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Chapter 2

Theories of Duties and Rights: Traditional Tools for Making Decisions in Business When the Means Justify the Ends

Chapter Overview

Chapter 2 "Theories of Duties and Rights: Traditional Tools for Making Decisions in Business When the Means Justify the Ends" examines some theories guiding ethical decisions in business. It considers ethics defined by duties and rights.

2.1 The Means Justify the Ends versus the Ends Justify the Means

LEARNING OBJECTIVE

1. Distinguish ethical theory centered on means from theory centered on ends.

A Foundational Question

In business ethics, do the **means**¹ justify the **ends**², or do the ends justify the means? Is it better to have a set of rules telling you what you ought to do in any particular situation and then let the chips fall where they may, or should you worry more about how things are going to end up and do whatever's necessary to reach that goal?

Until recently, Eddy Lepp ran an organic medicine business in Northern California. His herbal product soothed nausea and remedied vomiting, especially as suffered by chemo patients. He had a problem, though. While his business had been OK'd by California regulators, federal agencies hadn't approved: on the national level, selling his drug was breaking the law. On the other hand, *not* selling his remedy had a significant downside: it was consigning his clients to debilitating suffering. So when federal agents came knocking on his door, he had to make a decision.

If the means justify the ends—if you should follow the rules no matter the consequences—then when the agents ask Lepp point blank whether he's selling the medicine, the ethical action is to admit it. He should tell the truth even though that will mean the end of his business. On the other hand, if the ends justify the means—if your ethical interest focuses on the consequences of an act instead of what you actually do—then the ethics change. If there's a law forcing people to suffer unnecessarily, it should be broken. And when the agents ask him whether he's selling, he's going to have an ethical reason to lie.

Across the entire field of traditional ethics, this is a foundational distinction. Is it what you do that matters, or the consequences? It's hard to get oriented in ethics without making a preliminary decision between these two. No one can make the decision for you, but before anyone can make it, an understanding of how each works should be reached. This chapter will consider ethics as focusing on the specific act and not the consequences. Theories of duties and rights center discussion. Chapter 3 "Theories of Consequence Ethics: Traditional Tools for Making

1. What you do in order to reach a goal.
2. The goals you want to reach, as distinct from what you need to do to reach them.

Decisions in Business when the Ends Justify the Means" is about ethics as looking at the consequences instead of the act.

KEY TAKEAWAYS

- When the means justify the ends, ethical consideration focuses on what you do, not the consequences of what you've done.
- Traditionally, focusing on means instead of ends leads to an ethics based on duties or rights.

REVIEW QUESTIONS

1. Your mother is ill with diabetes, and you can't afford her medicine. In the pharmacy one day, you notice the previous customer forgot that same prescription on the counter when she left. Why might the premise that the ends justify the means lead you to steal the pills?
2. Why might the premise that the means justify the ends lead you to return the pills?

2.2 Perennial Duties

LEARNING OBJECTIVES

1. Define an ethical duty.
2. Distinguish specific duties.
3. Show how ethical duties work in business.
4. Consider advantages and drawbacks of an ethics based on duties.

Duties

“Should I steal that?”

“No, stealing’s wrong.”

Basic ethics. There are things that are right and others that are wrong, and the discussion ends. This level of clarity and solidity is the main strength of an ethics based on duties. We all have a duty not to steal, so we shouldn’t do it. More broadly, when we’re making moral decisions, the key to deciding well is understanding what our duties are and obeying them. An ethics based on duties is one where certain rules tell us what we ought to do, and it’s our responsibility to know and follow those rules.

The Madoff Family

If we’re supposed to obey our duties, then what exactly *are* they? That’s a question Andrew Madoff faced in December 2008 when he learned that some—maybe most, maybe all—of the money he and his family had been donating to the charitable Lymphoma Research Foundation and similar medical investigation enterprises was, in fact, stolen.

It was big money—in the millions—channeled to dedicated researchers hot on the trail of a remedy for lymphoma, a deadly cancer. Andrew, it should be noted, wasn’t only a cancer altruist; he was also a victim, and the charitable money started flowing to the researchers soon after he was diagnosed.

It's unclear whether Andrew knew the money was stolen, but there's no doubt that his dad did. Dad—Bernard “Bernie” Madoff—was the one who took it. The largest Ponzi scheme in history, they call it.

A Ponzi scheme—named after the famous perpetrator Charles Ponzi—makes suckers of investors by briefly delivering artificially high returns on their money. The idea is simple: You take \$100 from client A, promising to invest the money cleverly and get a massive profit. You spend \$50 on yourself, and at the end of the year, you send the other \$50 back to the client along with a note saying that the original \$100 investment is getting *excellent* results and another \$50 should come in next year and every year from then on. Happy client A recommends friends, who become clients B, C, and D. They bring in a total of \$300, so it's easy to make good on the original promise to send a \$50 return the next year to client A. And you've now got \$250 remaining from these three new clients, \$150 of which you will soon return to them (\$50 for each of the three new clients), leaving you with \$100 to spend on yourself. The process repeats, and it's not long before people are lining up to hand over their money. Everyone makes off like bandits.

Bandit is the right term for Madoff, who ran his Ponzi empire for around fifteen years. So many people handed over so much cash, and the paper trail of fake stock-purchase receipts and the rest grew so complicated that it's impossible to determine exact numbers of victims and losses. Federal authorities have estimated the victims were around five thousand and the losses around \$65 billion, which works out to about \$13 million squeezed from each client.

Madoff had, obviously, rich clients. He met them at his home in New York City; at his mansion in hyperwealthy Palm Beach, Florida; or on his fifty-five-foot yacht cleverly named *Bull*. He impressed them with a calm demeanor and serious knowledge. While it's true that he was mostly taking clients' money and sticking it in his wallet, the investments he *claimed* to engineer were actually quite sophisticated; they had to do with buying stock in tandem with options to buy and sell that same stock on the futures market. He threw in technical words like “put” and “call” and left everyone thinking he was either crazy or a genius. Since he was apparently making money, “genius” seemed the more likely reality. People also found him trustworthy. He sat on the boards of several Wall Street professional organizations and was known on the charity circuit as a generous benefactor. Health research was a favorite, especially after Andrew's cancer was diagnosed.

Exactly how much money Madoff channeled to Andrew and other family members isn't clear. By late 2008, however, Andrew knew that his father's investment company had hit a rough patch. The stock market was crashing, investors wanted their money back, and Madoff was having trouble rounding up the cash, which

explains why Andrew was surprised when his father called him in and said he'd decided to distribute about \$200 million in bonuses to family members and employees.

It didn't make sense. How could there be a cash-flow crisis but still enough cash to pay out giant bonuses? The blunt question—according to the Madoff family—broke Madoff down. He spilled the truth: there was little money left; it was all a giant lie.

The next day, Andrew reported the situation to the authorities.

Madoff sits in jail now. He'll be there for the rest of his life. He claims his scheme was his project alone and his children had no knowledge or participation in it, despite the fact that they were high executives in his fraudulent company. Stubbornly, he has refused to cooperate with prosecutors interested in determining the extent to which the children may have been involved. His estate has been seized. His wife, though, was left with a small sum—\$2.5 million—to meet her day-to-day living expenses. Bilked investors got nearly nothing.

One of those investors, according to ABC News, was Sheryl Weinstein. She and her family are now looking for a place to live because after investing everything with Madoff and losing it, they were unable to make their house payments. At Madoff's sentencing hearing, and with her husband seated beside her, she spoke passionately about their plight and called Madoff a "beast." The hearing concluded with the judge calling Madoff "evil." Brian Ross, Anna Schechter, and Kate McCarthy, "Bernie Madoff's Other Secret: His Hadassah CFO Mistress," *ABCNews.com*, April 16, 2011, accessed May 11, 2011, <http://abcnews.go.com/Blotter/Madoff/story?id=8319695&page=1>.

Weinstein was well remembered by Madoff's longtime secretary, Eleanor Squillari. Squillari reported that Weinstein would often call Madoff and that "he would roll his eyes and then they'd go meet at a hotel." Their affair lasted twenty years, right up until the finance empire collapsed.

What Do I Owe Myself? Historically Accumulated Duties to the Self

Over centuries of thought and investigation by philosophers, clergy, politicians, entrepreneurs, parents, students—by just about everyone who cares about how we live together in a shared world—a limited number of duties have recurred persistently. Called **perennial duties**³, these are basic obligations we have as human beings; they're the fundamental rules telling us how we should act. If we

3. Those specific requirements for action that have subsisted through history, for example, the duty not to steal.

embrace them, we can be confident that in difficult situations we'll make morally respectable decisions.

Broadly, this group of perennial duties falls into two sorts:

1. **Duties to ourselves**⁴
2. **Duties to others**⁵

Duties to the self begin with our responsibility **to develop our abilities and talents**⁶. The abilities we find within us, the idea is, aren't just gifts; it's not only a stroke of luck that some of us are born with a knack for math, or an ear for music, or the ability to shepherd conflicts between people into agreements. All these skills are also responsibilities. When we receive them, *they come with the duty to develop them*, to not let them go to waste in front of the TV or on a pointless job.

Most of us have a feeling for this. It's one thing if a vaguely clumsy girl in a ballet class decides to not sign up the next semester and instead use the time trying to boost her GPA, but if someone who's really good—who's strong, and elegant, and a natural—decides to just walk away, of course the coach and friends are going to encourage her to think about it again. She has something that so few have, it's a shame to waste it; it's a kind of betrayal of her own uniqueness. This is the spot where the ethics come in: the idea is that she really *should* continue her development; it's a responsibility she has to herself because she really can develop.

