something most moral theorists would be willing to accept.

That, I think, is enough to dispose of the objection. But that is not all there is to be said on behalf of the unanimity requirement. There is also an important positive argument for it. Conceiving moral practices as those (and only those) every moral agent consents to (as a member of the moral legislature) seems to catch something important in our conception of morality that any weaker voting rule would not. It allows us to explain how all moral agents can be both equal and incommensurable. Each is equal because the vote of each is equally necessary for the enactment of moral practice. But this equality does not make the vote of any one commensurable with that of any other. Because the vote of every member is not only equally necessary for legislation but absolutely necessary for unanimity, the vote of any member is ^{also} equal to the votes of all the rest together.

So, the unanimity requirement (together with the assumption of rationality) also assures that doing as our model requires will satisfy Kant's "categorical imperative" in its third form.¹² To act as the moral legislature requires is to treat ourselves and each other according to rules, principles, ideals, or the like each endorses as a rational agent and which would not be binding but for the rational endorsement of all. None may be treated as a "mere means", that is, as a being to be done with according to some practice he cannot rationally endorse. The enactments of the moral legislature necessarily respect the "humanity" (that is, the rational agency) of its members.

The unanimity requirement also assures that enactments of the moral legislature will satisfy the categorical imperative in its first form.¹³ Because nothing can be a moral practice unless every moral agent can endorse it, it follows that a particular moral agent can determine that a proposed practice ("maxim") cannot be moral simply by determining that she cannot rationally consent to it. That she cannot rationally consent to it is enough to show that it cannot win the rational consent of all. And, whatever cannot win the rational consent of all cannot be a moral practice.

The moral legislature is, however, not simply Kant's moral theory modernized. The moral-legislature model departs from Kant in two important ways. The model does not treat morality (as Kant puts it in the second form of the categorical imperative) "as if" it were a universal law of nature.¹⁴ Enactments of the moral legislature are not mere as-ifs. They are actual practices. Hence, that some moral agent rationally endorses a certain proposed practice does not make it a moral practice. Enactments of the moral legislature are also not "universal laws of nature". They are practices of certain rational agents capable of helping

one another and sharing a common sense, parochial "laws" of a specific community. They are not accessible by "pure practical reason" alone (that is, by rationality). They are accessible only with the aid of common sense.

The other procedures of the moral legislature are more or less the consequence of requiring unanimity to enact (or maintain) a practice. A proposed moral practice must be formulated in language any moral agent can understand (since no one could rationally support a practice he does not understand). The arguments for any proposal must be simple enough to be understood by any moral agent and rest upon common sense rather than on esoteric knowledge (since no one could rationally support a practice for which he could not see sufficient reason). The arguments must also appeal (in combination at least) to every moral agent. (So, for example, to appeal to my self-interest as a reason for others to adopt a certain practice not in their interest would be improper because--and only insofar as--it could not win votes.)

These procedures will, I think, together have much the same effect as the original position's "veil of ignorance" or the ideal observer's "sympathizing" with each moral agent in turn (or otherwise taking "the point of view of the universe"). But it will have that effect without all the conceptual difficulties these other models seem to generate. We need not, as we must to put ourselves in the original position, try to imagine how we would decide if we did not know who we were, if we lacked whatever elements of our character derived from being of one sex or the other, of one age or another, of one religion or another, and so on. We also need not, as we would to be ideal observers, imagine what we would feel if we had equal sympathy with beings for whom we may have very different feelings. The moral legislature only requires that we imagine ourselves as we

actually are when at our rational best and then look for arguments capable of winning our rational support for this or that actual or proposed practice.

I take this "naturalism" to be a substantial advantage the moral legislature has over rival models of moral reasoning. I am therefore unwilling to assume that deliberations of the moral legislature go on in some timeless version of the present. I think the element of "real time" too important to be assumed away. Almost no one spends more than a small part of life engaged in moral discussion. Yet such discussions are in fact the means by which the moral community must sift arguments, reach conclusions, and eventually set about establishing particular practices. Giving serious consideration to a proposal for moral change in fact requires a substantial community investment. If the moral legislature is to help us understand much about morality as a practice we make, it must incorporate as much as possible the constraints under which we make morality. Time is certainly one of them.

