

# **LAW AND ETHICS**

GENERAL INTRODUCTION EU LAW AND BEYOND

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OVERVIEW

# LAW AND ETHICS

1. Relationship of (EU) law and ethics
2. Different philosophers & philosophies
3. Deontology, consequentialism & virtue ethics

# GUIDING QUESTIONS



- What is the relationship of (EU) law and ethics?
- Which approach did Aristotle provide for 'virtue ethics'?
- What is the 'categorical imperative'?
- What is 'utilitarianism'?
- What is the 'veil of ignorance' proposed by Rawls?
- What is 'communitarianism'?
- How to differentiate 'deontology', 'consequentialism' and 'virtue ethics'?

Law and ethics

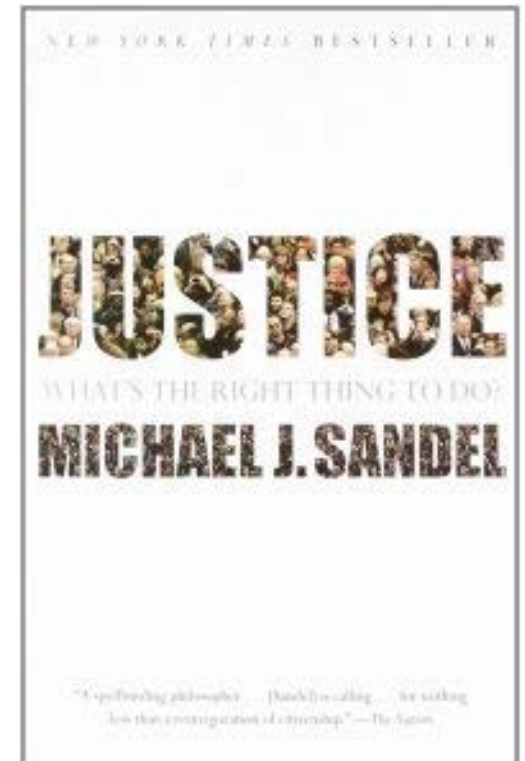
# Different concepts, but similar objectives

“These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, **justice**, solidarity and equality between women and men prevail.” (Article 2 para. 2 TEU)

Justice:

## What’s the Right Thing to Do?

(Sandel, 2010)



# Terminology: morality

544

*Frischhut*

- Territorial (regional) and cultural
- Temporal component (evolutionary character)
- Value based

According to the ECJ, morality has a cultural, a regional and a temporal component. While morality changes over the years (evolutionary character),<sup>98</sup> it is different from country to country (“in its territory”) and is based on certain values (“in accordance with its own scale of values”). That is why the ECJ, in a way of judicial self-restraint, has accepted the Member State’s competence in determining their understanding of morality. This morality (as mentioned in Art. 36 TFEU), is a *public* one, so in a way collective and in this context defined by public authorities, not by individuals.