What about Andrew Madoff, the cancer sufferer? He not only donated money to cancer research charities but also dedicated his time, serving as chairman of the Lymphoma Research Foundation (until his dad was arrested). This dedication *does* seem like a **duty**⁷ because of his unique situation: as a sufferer, he perfectly understood the misery caused by the disease, and as a wealthy person, he could muster a serious force against the suffering. When he did, he fulfilled the duty to exploit his particular abilities.

The other significant duty to oneself is nearly a corollary of the first: the **duty to do ourselves no harm**⁸. At root, this means we have a responsibility to maintain ourselves healthily in the world. It doesn't do any good to dedicate hours training the body to dance beautifully if the *rest* of the hours are dedicated to alcoholism and Xanax. Similarly, Andrew should not only fight cancer publicly by advocating for medical research but also fight privately by adhering to his treatment regime.

4. Ethical responsibilities we hold to ourselves, determining how we live and treat ourselves.

5. Ethical responsibilities for others.

6. The ethical duty to ourselves, requiring us to respect our innate abilities—especially the exemplary ones—by working them out to their full potential.

7. The moral obligation to perform an act that is right, regardless of the consequences.

8. The ethical duty to ourselves, requiring us to respect our being by not harming or abusing ourselves.

At the extreme, this duty also prohibits suicide, a possibility that no doubt crosses Bernie Madoff's mind from time to time as he contemplates spending the rest of his life in a jail cell.

What Do I Owe Others? Historically Accumulated Duties to Others

The duties we have to ourselves are the most immediate, but the most commonly referenced duties are those we have to others.

Avoid wronging others⁹ is the guiding duty to those around us. It's difficult, however, to know exactly what it means to wrong another in every particular case. It does seem clear that Madoff wronged his clients when he pocketed their money. The case of his wife is blurrier, though. She was allowed to keep more than \$2 million after her husband's sentencing. She claims she has a right to it because she never knew what her husband was doing, and anyway, at least that much money came to her from other perfectly legal investment initiatives her husband undertook. So she can make a case that the money is hers to keep and she's not wronging anyone by holding onto it. Still, it's hard not to wonder about investors here, especially ones like Sheryl Weinstein, who lost everything, including their homes.

Honesty¹⁰ is the duty to tell the truth and not leave anything important out. On this front, obviously, Madoff wronged his investors by misleading them about what was happening with their money.

Respect others¹¹ is the duty to treat others as equals in human terms. This doesn't mean treating everyone the same way. When a four-year-old asks where babies come from, the stork is a fine answer. When adult investors asked Madoff where the profits came from, what they got was more or less a fairy tale. Now, the first case is an example of respect: it demonstrates an understanding of another's capacity to comprehend the world and an attempt to provide an explanation matching that ability. The second is a lie; but more than that, it's a sting of disrespect. When Madoff invented stories about where the money came from, he disdained his investors as beneath him, treating them as unworthy of the truth.

Beneficence¹² is the duty to promote the welfare of others; it's the Good Samaritan side of ethical duties. With respect to his own family members, Madoff certainly fulfilled this obligation: every one of them received constant and lavish amounts of cash. There's also beneficence in Andrew's work for charitable causes, even if there's a self-serving element, too. By contrast, Madoff displayed little beneficence for his clients.

9. The duty to treat others as you would like to be treated by them.
10. The duty to tell the truth and not leave anything important out.
11. The duty to treat others as valuable in themselves and not as tools for your own projects.
12. The duty to promote others' welfare so far as it is possible and reasonable.

Gratitude¹³ is the duty to thank and remember those who help us. One of the curious parts of Madoff's last chapter is that in the end, at the sentencing hearing, a parade of witnesses stood up to berate him. But even though Madoff had donated millions of dollars to charities over the years, not a single person or representative of a charitable organization stood up to say something on his behalf. That's ingratitude, no doubt.

But there's more here than ingratitude; there's also an important point about all ethics guided by basic duties: *the duties don't exist alone*. They're all part of a single fabric, and sometimes they pull against each other. In this case, the duty Madoff's beneficiaries probably felt to a man who'd given them so much was overwhelmed by the demand of another duty: the duty to respect others, specifically those who lost everything to Madoff. It's difficult to imagine a way to treat people more disdainfully than to thank the criminal who stole their money for being so generous. Those who received charitable contributions from Madoff were tugged in one direction by gratitude to him and in another by respect for his many victims. All the receivers opted, finally, to respect the victims.

Fidelity¹⁴ is the duty to keep our promises and hold up our end of agreements. The Madoff case is littered with abuses on this front. On the professional side, there's the financier who didn't invest his clients' money as he'd promised; on the personal side, there's Madoff and Weinstein staining their wedding vows. From one end to the other in terms of fidelity, this is an ugly case.

Reparation¹⁵ is the duty to compensate others when we harm them. Madoff's wife, Ruth, obviously didn't feel much of this. She walked away with \$2.5 million.

The judge overseeing the case, on the other hand, filled in some of what Ruth lacked. To pay back bilked investors, the court seized her jewelry, her art, and her mink and sable coats. Those things, along with the couple's three multimillion-dollar homes, the limousines, and the yacht, were all sold at public auction.

13. The duty to thank and remember those who help us.

14. The duty to keep our promises and hold up our end of bargains.

15. The duty to compensate others when we harm them.

16. The duty to treat equals equally and unequals unequally.

The Concept of Fairness

The final duty to be considered—fairness—requires more development than those already listed because of its complexity.

According to Aristotle, **fairness**¹⁶ is treating equals equally and unequals unequally. The *treat equals equally* part means, for a professional investor like Madoff, that all his clients get the same deal: those who invest equal amounts of money at about the same time should get an equal return. So even though Madoff was sleeping with one

of his investors, this shouldn't allow him to treat her account distinctly from the ones belonging to the rest. Impartiality must govern the operation.

The other side of fairness is the requirement to *treat unequals unequally*. Where there's a meaningful difference between investors—which means a difference pertaining to the investment and not something extraneous like a romantic involvement—there should correspond a proportional difference in what investors receive. Under this clause, Madoff could find justification for allowing two distinct rates of return for his clients. Those that put up money at the beginning when everything seemed riskier could justifiably receive a higher payout than the one yielded to more recent participants. Similarly, in any company, if layoffs are necessary, it might make sense to say that those who've been working in the organization longest should be the last ones to lose their jobs. In either case, the important point is that *fairness doesn't mean everyone gets the same treatment; it means that rules for treating people must be applied equally*. If a corporate executive decides on layoffs according to a last-in-first-out process, that's fine, but it would be unfair to make exceptions.

One of the unique aspects of the idea of fairness as a duty is its hybrid status between duties to the self and duties to others. While it would seem strange to say that we have a duty of gratitude or fidelity to ourselves, it clearly makes sense to assert that we should be fair to ourselves. Impartiality—the rule of no exceptions—means no exceptions. So a stock investor who puts his own money into a general fund he runs should receive the same return as everyone else. A poor investment that loses 10 percent should cost him no more than 10 percent (he has to be fair to himself), and one that gains 10 percent shouldn't net him any more than what the others receive (he has to be fair to others).

Modern Fairness: Rawls

The recent American philosopher John Rawls proposes a **veil of ignorance**¹⁷ as a way of testing for fairness, especially with respect to the distribution of wealth in general terms. For example, in society as Madoff knew it, vast inequalities of wealth weren't only allowed, they were honored: being richer than anyone else was something to be proud of, and Madoff lived that reality full tilt. Now, if you asked Madoff whether we *should* allow some members of society to be much wealthier than others, he might say that's fair: everyone is allowed to get rich in America, and that's just what he did. However, the guy coming into Madoff's office at 3 a.m. to mop up and empty the trash might see things differently. He may claim to work just as hard as Madoff, but without getting fancy cars or Palm Springs mansions. People making the big bucks, the suggestion could follow, should get hit with bigger taxes and the money used to provide educational programs allowing guys from the cleaning crew to get a better chance at climbing the income ladder. Now, given

17. The idea that when you set up rules for resolving dilemmas, you don't get to know beforehand which side of the rules you will fall on.

these two perspectives, is there a way to decide what's really fair when it comes to wealth and taxes?

Rawls proposes that we try to reimagine society *without* knowing what our place in it would be. In the case of Madoff, he may like things as they are, but would he stick with the idea that everything's fair if he were told that a rearrangement was coming and he was going to get stuck back into the business world at random? He might hesitate there, seeing that he could get dealt a bad hand and, yes, end up being the guy who cleans offices. And that guy who cleans offices might figure that if he got a break, then *he'd* be the rich one, and so he's no longer so sure about raising taxes. The veil of ignorance is the idea that when you set up the rules, you don't get to know beforehand where you'll fall inside them, which is going to force you to construct things in a way that is really balanced and fair.

As a note here, nearly all children know the veil of ignorance perfectly. When two friends together buy a candy bar to split, they'll frequently have one person break it, and the other choose a half. If you're the breaker, you're under the veil of ignorance since you don't know which half you're going to get. The result is you break it fairly, as close to the middle as you can.

Balancing the Duties

Duties include those to

- develop abilities and talents,
- do ourselves no harm,
- avoid wronging others,
- honesty,
- respect others,
- beneficence,
- gratitude,
- fidelity,
- reparation,
- fairness.