Requiring deliberation in "real time" is, however, a highly conservative assumption. It means that the moral legislature will have to budget its agenda, try to screen out a good many proposals through something like "committees", and treat as "live issues" only a few proposals. We may have to take seriously the "politics of moral reasoning". Few proposals will "reach the floor" of the legislature; even fewer will eventually pass. The process of passage will be slow; the costs, enormous. Once a proposal passes, it is likely to remain in force in part just because giving it up is too expensive. The moral status quo will have a substantial advantage over any alternative just because it is the status quo. Even when we can easily see that a certain alternative is by far

preferable all else equal, we may have to admit that, all things considered, we are better off the way we are.

The conservatism of the real-time requirement nevertheless seems to explain why most strategic considerations seem out of place in moral reasoning. We must imagine the legislature as consisting not of a few representatives but of all moral agents today, all billion or so. Given the value of real time to any moral agent, "strategic behavior" will generally be too costly to be rational. For example, the benefits of agreeing on one of a wide range of alternatives is likely to outweigh whatever advantage might be gained by holding out for a certain one until everyone else decides to accept it because agreement on anything else seems impossible. Any strategy but honest cooperativeness is almost certain to be self-defeating.

Though the real-time requirement is conservative, it is not, I think, "too conservative". The moral legislature is not necessarily a static model. Though it does help us to understand why morality might be relatively static (as, indeed, it is), it also encourages us to look for ways of getting around the conservatism inherent in thinking of moral change as requiring new legislation under the conditions we have assumed. Here is another place where the analogy between morality (as we have analyzed it) and law is suggestive. I shall briefly describe three ways morality might change without any sudden change in the way most people act. All three should be familiar from legal history (if not from moral theory). I am confident others will have no trouble adding to the list.

1. Ideal to rule. Moral ideals seem to be an important way morality is open to change. A moral system can include several moral ideals which may or may not be altogether consistent and can add new ideals at relatively little cost. Individuals may choose, one by one, to follow a

particular ideal; or they might form small groups to do it (for example, "churches"). Eventually most people may be following that ideal, trying to live up to it in much the same way. Once that has happened, the status quo has lost most of its advantage. While moral practice has not changed, the distribution of acts under the practice has. Because a rule requiring what before had been done voluntarily would not in fact change what most people are doing, the new rule now has a good chance of adoption. This, perhaps, is a way to understand the process by which infanticide, slavery, or torture came to be morally wrong.

2. Casuistry. Because moral practices must be adopted, they must be formulated in words. But they need to be formulated only as fully as necessary to get everyone's consent. The costs of postponing decision may often be so great that everyone would prefer a certain admittedly loose formula to waiting till a better formula can be worked out. The result is that, at any time, morality can be stated but only as a series of very general rules, principles, ideals, and the like (sometimes hardly more than a name). That leaves lots of room for "casuistry". In this respect (as in many others), morality is like law. The process of settling particular cases can, day to day, seem no more than an explication of practice. Yet, as the days become decades, the practice can become something it clearly was not at the beginning. Once that has happened, little remains in the way of substituting a new formula for the old. This, sadly, seems to be how many of the moral limits on what can be done in war have one by one disappeared.

3. Changing by generalizing. Casuistry proceeds by cases without generalizing. But generalizing is itself a way to change practice. I may, for example, suddenly see that four seemingly independent principles can be subsumed under a more general one. I now understand the four

principles better. I am "clearer" about what they mean. But the same formula that seems only to clarify what practice is may also make reasonable developing that practice in ways unthought of before or, if thought of, ways that seemed (and were) indefensible in the terms previously available. Marx was unfair to philosophy (and to law, religion, and literature) when he accused philosophers of having "only seen the world differently" (when the problem is to change it). Sometimes at least, to see the world differently, or at least to get others to see it so, is to change it. We are seldom better than our words.