morality

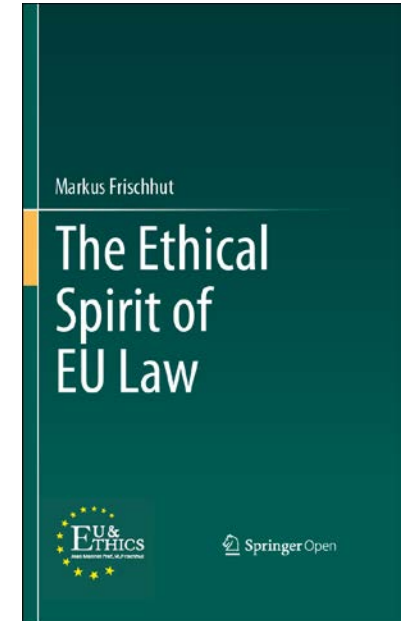
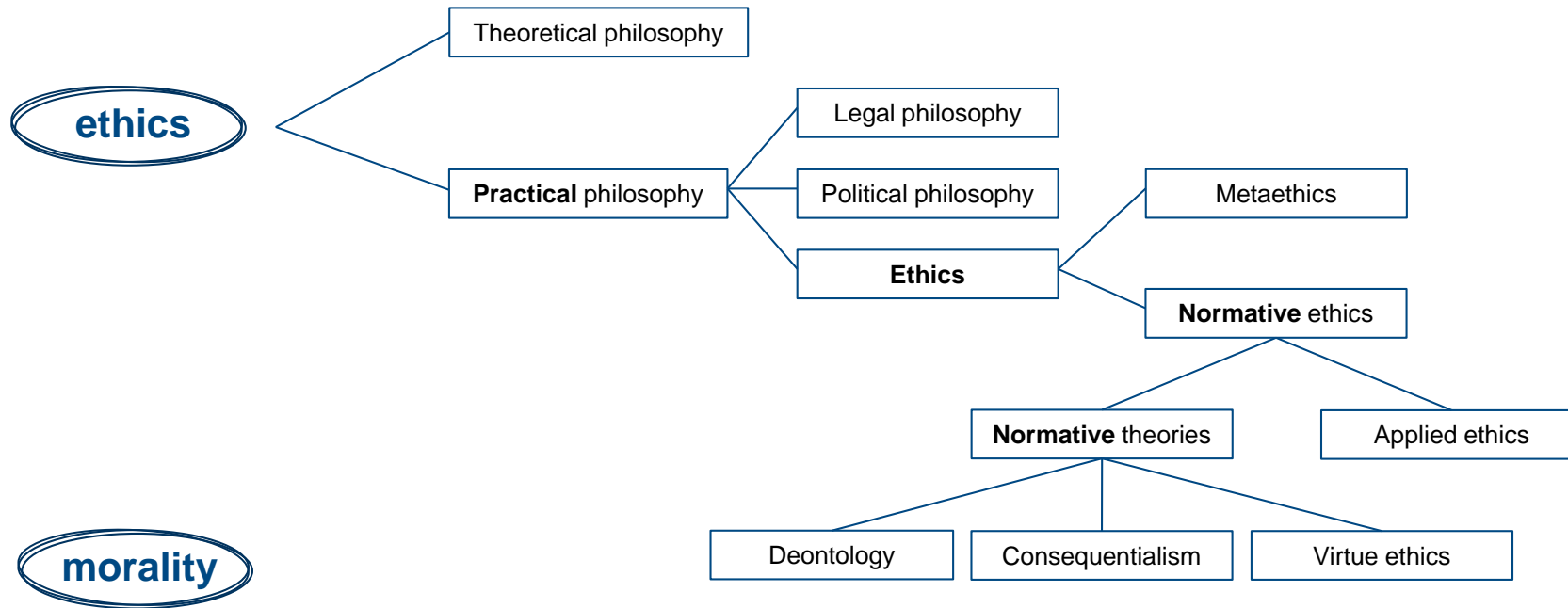
Source: Frischhut, 2015, p. 544

“In that context, as most of the Member States which submitted observations to the Court have noted, the legislation on **games of chance** is one of the areas in which there are **significant moral, religious and cultural differences** between the Member States. In the absence of Community harmonisation in the field, **it is for each Member State to determine** in those areas, in **accordance with its own scale of values**, what is required in order to ensure that the interests in question are protected [...]”