Taken on their own, each of these plugs into normal experience without significant problems. Real troubles come, though, when more than one duty seems applicable and they're pulling in different directions.

Take Andrew Madoff, for example. Lying in bed at night and taking his ethical duties seriously, what should he do in the wake of the revelation that his family

business was in essence a giant theft? On one side, there's an argument that he should just keep on keeping on by maintaining his life as a New York financier. The route to *justifying* that decision starts with a duty to himself:

- **Develop abilities and talents.** As an expert in finance, someone with both knowledge of and experience in the field, Andrew should continue cultivating and perfecting his talents, at least those he had acquired on the legitimate side of the family's dealings.

Beyond the duty to himself, Andrew can further buttress his decision to keep his current life going by referencing a duty to others:

- **Beneficence.** This may demand that Andrew continue along the lines he'd already established because they enabled his involvement with cancer research. He's got money to donate to the cause and his very personal experience with the disease allows rare insight into what can be done to help sufferers. To the extent that's true, beneficence supports Andrew's decision to go on living as he had been.

On the other side, what's the duty-based argument in favor of Andrew taking a different path by breaking away from his old lifestyle and dedicating all his energy and time to doing what he can for the jilted investors the family business left behind?

- **Respect.** The duty to treat others as equals demands that Andrew take seriously the abilities and lives of all those who lost everything. Why should *they* be reduced to powerlessness and poverty while he continues maximizing his potential as a stock buyer and nonprofit leader? Respecting others and their losses may mean leaving his profession and helping them get back on their feet.
- **Reparation.** This duty advances as the proposal for Andrew to liquidate his assets and divide the money as fairly as possible among the ruined investors. It may be that Andrew didn't orchestrate the family Ponzi scheme, but wittingly or not, he participated and that opens the way to the duty to repayment.

So which path should Andrew follow? There's no certain answer. What duties *do* allow Andrew—or anyone considering his situation—to achieve is a solid footing for making a reasonable and defensible decision. From there, the ethical task is to weigh the various duties and choose which ones pull harder and make the stronger demand.

Where Do Duties Come From?

The question about the origin of duties belongs to metaethics, to purified discussions about the theory of ethics as opposed to its application, so it falls outside this book's focus. Still, two commonly cited sources of duties can be quickly noted.

One standard explanation is that duties are written into the nature of the universe; they're part of the way things *are*. In a sense, they're a moral complement to the laws of physics. We know that scientists form mathematical formulas to explain how far arrows will travel when shot at a certain speed; these formulas describe the way the natural world is. So too in the realm of ethics: duties are the rules describing how the world is in moral terms. On this account, ethics isn't so different from science; it's just that scientists explore physical reality and ethicists explore moral reality. In both cases, however, the reality is already there; we're just trying to understand it.

Another possible source for the duties is humanity in the sense that part of what it means *to be* human is to have this particular sense of right and wrong. Under this logic, a computer-guided robot may beat humans in chess, but no machine will ever understand what a child does when mom asks, "Did you break the vase? Tell me the truth." Maybe this moral spark children are taken to feel is written into their genetic code, or maybe it's something ineffable, like a soul. Whichever, the reason it comes naturally is because it's part of our nature.

What Are the Advantages and Drawbacks of an Ethics Based on Duties?

One of the principal advantages of working with an ethics of duties is simplicity: duties are fairly easy to understand and work with. We all use them every day. For many of us these duties are the first thing coming to mind when we hear the word *ethics*. Straightforward rules about honesty, gratitude, and keeping up our ends of agreements—these are the components of a common education in ethics, and most of us are well experienced in their use.

The problem, though, comes when the duties pull against each other: when one says yes and the other says no. Unfortunately, there's no hard-and-fast rule for deciding *which* duties should take precedence over the others.

KEY TAKEAWAYS

- Duties include responsibilities to oneself and to others.
- Duties do not exist in isolation but in a network, and they sometimes pull against each other.

REVIEW QUESTIONS

1. Bernie Madoff was a very good—though obviously not a perfect—fraudster. He got away with a lot for a long time. How could the duty to develop one's own abilities be mustered to support his decision to become a criminal?
2. In the Madoff case, what duties could be mustered to refute the conclusion that he did the right thing by engaging in fraud?
3. Madoff gave up most of his money and possessions and went to jail for his crimes. Is there anything else he should have done to satisfy the ethical duty of reparation?
4. In your own words, what does it mean to *treat equals equally* and *unequals unequally*?

2.3 Immanuel Kant: The Duties of the Categorical Imperative

LEARNING OBJECTIVES

1. Define Immanuel Kant's categorical imperative.
2. Show how the categorical imperative functions in business.
3. Consider advantages and drawbacks of an ethics based on the categorical imperative.

Kant

German philosopher Immanuel Kant (1724–1804) accepted the basic proposition that a theory of duties—a set of rules telling us what we're obligated to do in any particular situation—was the right approach to ethical problems. What he set out to add, though, was a stricter mechanism for the use of duties in our everyday experience. He wanted a way to get all these duties we've been talking about to work together, to produce a unified recommendation, instead of leaving us confused between loyalty to one principle and another. At least on some basic issues, Kant set out to produce ethical *certainty*.

Lying is about as primary as issues get in ethics, and the Madoff case is shot through with it:

- Bernie Madoff always claimed that the Ponzi scheme wasn't the original idea. He sought money from investors planning to score big with complicated financial maneuvers. He took a few losses early on, though, and faced the possibility of everyone just taking their cash and going home. That's when he started channeling money from new investors to older ones, claiming the funds were the fruit of his excellent stock dealing. He always intended, Madoff says, to get the money back, score some huge successes, and they'd let him get on the straight and narrow again. It never happened. But that doesn't change the fact that Madoff *thought* it would. He was lying *temporarily*, and for the good of everyone in the long run.
- Sheryl Weinstein had a twenty-year affair with Madoff. She also invested her family's life savings with him. When the Ponzi scheme came undone, she lost everything. To get some money back, she considered writing a tell-all, and that led to a heart-wrenching decision between money and her personal life. Her twenty-year dalliance was

not widely known, and things could have remained that way: her husband and son could've gone on without the whole world knowing that the husband was a cuckold and the son the product of a poisoned family. But they needed money because they'd lost everything, including their home, in Madoff's scam. So does she keep up the false story or does she turn the truth into a profit opportunity?

What does Kant say about all this? The answer is his **categorical imperative**¹⁸. An imperative is something you need to do. A *hypothetical* imperative is something you need to do, but only in certain circumstances; for example, I have to eat, but only in those circumstances where I'm hungry. A *categorical* imperative, by contrast, is something you need to do all the time: there are ethical rules that don't depend on the circumstances, and it's the job of the categorical imperative to tell us what they are. Here, we will consider two distinct expressions of Kant's categorical imperative, two ways that guidance is provided.

First Version of the Categorical Imperative

The first version or expression of the categorical imperative: Act in a way that the rule for your action could be **universalized**¹⁹. When you're thinking about doing something, this means you should imagine that *everyone did it all the time*. Now, can this make sense? Can it happen? Is there a world you can imagine where everyone does this thing that you're considering at every opportunity? Take the case of Madoff asking himself, "Should I lie to keep investor money flowing in?" What we need to do is imagine this act as universalized: everyone lies all the time. Just imagine that. You ask someone whether it's sunny outside. It is sunny, but they say, "No, it's raining." The next day you ask someone else. Again, it's sunny, but they say, "No, it's snowing." This goes on day after day. Pretty soon, wouldn't you just give up listening to what people say? Here's the larger point: if everyone lies all the time, pretty soon people are going to stop listening to anyone. And if no one's listening, is it possible to lie to them?

What Kant's categorical imperative shows is that lying *cannot* be universalized. The act of lying can't survive in a world where everyone's just making stuff up all the time. Since no one will be taking anyone else seriously, you may try to sell a false story but no one will be buying.

18. An ethical rule that does not depend on circumstances.

19. Within Kant's theory of the categorical imperative, an action that could be carried out by everyone all the time. For example, telling the truth.

Something similar happens in comic books. No one accuses authors and illustrators of lying when Batman kicks some bad guys into the next universe and then strips off his mask and his hair is perfect. That's not a lie; it's fiction. And fictional stories *can't* lie because no one expects they'll tell the truth. No one asks whether it's real or fake, only whether it's entertaining. The same would go in the real world if

everyone lied all the time. Reality would be like a comic: it might be fun, or maybe not, but accusing someone of lying would definitely be absurd.

Bringing this back to Madoff, as Kant sees it he has to make a basic decision: should I lie to investors to keep my operation afloat? The answer is no. According to the categorical imperative, it *must* be no, not because lying is directly immoral, but because lying cannot be universalized and therefore it's immoral.

The same goes for Sheryl Weinstein as she wonders whether she should keep the lid on her family-wrecking affair. The answer is no because the answer is *always* no when the question is whether I should lie. You might want to respond by insisting, "She's already done the deed, and Bernie's in jail so it's not going to happen again. The best thing at this point would be for her to just keep her mouth shut and hold her family together as best she can." That's a fair argument. But for Kant it's also a loser because the categorical imperative gives the last word. There's no appeal. There's no lying, no matter what.

One more point about the universalization of acts: even if you insist that a world could exist where everyone lied all the time, would you really want to live there? Most of us don't mind lying so much as long as *we're* the ones getting away with it. But if *everyone's* doing it, that's different. Most of us might agree that if we had a choice between living in a place where everyone told the truth and one where everyone lied, we'd go for the honest reality. It just makes sense: lying will help you only if you're the sole liar, but if everyone's busy taking advantage of everyone else, then there's nothing in it for you, and you might just as well join everyone in telling the truth.