VI. Using the Moral Legislature

It may, I think, be helpful to think of Kant as trying to work out the procedures of the moral legislature. Since the (basic) procedures are the same for any moral legislature, they are "the form" of morality, accessible (at least in principle) to any moral agent who thinks about it. Morality as such may differ from place to place, time to time, and so on, but only as the "material" of morality--that is, circumstances and common sense--varies. Moral progress within a community will be measurable by approach to some received ideal; the moral superiority of one community's practice over that of another, by approach to the moral ideals of the community to which the judge belongs; and so on. Nothing in Kant seems to rule out such possibilities (though they do not well-suit some of his language).

There is, nonetheless, a certain irony in thinking of Kant that way. Because the procedures of the moral legislature are "Kantian", debate in the moral legislature cannot be. Because all Kantian considerations have been incorporated into the procedures, the legislature need only

consider the consequences of proposed and actual practices. Debate will be broadly utilitarian. It will, however, be neither distinctly "act-utilitarian" nor distinctly "rule-utilitarian" (though the model's emphasis on practice is rule- rather than act-utilitarian). Because the only acts moral legislators engage in (as moral legislators) are acts of "rule"-making, act-utilitarians should make exactly the same arguments as rule-utilitarians. We might then think of utilitarians as concerned with trying to formulate arguments for the moral legislature while Kantians are concerned only with the legislature's procedures. Thinking of utilitarians in this way may help us to understand why so much of the many exchanges between them and Kantians seem more like parallel discourse than part of a single debate.¹⁵

The moral legislature is also "broadly utilitarian" in a way Kant might take more comfort in than most utilitarians will. A moral community need not share a particular conception of the good. All that is necessary for morality is that the range of conceptions not be too wide to make cooperation impossible. A particular community may, then, not be able to agree on how to calculate utility. I, for example, may make my decisions taking into account only pleasure. You, in contrast, may make your calculations taking into account not only your pleasure (and mine) but beauty, knowledge, and order as independent goods. A third person may take into account the same goods you do, but assign them different weight, for example, giving beauty more weight than knowledge where you would give knowledge more weight than beauty. If none of these three modes of calculation is irrational, then the moral legislature is utilitarian in a quite unutilitarian way. It does not presuppose any particular connection between the (morally) right and the (nonmorally) good.

Though broadly utilitarian in this loose way, the moral legislature is not equally friendly to all versions of the "principle of utility". The unanimity requirement makes it unlikely that the legislature will make the same choices the principle of utility does when interpreted "aggregatively". (It does not seem reasonable for me to maximize the general happiness if, say, I or those I care about would suffer as a result.) So, the moral legislature may help us to see why "justice" might be a consideration independent of "[merely aggregative] utility".

The real-time requirement (together with other assumptions) has a similar effect. Because of it, the moral legislature is unlikely to make the same choices as any principle of utility that does not build into its calculation the cost of departing from existing practice. It does not, for example, seem rational to choose that practice of all noncompossible practices the general following of which would be best if "best" means only "best if we were starting from scratch". What "popular morality" (that is, the morality in force) happens to be seems relevant to what practice it would be best to follow or what act it would be best to do.

Utilitarians have, of course, been aware for some time of the problems of being a utilitarian in a nonutilitarian world. They have even been aware of the importance of people not generally appealing to the principle of utility.¹⁶ In fact, utilitarianism seems more like a criticism of "popular morality" than an alternative to it. What utilitarians seem to do when they do "applied ethics" is to point out morality-making reasons tending to show that a certain existing practice cannot have our rational support because (though it has our support) there is an alternative which, all things considered, would be worth the

trouble of switching to. The existing practice is mere positive morality.

We may, then, distinguish two uses of the moral legislature. We can use it, first, to decide whether a certain practice is moral. We ask whether, taking into account that the practice is in place, every moral agent can rationally support it. Some practices, for example, torturing suspected criminals for information, fail the test because many of us value bodily integrity so much that we can rationally accept the consequences of denying the state that means of gaining information. Our work is done as soon as we can find some actual moral agent who rationally opposes the practice.