Conclusion. The first expression of the categorical imperative—*act in such a way that the rule for your action could be universalized*—is a **consistency principle**²⁰. Like the golden rule (treat others as you'd like to be treated), it forces you to ask how things would work if everyone else did what you're considering doing.

Objections to the First Version of the Categorical Imperative

One of the objections to this ethical guidance is that a reality without lying can be awfully uncomfortable. If your boss shows up for work on a Friday wearing one of those designer dresses that looks great on a supermodel and ridiculous everywhere else, and she asks what you think, what are you going to say? "Hideous"? Telling the truth no matter what, whether we're at work or anywhere else, is one of those things that sounds good in the abstract but is almost impossible to actually live by.

20. In ethics, the requirement that similar people in similar situations be treated in similar ways.

Then the problem gets worse. A deranged addict storms into your office announcing that he's just received a message from the heavens. While chewing manically on dirty fingernails, he relates that he's supposed to attack someone named Jones—*anyone* named Jones. "What," he suddenly demands, "is your name?" Unfortunately, you happen to be named Sam Jones. Now what?

Second Version of the Categorical Imperative

The second expression of the categorical imperative is: Treat people as an end, and never as a means to an end. To treat **people as ends, not means**²¹ is to never use anyone to get something else. People can't be tools or instruments, they can't be things you employ to get to what you *really* want. A simple example of using another as a means would be striking up a friendship with Chris because you really want to meet his wife who happens to be a manager at the advertising company you desperately want to work for.

It'd be hard to imagine a clearer case of this principle being broken than that of Madoff's Ponzi scheme. He used the money from each new investor to pay off the last one. That means every investor was nothing but a means to an end: every one was nothing more than a way to keep the old investors happy and attract new ones.

Madoff's case of direct theft is clear cut, but others aren't quite so easy. If Weinstein goes ahead and writes her tell-all about life in bed with Madoff, is she using him as a means to her end (which is making money)? Is she using book buyers? What about her husband and the suffering he would endure? It can be difficult to be sure in every case exactly what it means to "use" another person.

Another example comes from Madoff's son, Andrew, who donated time and money to the cause of treating cancer. On one hand, this seems like a generous and beneficial treatment of others. It looks like he's valuing them as worthwhile and good people who deserve to be saved from a disease. On the other hand, though, when you keep in mind that Andrew too had cancer, you wonder whether he's just using other peoples' suffering to promote research so that *he* can be saved.

21. Within Kant's theory of the categorical imperative, the requirement that people not be used as instruments to get something else.

22. In ethics, the requirement that people be treated as holding intrinsic value.

Summarizing, where the first of the categorical imperative's expressions was a consistency principle (treat others the way you want to be treated), this is a **dignity principle**²²: treat others with respect and as holding value in themselves. You will act ethically, according to Kant, as long as you never accept the temptation to treat others as a way to get something else.

Objections to the Second Version of the Categorical Imperative

The principal objection to this aspect of Kant's theory is that, like the previous, it sounds good in the abstract, but when you think about how it would actually work, things become difficult. Almost *all* businesses require treating people as means and not as ends. In the grocery store, the cashier isn't waiting there to receive your respectful attention. She's there to run your items through the scanner and that's it. The same goes for the guy in the produce section setting up the banana display. Really, just *paying* someone to do a job—no matter what the job might be—is treating them as a means to an end, as little more than a way to get the work done.

If that's right, then you're not going too far by wondering whether the entire modern world of jobs and money would unravel if we all suddenly became Kantians. Paying a janitor to clean up after hours, a paralegal to proofread a lawyer's briefs, a day-care worker to keep peace among children at recess, all these treatments of others seem to fail Kant's test.

Defenders of Kant understand all this perfectly and can respond. One argument is that providing someone with a job is *not* treating them as a means to your ends; instead, by allowing them the opportunity to earn a living, you're actually supporting their projects and happiness. Seen this way, hiring people is not denigrating them, it's enabling. And far from being immoral in the Kantian sense, it's ethically recommendable.

KEY TAKEAWAYS

- The first expression of Kant's categorical imperative requires that ethical decisions be universalizable.
- The second expression of Kant's categorical imperative requires that ethical decisions treat others as ends and not means.
- Kant's conception of ethical duties can provide clear guidance but at the cost of inflexibility: it can be hard to make the categorical imperative work in everyday life.

REVIEW QUESTIONS

1. Imagine Madoff lied to attain his clients' money as he did, but instead of living the high life, he donated everything to charity. For Kant, does this remove the ethical stain from his name? Why not?
2. Think back to your first job, whatever it was. Did you feel like you were used by the organization, or did you feel like they were doing you a favor, giving you the job? How does the experience relate to the imperative to treat others as an end and not a means?

2.4 Rights

LEARNING OBJECTIVES

1. Define an ethical right.
2. Distinguish specific rights.
3. Show how ethical rights work in business.
4. Consider advantages and drawbacks of an ethics based on rights.

Rights

An ethics based on rights is similar to an ethics based on duties. In both cases specific principles provide ethical guidance for your acts, and those principles are to be obeyed regardless of the consequences further down the line. Unlike duties, however, rights-based ethics concentrate their force in delineating your possibilities. The question isn't so much *What are you morally required to do*; it's more about defining exactly where and when you're free to do whatever you want and then deciding where you need to stop and make room for other people to be free too. Stated slightly differently, duties tend to be ethics as what you can't do, and rights tend to be about what you can do.

My Property, My Religion, My Nonprofit Organization, My Health Care, My Grass

Charles Edward “Eddy” Lepp is in jail now, in a prison not too far away from the site of the business that got him in trouble: Eddy’s Medicinal Gardens and Ministry. What was Eddy Lepp the gardener and minister up to on his twenty-acre property near a lake in California, about a hundred miles north from San Francisco? Here are the highlights:

- **Ministry.** Lepp claims—and there doesn't seem to be anyone who disputes him—that he's an authentic Rastafarian reverend.
- **Rastafarianism.** Developed over the last century in Africa and the Caribbean, the religion works within the basic structure of Christianity but contains important innovations. Haile Selassie I was the emperor of Ethiopia from 1930 to 1974 and, according to the faith, was also the reincarnation of Jesus Christ. Further, marijuana—called *ganja* by believers—accompanies religious meetings and ceremonies; it brings adherents closer to God.

- **Lepp's Medicinal Gardens.** In fact, this wasn't a garden so much as a collective farm. Lepp oversaw the work of volunteers—their numbers totaling about two hundred—and did some harvesting and planting himself. Many of the farm's marijuana leaves were smoked by the 2,500 members of his zonked-out church as part of Rastafarian celebrations and meetings, and the rest was, according to Lepp, distributed to individuals with serious health problems.
- **Marijuana and health care.** Studies indicate that in some patients marijuana may alleviate nausea and vomiting, especially as connected with chemotherapy. There's also a list of further symptoms and maladies the drug could relieve, according to some evidence. It should be noted here that many suspect the persons conducting these studies (not to mention the patients receiving the testing) are favorably predisposed toward marijuana in the first place, and the prejudice may contaminate conclusions. What's certain is that from a strictly medical perspective, the question about marijuana's utility remains controversial. Among those who are convinced, however, smoking is a good remedy. That's why in California patients have been granted a legal right to possess and use marijuana medicinally, as long as they've got a doctor's approval. Unfortunately for Lepp, California law can't bar federal prosecutions, and it was the US Drug Enforcement Administration from all the way out in Washington, DC, that eventually came after him. Elizabeth Larson, "Lepp Sentenced to 10 Years in Federal Prison for Marijuana Case," *Lake County News*, May 18, 2009, accessed May 11, 2011, <http://lakeconews.com/content/view/8703/764/>; Bob Egelko, "Medical Pot Grower Eddy Lepp Gets 10 Years," *Cannabis Culture Magazine*, May 18, 2009, accessed May 11, 2011, <http://www.cannabisculture.com/v2/content/medical-pot-grower-eddy-lepp-gets-10-years>.

About retirement age now, Eddy Lepp is one of those guys who never really left Woodstock. Before being incarcerated, he slumped around in tie-dyes and jeans. He liked wearing a hat emblazoned with the marijuana leaf. Out on his semirural farm, he passed the days smoking joints and listening to Bob Marley music.

Everyone seems to like the guy. A longtime activist for the legalization of marijuana, he's even something of a folk hero in Northern California. At his sentencing, the crowd (chanting "free Eddy!") spilled out into the courthouse hallways. The judge didn't seem to mind the spectacle, and she went out of her way to say she didn't want to hit him with ten years of jail time, but federal guidelines gave her no choice. Now there's talk of a pardon.

Like Bernie Madoff, Lepp was touched by cancer. Madoff's son Andrew was stricken and so was Lepp's wife. She died. Also, like Madoff, Lepp was a businessman. Madoff made millions and lived in luxury while robbing investors; Lepp made enough to scrape by from his ministry and farming enterprises.

What's a Right?

One definition of a **right**²³ in ethics is *a justified claim against others*. I have the right to launch a gardening business or a church enterprise or both on my property, and you're not allowed to simply storm in and ruin things. You do have the right, however, to produce *your own* garden company and church on your property. On my side, I have the right to free speech, to say whatever I want no matter how outrageous and you can't stop me. You can, however, say whatever you want, too; you can respond to my words with whatever comes into your head or just ignore me completely. A right, in sum, is something you may do if you wish, and others are morally obligated to permit your action.

Duties tend to be *protective* in nature; they're about assuring that people aren't mistreated. Rights are the flip side; they're *liberating* in nature, they're about assuring that you're as free as possible.

Because rights theory maximizes choices in the name of ethics, it's not surprising that Lepp built his court defense on that ground. Lepp fought the law by maintaining that his medical gardens business and church operations involved *his* land and *his* religion. It wasn't that he had a right to grow pot or pray to a specific God; that had nothing to do with it. The point is he had a right *to do whatever* he wanted on that land, and *believe in whatever* he wanted in his mind. That's what rights are about. As opposed to duties that fix on specific acts, rights ethics declares that there are places (like my land) where the acts don't matter. As long as no one else's rights are being infringed on, I'm free.

Finally, duties tend to be community oriented: they're about how we get along with others. Rights tend to center on the individual and what he or she can do regardless of whether anyone else is around or not. That explains why a duty-based ethics coheres more easily with a scene like the one Madoff provoked, a situation that involves winners and losers, criminals and victims. On the other side, an ethics based on rights is more convenient for Lepp and his gardening and religious enterprises. Though he ended up in jail, there were no obvious victims of his crimes; at least no one complained that they'd been mistreated or victimized as individuals.

23. A justified claim against others.

What Are the Characteristics of Rights?

English philosopher John Locke (1632–1704) maintained that rights are

- **Universal.** The fundamental rights don't transform as you move from place to place or change with the years.
- **Equal.** They're the same for all, men and women, young and old.
- **Inalienable.** They can't be taken, they can't be sold, and they can't be given away. We can't *not* have them. This leads to a curious paradox at the heart of rights theory. Freedom is a bedrock right, but we're *not* free to sell ourselves into slavery. We can't because freedom is the way we are; since freedom is part of my essence, it can't go away without me disappearing too.

What Rights Do I Have?

The **right to life**²⁴ is just what it sounds like: Lepp, you, and I should be able to go through our days without worrying about someone terminating our existence. This right is so deeply embedded in our culture that it almost seems unnecessary to state, but we don't need to stretch too far away from our time and place to find scenes of the right's trampling. Between the world wars, Ukraine struggled for independence from Joseph Stalin's neighboring Russia. Stalin sealed the borders and sent troops to destroy all food in the country. Millions died from starvation. Less dramatically but more contemporaneously, the right to life has been cited as an argument against capital punishment.

The **right to freedom**²⁵ guarantees individuals that they may do as they please, assuming their actions don't encroach on the freedom of others. In a business environment, this assures entrepreneurs like Lepp and Madoff that they may mount whatever business operation they choose. Lepp's garden and ministry were surely unorthodox, but that can't be a reason for its prohibition.

Similarly, *within* a company, the right to freedom protects individuals against abuse. No boss can demand more from an employee than what that employee has freely agreed—frequently through a signed contract—to provide.

On the other side, however, there are questions about how deeply this basic right extends through day-to-day working life. For example, the freewheeling Lepp probably wasn't too concerned about the clothes his volunteer workers chose to wear out in the garden, but what about clothes in Madoff's investment house? He was serving wealthy, urban clients in suits and ties. What would *their* reaction be to a junior investment advisor just out of college who shows up for a meeting in a tie-

24. Within a rights ethical theory, the responsibility to respect the life of all individuals.

25. Within a rights ethical theory, the guarantee that individuals may do as they please, assuming their actions don't encroach upon the freedom of others.

dye and jeans? Some clients, it's safe to say, would head for the exit. Now, what recourse does boss Madoff have when the casual employee says, "Look, it's a free country; I can wear whatever I want"? Within a rights theory of ethics, it must be conceded that the employee is correct. *It's also true*, however, that Madoff has rights too—specifically, the freedom to fire the guy. What can be taken from this is that, as a general rule, the *enabling side* of a rights ethics is that you can do whatever you want, but the *limiting and controlling side* is that the same goes for everyone else.

From the right to freedom, other rights seem to derive naturally. The **right to free speech**²⁶ is tremendously important in the commercial world. Lepp's messages to his Rasta flock may have provoked skepticism in some listeners, but no one doubts that he had a right to voice his ideas. The same goes for Madoff's exuberant claims concerning his investing strategy. Crucially, the same also goes for those on the other side of Madoff's claims; the same freedom Madoff enjoyed also allowed whistle-blowers to answer back that it's *impossible* to legitimately realize such constant and high profits. In fact, in the case of Madoff's investment company, whistle-blowers *did* say that, repeatedly. No one listened, though. The right of free speech doesn't guarantee a hearing.

The **right to religious expression**²⁷ also follows from basic freedom. It guaranteed Lepp the space he needed to pioneer his particular brand of gardening Rastafarianism in Northern California. His is, obviously, a weird case, but the right works in more traditional workplaces, too. *USA Today* Emily Bazar, "Prayer Leads to Work Disputes," *USA Today*, October 16, 2008, accessed May 11, 2011, http://www.usatoday.com/news/nation/2008-10-15-Muslim_N.htm. reported a case where Muslim workers were fired from their jobs in several meatpacking plants in the Midwest because they left the production line in the middle of the day without authorization to go outside and pray. The workers' response? They filed a lawsuit claiming their right to religious expression had been violated.

No doubt it had been.

26. Within a rights ethical theory, the guarantee that individuals may say what they like, assuming their speech doesn't encroach upon the freedom of others.

27. Within a rights ethical theory, the guarantee that individuals may express religious beliefs freely, assuming their acts don't encroach upon the freedom of others.

But the company's response is also weighty. According to the article, "The problem with the Muslim prayer request is that it's not one day or annual, it's every day and multiple times. Further, those times shift over the course of the year based on the sun's position."

The result, according to the company, is that scheduling becomes very difficult, and those who aren't Muslim find it nearly impossible to keep working when they're getting abandoned so frequently during the day. Here we're confronted with a very basic conflict of rights. While no one doubts that freedom exists to practice a religion, isn't it also true that the company—or the company owners if we want to

cast this in personal terms—have a right to set up a business in whatever manner they choose, with breaks scheduled for certain times and worker responsibilities strictly defined? In the end, the question about Muslim workers leaving the work floor to pray isn't about one *kind* of religion or another; it's not Christians against Muslims or something similar. The question is about which right takes precedence: the owners' right to set up and run a company as they wish or the employees' right to express their beliefs how and when they choose.

From an ethical perspective—which doesn't necessarily correlate with a legal one—the resolution to this dilemma and any clash about conflicting rights runs through the question of whether there's a way to protect the basic rights of *both* groups. It runs that way because rights are fundamentally about that, about maximizing freedom. In this case, it seems that firing the workers *does* achieve that goal. The owners' initiative inside their company is protected, and the workers are now able to pray when they desire.

To be sure, other ethical approaches will yield different outcomes, but in the midst of rights theory where individual liberty is the guiding rule and the maximization of freedom is the overriding goal, it's difficult for other concerns to get traction. So it may be that the *community as a whole* is better served by looking for a solution that allows Muslims to maintain their prayer schedule *while also* allowing the plant to continue functioning in a normal way. Even if that's true, however, it's not going to affect a rights-theory resolution very much because this kind of ethics privileges what *you* and *I* can do over what *we* can do together. It's an ethics of individualism.

The **right to pursue happiness**²⁸ sits beside the right to life and the right to freedom at the foundation of rights ethics. The pursuit gives final direction and meaning to the broad theory. Here's how: it doesn't do much good to be alive if you're not free, so freedom orients the right to life. It also doesn't do much good to be free if you can't pursue happiness, so the right to pursue happiness orients freedom. That's the organizing reasoning of ethical rights; it's how the theory holds together. This reasoning leaves behind, however, the difficult question as to exactly where the pursuit of happiness leads.

28. Within a rights ethical theory, the guarantee that individuals may seek happiness any way they like, assuming they don't encroach upon the freedom of others.

29. Within a rights ethical theory, the guarantee that individuals and organizations may earn freely and keep what they have made.

In an economic context, one way of concretizing the pursuit of happiness is quite important: it's our **right to possessions**²⁹ and the fruits of our work. What's ours, along with what we make or earn, we have a right to keep and use as we wish. Among rights theorists, this particular right attracts a staunch group of advocates. Called libertarians, they understand liberty as *especially* reflected in the right to dominion over what's ours.

Libertarianism³⁰ is arguably the most muscular area of rights theory, and it’s the one where most conflicts—and most stands in the name of personal rights and the pursuit of happiness—take place. This is definitely where Lepp made his stand. A frequently viewed YouTube video reveals exactly what standing up for libertarian rights looks like. In the clip, police have been called to Lepp’s Medicinal Gardens. The squad car pulls up the long dirt road, and Lepp goes out to stop it. This is their conversation:

Lepp:	I am demanding that if you do not have a warrant that you leave. You are illegally on my property and I am <i>demanding that you leave!</i>
Police officer:	(Into his radio) Can I get some help up here?
Lepp:	This is private property. This is a church function. Again, I am asking, if you do not—
Police officer:	You can ask all you want, Mr. Lepp, but I’m not leaving.
Lepp:	Please leave my property! Under what authority are you standing here? <i>Sir, I am demanding that you tell me under what authority are you violating my rights!</i>
Police officer:	Under no authority, Mr. Lepp. As soon as my sergeant gets here, he’ll advise you of whatever he wants to advise you of.
Lepp:	Fine, then I suggest you go down and wait for him at the bottom of my property!
The officer stands there silently.	