I should perhaps stress that it is not enough to imagine such an agent, or to imagine arguments that someone might find convincing (though no one does). If our concern is what morality is, not merely what it "should" be, we must imagine the moral legislature as consisting of all of us, neither less nor more. We dare not populate it with "devil's advocates" or other what-ifs. We must imagine ourselves as we are (at our rational best), not as beings convinced by what does not convince us. Still, I do not want to forbid the use of imagination here. That we can find no actual moral agent who rationally opposes the practice in question is only strong evidence for the morality of the practice. We may have overlooked someone. Imagining such a person is often the first step to meeting him--in the mirror.

That is the first use of the moral legislature. The second is using it to determine whether a certain proposal is a candidate for moral practice. We ask whether, taking into account the costs of instituting the practice and the available alternatives, the practice is one every moral agent can rationally support. The practice is

disqualified if there is any moral agent who cannot rationally support it. But, even if all moral agents can (or "must" as rational agents) support it, it does not follow that the practice is any more than a likely candidate for moral practice (a "realistic alternative"). Morality is what we make it, not what we should, could, will, or must make it.

That brings me to the sketch of an argument promised at the beginning of this paper. I shall assume that the claim that there is an obligation (generally) to obey the law is equivalent to the claim that "Obey the law" is a moral rule (which may have exceptions). My sketch has two parts. In the first, I argue that "Obey the law" does not seem to state a moral practice; in the second, that it does not state a plausible candidate for such a practice.

To claim that "Obey the law" states a moral practice is (in part) to make a certain empirical claim, that is, that there is a certain practice. The evidence against that claim is considerable. There is, first, the fact that moral philosophers, religious writers, lawyers, and ordinary citizens seem to argue about the claim. No similar dispute seems to arise concerning, for example, "Don't kill" or "Don't steal" (though some exceptions are disputed). There is, second, the fact that many ordinary citizens have no clear intuitions of such obligation. While recognizing an obligation to obey certain laws (for example, those concerned with preventing harm), they recognize no such obligation to obey others (for example, the law requiring one to carry a driver's license when driving). A practitioner can easily suppose a particular practice to be moral when it is not. He has only to fail to anticipate someone else's rational objection or to fail to see that the practice does not have the support he thought. But a practitioner cannot so easily be wrong in believing that

there is no such practice. His ignorance of the practice is enough to raise doubts about its existence. If the ignorance is widespread, it is decisive. People generally know what practices they engage in.

So, it seems, the rule "Obey the law" is not part of morality as we know. Should it be? Plainly not. Political legislatures (generally) do not decide by unanimous and rational consent of all those subject to the law in question. Their procedures at best only make rational decision a good bet. So, to make obeying the law a moral rule is in effect to delegate to political legislatures the power to decide (for their own locale) any question upon which the moral legislature has yet to agree, without the safeguards the moral legislature itself labors under. Why would rational agents like us want to do that? The question is not, after all, whether governments should be able to make laws. That is a question independent of our moral obligation to obey, one we may answer by saying that they may so long as the laws are themselves not morally wrong. There is also no question that governments should be able to enforce the laws so made. They may, it seems, enforce any (morally permissible) law just as (but perhaps only just as) ordinary moral agents may, when necessary, enforce rules they or the moral legislature make. The question is rather whether, in addition, the laws as such should "bind in conscience". Certainly some of us do not want to give governments that much power, at least without severe procedural safeguards or substantive limits on what can be legislated, because the risks seem to outweigh any benefit likely follow from every government having a general power to bind in conscience. So, unless that preference is irrational for reasons not yet given, the rule "Obey the law" cannot even be a candidate for part of morality.

That is the sketch. I have said nothing about the possibility that "Obey the law" should be interpreted as a moral principle, ideal, or the like. I have also said nothing about a good many other matters more directly relevant to the argument. I leave these details for another time.¹⁷ Nevertheless, I hope that what I have said is sufficient to show how the moral legislature can help us understand better what morality is.

NOTES

*I should like to thank all those who made helpful criticism of early versions of the moral legislature but especially Peter Dalton, Michael Gorr, Mark Strasser, Gregory Trianosky, and Robert Turnbull.