Video Clip

Eddy Lepp Makes a Stand

[\(click to see video\)](#)

This is the kind of scene that makes libertarians’ blood boil. Lepp, decked out in a t-shirt emblazoned with a marijuana leaf, actually stays fairly mellow, but he makes his point. He makes two points actually, and they need to be distinguished. The first is a *legal* point, it’s the question about whether the officer has a warrant. The officer doesn’t, but the second point—“under what authority are you violating my rights”—goes beyond the legal and into the ethical. Lepp believes the land is his and he’s not infringing on anyone else’s freedoms, and therefore, he can do what he wants and the police should leave him alone.

30. Within ethical theory, the acceptance of basic rights as the providers of moral guidance, with emphasis attached to the right to our possessions and the fruits of our work.

The officer isn't quite sure how to reply to this, which is understandable. It is because this case displays a clear separation between the law on one side and an ethical reality on the other. Moreover, the two appear not only separate but also incompatible; it's difficult to see any way to bring them together. With respect to the law, the case is clear: Lepp was growing massive amounts of marijuana on his farm and growing it for distribution. Federal law explicitly prohibits both the growing and the distributing. It's unambiguous. It's also clear that Lepp was doing it since you could see the crop from the public highway passing by his fields. Everyone saw that marijuana was growing, that people were harvesting it, and that they were planting more. As far as the law goes, Lepp really had no leg to stand on. Once the DEA found out about him, they didn't have any choice but to bring him in. But *ethically*—and in terms of rights theory—there seems to be equal clarity going in the *other* direction. There were few complaints about Lepp's activities. No one was hurt, and it was his land. It's hard to see within a libertarian perspective any way to justify the police harassment, the legal proceedings, or the jail term Lepp ended up getting. This doesn't mean Lepp was treated unjustly; it only means that whatever justice was served on him, it wasn't libertarian.

Libertarianism in the Economic World

Lepp wasn't a big-time businessman. His medicinal garden enterprise produced enough income to get him through the day and little more. When he went to court, he needed a public assistance attorney (not that it would've made any difference). But the issues he brings forward reverberate through the business world. Here are a few hypothetical scenarios where libertarian ethics comes into play:

- A massive brewery is constructed upstream from farmland and soaks up most of the water to make beer, leaving the downstream farms with almost nothing for irrigation. It's the brewery's land, so can't the owners do what they want with the water running through it?

A strong libertarian argument offers a reason to say yes. Even though it's true that others will be severely harmed by the act, an ethics that *begins* with the freedom to have what's mine doesn't buckle before the demands of others. Now, compare this outcome with the guidance offered by Kant's categorical imperative, the idea that any act must be universalized. Within this framework the opposite conclusion is reached because if *everyone* just dammed up the water channeling through his or her land, then the brewer wouldn't even have the choice: no water would be flowing across the land in the first place. So a duty-oriented ethics leads toward a solution that is more favorable for the larger community, where a rights-based perspective leaves more room for individuality but at the cost of the interests of others.

- Bernie Madoff didn't start off rich. His father was a plumber in Queens. Even before launching his Ponzi scheme, he became wealthy by working hard, being smart, and investing wisely. He grew an investment house from scratch to being among the most prominent in New York. His annual income hit the millions even without the Ponzi stuff. Possibly, there was an administrative assistant of some kind there with him from the beginning. She was hired at, say, \$32,000 annually. Years later, Madoff is rich, and she's at \$36,000. She still arrives at work in her beater car while Madoff gets the limousine treatment. Is this fair?

A strong libertarian position gives Madoff a reason to say yes. The wealth *did* accumulate from his efforts, not hers. If Madoff hadn't been there the money wouldn't have come in, but, if she'd quit on the first day, he would've hired someone else and the end result probably wouldn't have been much different. The money, in other words, grew because of Madoff's efforts, therefore it's his, and therefore there's no ethical obligation to spread it around.

On the other hand, a duty-based orientation would generate concerns about *gratitude* and *respect*. These perennial duties leave room for wealth redistribution. The argument is that Madoff owes the assistant a higher wage not because of her work performance but as a show of gratitude for her contribution over the years. Similarly, the duty of respect for others doesn't demand that everyone be treated equally. It doesn't mean everyone should get the same wage, but it does demand that people be *respected* as equals. This implies taking into account that the assistant's *efforts* were prolonged and significant, just like Madoff's, and therefore she should receive a salary more commensurate with his.

Negative and Positive Rights

The ethics of rights can be categorized as negative rights and positive rights. **Negative rights**³¹ are fundamental. They require others to not interfere with me and whatever I'm doing. The right to life is the requirement that others not harm me, the right to freedom is the requirement that others not interfere with me, the right to speech requires that others not silence me, the right to my possessions and the fruits of my labors requires that others let me keep and use what's mine.

Positive rights³², by contrast, are closer to traditional duties. They're obligations others have to help protect and preserve my basic, negative rights. For example, the right to life doesn't only require (negatively) that people not harm me, but it also requires (positively) that they come to my aid in life-threatening situations. If I'm in

31. Those rights that require others to not interfere with me and whatever I'm doing.

32. Obligations others have to help protect and preserve my basic, negative rights.

a car wreck, my right to life requires bystanders to call an ambulance. So if an individual with a rights-based philosophy and an individual with a duty-based philosophy both arrive on a crash scene, they'll do the same thing—just for different reasons. The rights person calls for help to protect the victim's right to life; the duties person calls to fulfill the duty to beneficence, the duty to look out for the welfare of others.

Positive rights can be drawn out to great lengths. For example, the argument is sometimes made that my basic right to freedom is worthless if I don't have my health and basic abilities to operate in the world. This may lead a rights theorist to claim that society owes its members health care, education, housing, and even money in the case of unemployment. Typically, these positive rights are called **welfare rights**³³. Welfare, in this context, doesn't mean government handouts but minimal social conditions that allow the members to fully use their intrinsic liberty and pursue happiness with some reasonable hope for success.

The hard question accompanying positive rights is: *where's the line?* At what point does my responsibility to promote the rights of others impinge on *my own* freedom, my own pursuit of happiness, and my own life projects?

Rights in Conflict

The deepest internal problems with rights ethics arise when rights conflict. Abortion is a quick, hot-button example. On one side (pro-life), support comes from the initial principle: a human being, born or not, has a right to life, which may not be breached. On the other side (pro-choice), every person's original freedom over themselves and their bodies ends all discussion. Now, one of the reasons this debate is so intractable is that both sides find equally strong support *within the same basic ethical framework*. There's no way to decide without infringing on one right or the other.

A complementary case arose around Lepp's Rasta religious gatherings. Though many of his neighbors didn't care, there were a few who objected to having what were essentially mini-Woodstocks on the land next door. It was impossible, of course, for Lepp to entirely contain the noise, the smoke from fires, the traffic congestion, and the rest entirely on his property. The question is, when does my right to do what I want on my land need to be curtailed so that your right to dominion over yours isn't soiled?

Broadening further, there's the question about Lepp growing marijuana for medicinal purposes. On one side, a rights theory supports his inclination to grow what he wants on his land and sell the fruits of his labors to other adults for their

33. Within a rights ethical theory, obligations society holds to provide minimal conditions allowing individuals their free pursuit of happiness.

consenting use. His is a farming business like any other. But on the other side, a theory of rights can extend into the realm of positive requirements. The right to the pursuit of happiness implies a right to health, and this may require government oversight of medical products so that society as a whole may be protected from fraudulent claims or harmful substances. The question of marijuana shoots up right here. What happens when socially sanctioned entities like the US Food and Drug Administration decide that marijuana is harmful and should therefore be prohibited? Which rights trump the others, the negative right to freedom or the positive right to oversee medical substances?

A similar question comes up between Madoff and his investors. A pure libertarian may say that individuals have the unfettered right to do as they choose, so if Bernie Madoff lies about investing strategies and his clients go along with it, well, that's their problem. As long as they weren't *forced*, they're free to do whatever they wish with their money, even if that means turning it over to a charlatan. Again here, however, a broader view of rights theory answers that in the complex world of finance and investment, the right to the pursuit of happiness is also a right to some governmental oversight designed to make sure that everyone involved in the financial industry is playing by a single set of rules, ones prohibiting Ponzi schemes and similar frauds.

Examples multiply easily. I have the right to free speech, but if I falsely yell "fire!" in a crowded theater and set off a life-threatening stampede, what's happening to everyone else's negative right to life and positive right to health? Leaving the specifics aside, the conclusion is that, in general, problems with rights theory occur in one of two places:

1. I have negative rights to life, freedom, and my possessions but they infringe on *your* rights to the same.
2. I have a right to freedom and to do what I want but that right clashes with larger, society-level protections put into place to assure everyone a reasonable shot at pursuing their happiness.

What Justifies a Right?

One justification for an ethics of rights is comparable with the earlier-noted idea about duties being part of the logic of the universe. Both duties and rights exist because that's the way things *are* in the moral world. Just like the laws of physics tell us how far a ball will fly when thrown at a certain speed, so too the rules of rights tell us what ought to happen and not happen in ethical reality. The English philosopher John Locke subscribed to this view when he called our rights "natural."

He meant that they're part of who we are and what we do and just by living we incarnate them.

Another justification for an ethics of rights is to derive them from the idea of duties. Kant reappears here, especially his imperative to treat others as ends and not as means to ends. If we *are* ends in ourselves, if we possess basic dignity, then that dignity must be reflected somehow: it must have some content, some meaning, and the case can be made that the content is our possession of certain autonomous rights.

Advantages and Drawbacks of an Ethics Based on Rights

Because of its emphasis on individual liberties, rights theory is very attractive to open-roaders and individualists. One of the central advantages of a rights ethics is that it clears a broad space for you and me and everyone else to be ourselves or make ourselves in any way we choose. On the other side of that strength, however, there's a disadvantage: centering ethics on the individual leaves little space of agreement about how we can live together. An ethics of rights doesn't do a lot to help us resolve our differences, it does little to promote tolerance, and it offers few guarantees that if I do something beneficial for you now, you'll do something beneficial for me later on.

Another strong advantage associated with an ethics of rights is simplicity in the sense that basic rights are fairly easy to understand and apply. The problem, however, with these blunt and comprehensible rights comes when two or more of them conflict. In those circumstances it's hard to know which rights trump the others. In the case of Lepp's business—the Medicinal Gardens—it's hard to be sure when his use of his land infringed on the rights of neighbors to enjoy their land, and it's difficult to know when the health product he offered—marijuana—should be prohibited in the name of the larger right to health for all individuals in a society. Most generally, it's difficult to adjudicate between claims of freedom: where does mine stop and yours begin?

KEY TAKEAWAYS

- Rights are universal and inalienable.
- Basic rights include those to life, freedom, and the pursuit of happiness.
- Rights theory divides negative from positive rights.
- Ethical rights provide for individual freedom but allow few guidelines for individuals living and working together in a business or in society

REVIEW QUESTIONS

1. How does the right to pursue happiness license Lepp's Medicinal Gardens?
2. What is a libertarian argument against imprisoning Lepp?
3. One justification Lepp cited for his farm was the health benefits marijuana could provide. Assuming Lepp was right about those benefits, how could they be combined with a rights-based ethics to justify his activities?
4. How could the rights to freedom and the pursuit of happiness be set against Lepp's business?
5. What are positive rights and how could they be mustered against Lepp's farm?
6. If someone drives away from Lepp's farm high as a kite and soon after drives off the road and into a tree, does Lepp bear any ethical responsibility for this within a rights ethics?

2.5 Case Studies

Skin and Money



Source: Leslie Adams,
[http://www.ugo.com/the-goods/
calculator-tattoo](http://www.ugo.com/the-goods/calculator-tattoo).

In the mid-1980s in Los Angeles, Somen “Steve” Banerjee and his friend Nick DeNoia pooled money to start a new kind of strip club: men baring it for women. Since they had no idea what they were doing, it didn’t go well. What finally helped was a couple of showmen from Las Vegas. Steve Merrit and his partner (professional and romantic) Mark Donnelly came aboard and hatched the idea of a Vegas-type song-and-dance show wrapped around the disrobing.

To find performers, they cruised the muscle beaches outside LA. They brought the guys back to a studio, applied some Village People–style outfits (policeman, fireman, construction worker, and so on), and ran the group through a line-dancing routine.

Their idea was simple but innovative: sex sells; but instead of making the show lustful, they made it entertaining. Drawing on their Las Vegas experience, Merrit and Donnelly understood how to do it, how to produce a fun theatrical fantasy instead of a crude flesh show. The general concept made sense and the execution was professional, but on opening night, no one knew what would happen.

Chippendales exploded. Women went crazy for the performances, first in the United States, then Europe, and then everywhere as Banerjee and DeNoia rushed to form multiple traveling versions of their production. The time they didn't spend together mounting the shows they spent in court fighting over who was entitled to how much of the profits and who really owned the suddenly very valuable Chippendales name and concept. The dispute ended in 1987 after DeNoia was shot dead in his office.

One major problem Chippendales faced is that it wasn't a hard show to copy. Get some muscled guys, some uniform-store costumes, a pop music soundtrack, and pound it all together into a dance routine with a little teasing; you don't need a genius to do it. So others started.

Michael Fullington was a junior choreographer for Chippendales. He struck up a friendship with some of the showguys, and they split away into a group called Club Adonis. The original choreographers—Merrit and Donnelly—also got in on the act, forming their own traveling revue called Night Dreams.

Unhappy with these copycat acts, Banerjee hired a hit man to go around killing the whole bunch. The hit man, it turned out, was an FBI informant. Banerjee ended up in jail. The ensuing investigation led to more charges. There was arson (he'd burned down one of his own clubs for the insurance money some time back) and also another count of conspiracy to murder since it was Banerjee who'd arranged to have his original partner shot.

The case never got to trial. Banerjee agreed to plead guilty, absorb a twenty-six-year sentence, and give up his rights to Chippendales along with nearly all his money and real estate holdings.

While the lawyers worked out the details, Banerjee's wife Irene worked feverishly to organize a group of character witnesses. By bringing a parade of people to testify about her husband's good side at the sentencing hearing, she was hoping to get the jail time reduced a little bit. Or maybe she was hoping to hold on to more of the money and real estate they'd accumulated.

No one got the chance to testify. On the morning of the hearing, Banerjee hung himself in his cell.

Because the trial was never completed, the plea deal never went into effect. And because the guilty man was dead, there was no one left to charge with any crime. Chippendales and all the money and property associated with it went to Banerjee's wife Irene.

QUESTIONS

1. Is being a Chippendale's dancer honorable work?
 - How could the perennial ethical duties to the self—*develop our abilities and talents* and *do ourselves no harm*—be mustered to support the idea that these men should be proud of what they do?
 - Ethically, how does this job compare with working for the Metropolitan Opera in New York, an outfit that calls itself “a vibrant home for the world’s most creative and talented artists working in opera”?
2. Is *hiring and training* a Chippendale's dancer honorable? Imagine you were one of the original choreographers cruising California beaches in search of beefcake and dance talent. You bring the guys in, choreograph their routine, and send them up on stage.
 - Thinking just of the perennial duties to the self, is hiring and training them honorable? Under what conditions?
 - Thinking just of the perennial duties to others—avoiding wrongful actions toward others, honesty, respect, beneficence (promoting the welfare of others), gratitude, fidelity (keeping promises, honor agreements), and reparation (compensating others when we harm them)—is hiring and training them honorable? Why or why not?
3. With respect to the ethics of duties, is Chippendale's a respectable company in terms of how it treats its clients? How does this company compare with the Metropolitan Opera's treatment of its clients (note that the Met occasionally replaces the word *clients* with the more flattering *patrons*)?
4. Leaving aside the legal issues and using only the perennial duties, what ethical case could be made in favor of Banerjee getting a hit man to eliminate the people who were copying his show?
 - Should he have hired someone or done the job himself? Explain.
 - What's the difference between hiring a hit man and hiring a beefcake dancer?

- How would Kant respond to these questions?
- 5. The Club Adonis group worked for Chippendales before splitting to do the same thing elsewhere. Use Kant's categorical imperative to show that their action was wrong.
- 6. According to the perennial duties, did Banerjee do the right thing hanging himself in the end?
- 7. According to Kant, did Banerjee do the right thing hanging himself?
- 8. When Banerjee hung himself, he lost his life, but he did manage to preserve his life's property and wealth for his wife. Can a libertarian ethics be used to show that Banerjee did the right thing?

Two at the Same Time



Source: Photo courtesy of Robert Fairchild,
<http://www.flickr.com/photos/coffeego/3545289824>.

On a real estate discussion board, “Ethical dilemma with submitting two offers at once? (contingency, clause, agent),” City-Data, accessed May 11, 2011, <http://www.city-data.com/forum/real-estate/710433-ethical-dilemma-submitting-two-offers-once.html>. someone with the sign-in name BriGuy23 asks, “Does anyone on here find any issue with submitting two offers to buy two different apartments at the same time? My friend thinks that it’s unfair due to the fact that one of the offers is definitely going to not go through which means they’re tying up the seller’s time (and money in a way). From a seller’s standpoint I think I would be annoyed but I really don’t see anything wrong with it from a buyer’s perspective. Thoughts?”

A response comes from middle-aged mom: “Sellers can negotiate multiple offers so there is no reason why a buyer could not make multiple offers on different places. Assuming you are represented by a buyer’s agent, I would use the same agent to make both offers. Make certain that your contract gives you an out in the unlikely event both are accepted.”

QUESTIONS

1. What does BriGuy23 suspect might be unethical about submitting two offers to buy two different apartments at the same time? Can you wrap this suspicion in the language of the duties?
2. Is middle-aged mom appealing to the concept of fairness to justify making multiple offers at the same time? If she is, then how? If she isn't, what is her reasoning?
3. If Kant decided to make a contribution to this discussion board, what do you think he would write?
4. Middle-aged mom writes, "Make certain that your contract gives you an out in the unlikely event both are accepted." She means that when you make an offer to buy, you actually offer a signed contract to buy the apartment, *but* there's a catch, an escape clause that lets you pull out if you choose. Is that ethical, offering a signed contract offering to buy a property that includes an "out"?
5. You need a date for Saturday night.
 - Would you have any problem with inviting two different people at the same time (by, say, leaving a message on both their phones)? Why or why not?
 - Would you leave yourself an out in case both answers were yes? If not, why not? If so, what would it be and how could it be justified ethically?

Working at American Apparel



Photo courtesy of Natalia Rivera,
<http://www.flickr.com/photos/96952704@N00/317531326/>.