1. John Rawls, "Kantian Constructionism in Moral Theory", The Journal of Philosophy 77 (September 1980): 516.
2. The original is, of course, "The sabbath was made for man, not man for the sabbath." Mark 2:27. I believe I owe this paraphrase to William Frankena, though I have not been able to find the source.
3. Nothing depends on this particular example, so long as there are some beliefs important to what morality is that are neither rationally required nor rationally forbidden. I shall assume here that that is not in dispute.
4. See my "The Moral Status of Dogs, Forests, and Other Persons", forthcoming. Social Theory & Practice 12 (Spring 86), 27-59.
5. See my "Interested Vegetables, Rational Emotions, and Moral Status", Philosophy Research Archives 11 (March, 1986). *****. 531-550.
6. One advantage of thinking about morality as a practice like law is that recent work in legal theory provides interesting models for the complex arrangements that may exist between the rules, principles, and so on that seem to constitute morality. See, for example, Ronald Dworkin's distinction between "rules", "principles", and "policies" in Taking Rights Seriously (Harvard University Press: Cambridge, Massachusetts, 1977), especially pp. 22-28.
7. What contemporary moral theory (with its emphasis on human rights and rational agents) seems most to lack is a theory of offices (daughter, parent, friend, national, and so on) as conferring special moral rights or making

- special moral claims. Here legal theory may be especially useful. See, for example, Mortimer R. Kadish and Sandford Kadish, Discretion to Disobey (Stanford University Press: Stanford, California, 1973).
8. See Christine M. Korsgaard, "The Right to Lie: Kant on Dealing with Evil", unpublished, for a somewhat different Kantian solution to this problem.
 9. For a similar analysis of morality, see J.L. Mackie, Ethics: Inventing Right and Wrong (Penguin Books: New York, 1977).
 10. Cambridge History of Poland, To 1696, eds. William F. Reddaway and others (University Press: Cambridge, England, 1950), pp. 421-23 and 429-30.
 11. There have, however, also been (qualified) dissents. See, for example, Jean-Jacques Rousseau, The Government of Poland, trans. Willmoore Kendall (Liberal Arts Library: Indianapolis, 1972), esp. pp. 55-61.
 12. Immanuel Kant, The Fundamental Principles of the Metaphysic of Ethics, trans. Otto Manthey-Zorn (Appleton-Century-Crofts, Inc.: New York, 1938), p.47.
 13. Ibid., p. 38.
 14. Ibid.
 15. For an early example of this, see John Stuart Mill, Utilitarianism (Liberal Arts Library: Indianapolis, 1957), p. 65 (and similar remark on p. 6): "To give any meaning to Kant's principle, the sense put upon it must be that we ought to shape our conduct by a rule which all rational beings might adopt with benefit to their collective interest." As I am interpreting Kant, any disagreement with Mill must wait upon Mill's explication of "collective interest". Mill, of course, never made the crucial distinction between the aggregative and various distributive senses of "collective".

16. See, for example, Rolf E. Sartorius, Individual Conduct and Social Norms (Dickenson Publishing Company, Inc.: Encino, California, 1975), especially pp.59-73, for an interesting recent discussion of the weight to be given to existing practices. My chief disagreement with Sartorius would be his (act-utilitarian) conclusion that the principle of utility is the only moral rule (rather than merely the only morality-making reason) and that "social rules" are, though "reliable rules of thumb", not themselves part of morality (that is, not morality-reporting). On my view, of course, "social rules" are morality-reporting and, for that reason, necessarily actual "moral rules". I do not know why Sartorius should claim otherwise when, as he knows, there is no general practice of citing act-utility to settle disputes about the moral rightness (or goodness) of conduct, that it is sometimes even morally objectionable to cite it. Perhaps he implicitly rejects the distinction between morality-reporting and morality-making reasons. I have a similar objection to R. M. Hare's treatment of "intuitive morality" in ~~* * XX~~.
17. I have already dealt with some of these matters in "Smith, Gert, and the Obligation to Obey the Law", Southern Journal of Philosophy 20 (1982): 139-52. I regret that I did not then distinguish as clearly as I now do the different concerns of the two arguments.