Dov Charney is an American immigrant success story, but he's not exactly a "Give me your tired, your poor" kind of immigrant. He's a Canadian who came to America to attend an expensive private university.

He ended up founding American Apparel (AA), a clothing manufacturer producing trendy t-shirts and basics selling mainly to a young, edgy crowd.

Based in Los Angeles, their factory is among the biggest clothes-making operations in the nation. It employs almost five thousand workers. Those workers are well known for a number of reasons:

- Just *having* workers sets AA apart. Nearly all US clothing manufacturers outsource their cutting and sewing to poor countries. From Mexico to China, you can find factories paying locals fifty cents an hour to do the same kind of work they do at AA. The difference is the sewers working in Los Angeles typically get around fifteen dollars an hour. That's not a lot in Southern California, but it's enough to make them—according to AA—the best paid garment workers in the world.
- The workers don't report to bosses so much as each other. They organize as independent teams paid a base wage of eight dollars an hour. On top of that they receive a bonus depending on how much they produce. So they get together, set their own targets, and go for them. This liberating of the workforce led to nearly a tripling of output and was matched by about a doubling of wages.

- The company features a generous stock options program to help workers buy shares in the enterprise.
- On its own initiative, the company provides basic health-care services through a clinic tucked into a factory corner. It provides bikes to employees, helping them zip through the downtown traffic morass without adding pollution to the infamous city smog. There are free telephones in the factory for employees to use to call family members at home.
- Many of those employees' family members are in other countries; AA has a very large immigrant workforce.
- Many of those immigrants are in the country illegally, which partially explains why the company has been on the forefront of amnesty campaigns, organizing public rallies and media events of all kinds for the undocumented. Called *Legalize LA*, the campaign's title references the fact that a tremendous number of Southern Californians outside AA are also illegal immigrants.
- In 2009, the federal government indicated to AA that 1,800 of its workers were using Social Security numbers and other identifying documents that had been purchased, stolen, or just plain invented. In any case, they didn't match up. The company was forced to fire the employees.

QUESTIONS

1. Workers at Charney's America Apparel are the highest-paid mass-production sewers in the world.
 - In terms of Charney's duties to the self, what ethical case can be made in favor of this high pay?
 - In terms of Charney's duties to others, what ethical case can be made in favor of this high pay?
 - Are these wages fair? Why or why not?
2. In terms of duties—either the perennial duties or Kant's categorical imperative—which is more recommendable: keeping the AA plant where and how it is, or moving it to Mexico and cutting the workers' wages in half? Why is the decision you've made the better of the two?

A few factors to consider:

- In Mexico, the workers' *real* pay in terms of local buying power would be much higher, even though the actual amount is less than what they receive here.
 - Many of the workers are illegal immigrants from Mexico; their legal situation would obviously be remedied and proximity to family would increase.
 - The national Mexican economy would benefit more from AA's presence than does the US economy.
3. Kant's categorical imperative requires that others be treated as ends and never as means.
 - In what way could the argument be made that the employees at AA are being treated as *means*, and therefore Charney's plant is unethical no matter how high his salaries may be?
 - Besides high pay, the company provides workers with considerable freedom to set their own work pace and schedule. The company also provides a stock purchase program. Do either or both of these factors alleviate the charge that the workers are treated as means and not ends? Why or why not?

4. Eighteen hundred of AA's five thousand workers were using false papers and Social Security numbers to get their job. Charney knew all about that but chose to overlook it.
 - Leaving the law aside, how can that overlooking be justified ethically?
 - Leaving the law aside, how can Kant be used to cast that action as ethically wrong in terms of lying? In terms of stealing? In terms of using people as means instead of ends?
 - Charney and AA support illegal immigrants in two ways: by giving them jobs and by organizing popular protests in favor of their legalization. Ethically, are these two activities recommendable or not? Or is one recommendable and the other not?
5. Assuming it's wrong for illegal immigrants to be working in America, who deserves the sterner ethical reprobation, Charney or the illegal workers? Explain in ethical terms.
6. The basic and natural rights of mainstream rights theory include the following:
 - Life
 - Freedom
 - Free speech
 - Religious expression
 - The pursuit of happiness
 - Possessions and the fruits of our work

 - How can these rights be mustered to support Charney's hiring and keeping workers he knows are in the country illegally?
 - How can these rights be mustered to ethically denounce Charney for hiring and keeping workers he knows are in the country illegally?
 - Thinking about those workers, do these rights give them an ethical license to use false Social Security numbers and identifying documents? Why or why not?
7. Eddy Lepp ended up in jail for his medicinal marijuana garden, yet Charney sleeps in a million-dollar beach house. Is this fair?

Pirates



Source: Photo courtesy of Marco Gomes, <http://www.flickr.com/photos/marcogomes/1346283989>.

The following is from an online discussion: “My cd-burner wont let me copy the cd..why...,” Hardforum, accessed May 11, 2011, <http://www.hardforum.com/archive/index.php/t-711331.html>.

overstand:	I've been having problems with copying cds and trying to burn them...when the copy process gets to 4% the used read buffer will go down to zero and continue fluctuating...will someone let me know the procedures on fixing this.
retardedchicken:	May I ask what CDs are you copying? Usually big companies put copy protection on their CDs so people dont ILLEGALLY copy their CDs.
--iNsAnE--:	why do people post worthless crap like this? its none of your business what cd's he's copying...dont accuse him of making illegal copy's of cd's...maybe try posting somethign useful next time
Flipside:	It's not worthless crap mongloid....Copyright protection does prevent the copying of some disks especially in main-stream programs such as Nero. Try using Clone CD—you may have better luck with a pure duplication program (No fuss).

QUESTIONS

1. The unanswered question here is whether the CD being copied is copyright protected, in other words, whether this is a piracy case. Assume it is. If retardedchicken had to fill out an ethical argument against CD piracy that relied on either the perennial duties or Kant, what could he say?
2. While overstand may be pirating, no one doubts that the original disc is legitimately his. Maybe he bought it or maybe someone gave it to him; either way, what's the libertarian argument against retardedchicken? How could a libertarian justify overstand's copying?
3. Would a libertarian believe that the company producing the disc has a right to lace it with code that makes duplication impossible? Explain.
4. It sounds like Clone CD is specifically made to help pirates get around the copyright protections manufacturers put on their discs.

- What's the Kantian case for condemning Clone CD for their project?
- What's the libertarian case for congratulating them?

Which of the two cases is stronger? Why?

5. Retardedchicken implies that overstand is a thief and --iNsAnE-- calls retardedchicken's post "worthless crap." Flipside calls --iNsAnE-- a "mongloid."
- Is there an ethical case that can be made against the tone of this discussion?
 - Does online interaction foster this tone? If so, can an ethical case be made against the existence of Internet discussion boards?

Gun Shop under Attack



Source: Photo courtesy of jaqian,
<http://www.flickr.com/photos/jaqian/478574894/>.

The headline from a local Oakland newspaper reported that a gun shop is closing due to unfair taxes. Alexandra J. Wall, “Jewish Gunshop Owner Closing Store; Cites Unfair Taxes,” *Jweekly*, July 21, 2000, accessed May 11, 2011, <http://www.jweekly.com/article/full/13657/jewish-gunshop-owner-closing-store-cites-unfair-taxes>. The gun shop’s name was Siegle’s Guns. Closing was inevitable, according to owner Mara Siegle, after Oakland residents passed Measure D, which levied a huge tax on gun dealers. They had to pay \$24 for every \$1,000 earned, in comparison to the \$1.20 per \$1,000 that all the other retailers in Oakland fork over. “No one can stay in business paying that kind of tax,” Siegle said while preparing her going-out-of-business sale. “And that’s exactly what Oakland wanted.”

No one disputes the point.

The disputes are about whether Oakland should want that and whether it’s fair for the city to use taxes as a weapon.

- Tracy Salkowitz says yes to both. “Except for hunting rifles, the sole purpose of weapons is to kill people.” Getting rid of gun shops, the logic follows, is a public welfare concern. And about the taxes that brought the store down? She’s “delighted” by them.
- Mara Siegle’s opinion is that people who don’t hunt and shoot for recreation don’t understand that guns are a legitimate pastime. “They don’t see this side,” she says, “because they don’t try to.” Further, she asserts, over the years gun owners have told her that they own guns to defend themselves.

- Outside the store, mingling customers agreed with Siegle. They said closing gun stores was the wrong way to fight crime and then cursed the city for the unjust taxes.

Amid the winners and losers, Mara Siegle certainly got the rottenest part of the deal. She has two sons, fifteen and seventeen, and she doesn't know what she'll do for income. "I need a job," she said.

A hand-lettered sign posted in the store's backroom for the benefit of Siegle's five full-time employees displayed the phone number of the unemployment office. The sign said, "You paid for it, use it."

QUESTIONS

1. With an eye on the concept of fairness, form an argument in favor of the drastically higher taxes imposed on gun shops.
2. Kant's categorical imperative prohibits killing. Can it be transformed into an argument against a gun shop in Oakland?
3. Would an ethics of duties or an ethics of rights work better for Siegle as she defends her business? Why? What might her argument look like?
4. Unemployment benefits are the result of unemployment insurance, which is not optional. Workers are forced to pay a bit out of each paycheck to the federal government, and if they lose their job, they get a biweekly check partially covering lost wages.
 - Would a libertarian approve of the unemployment insurance program?
 - Would it be right for a libertarian gun shop owner—someone defending her business on libertarian grounds—to accept unemployment benefits after her shop is forced out of business by extreme taxes? Explain.