CJEU judgment of 8 September 2009, *Liga Portuguesa*, C-42/07, EU:C:2009:519, para. 57

Law and ethics

# Terminology: ethics



Source: Frischhut,  
2019, p. 9

# Morality in EU law | umbrella approach



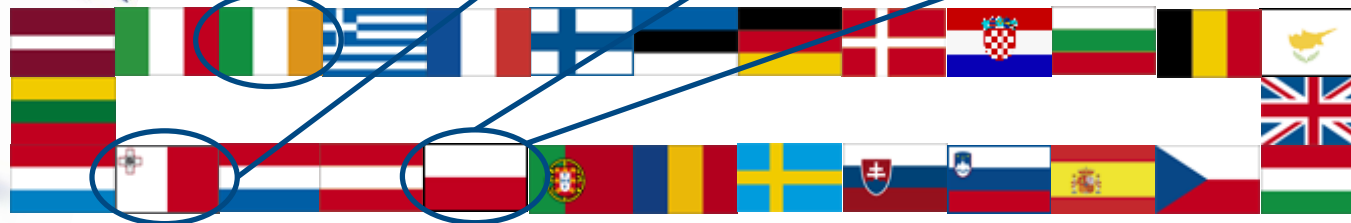
Public morality (not defined) as reason of **justification** in the context of the free movement of **goods** (Art. 36 TFEU)

Nothing in Treaties shall affect nat. law concerning “questions of **moral significance**” and “the protection of human life” (**Declaration** Accession Treaty 2003)

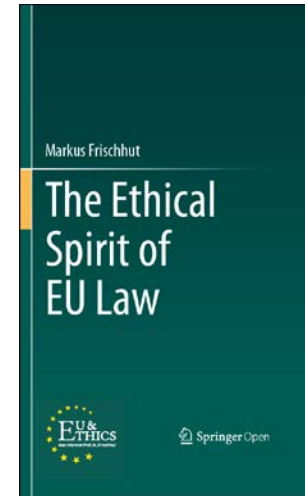
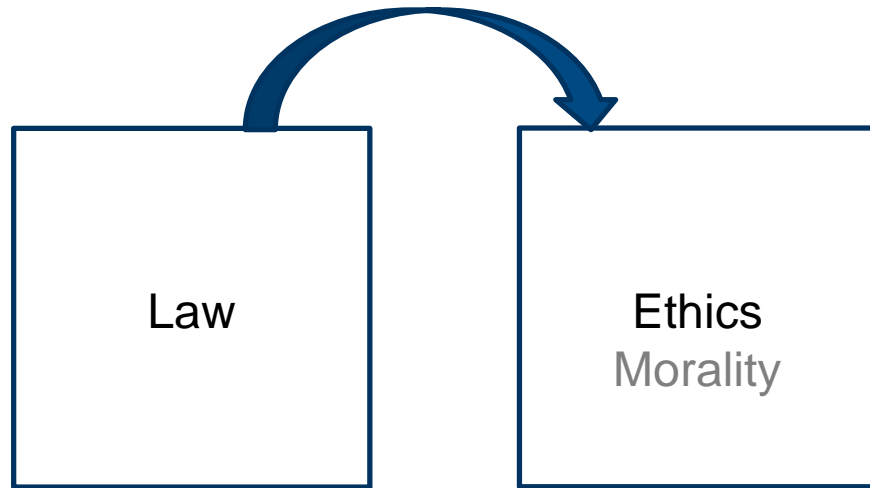
Nothing in Treaties shall affect Irish constitutional law concerning **abortion** (Prot. Maastricht Treaty 1992)

Nothing in Treaties shall affect nat. law concerning **abortion** (Prot. Accession Treaty 2003)

**EU Charter** does not affect right to legislate “in the sphere of **public morality** [...] of human dignity and respect for **human physical and moral integrity**” (**Declaration** Lisbon Treaty 2007)



# Ethics in EU law | different categories



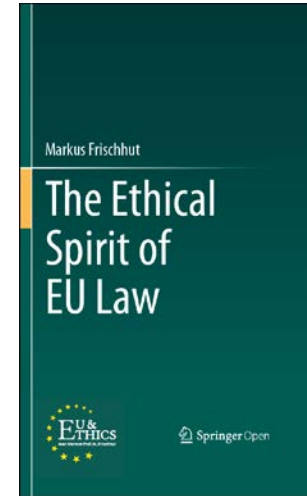
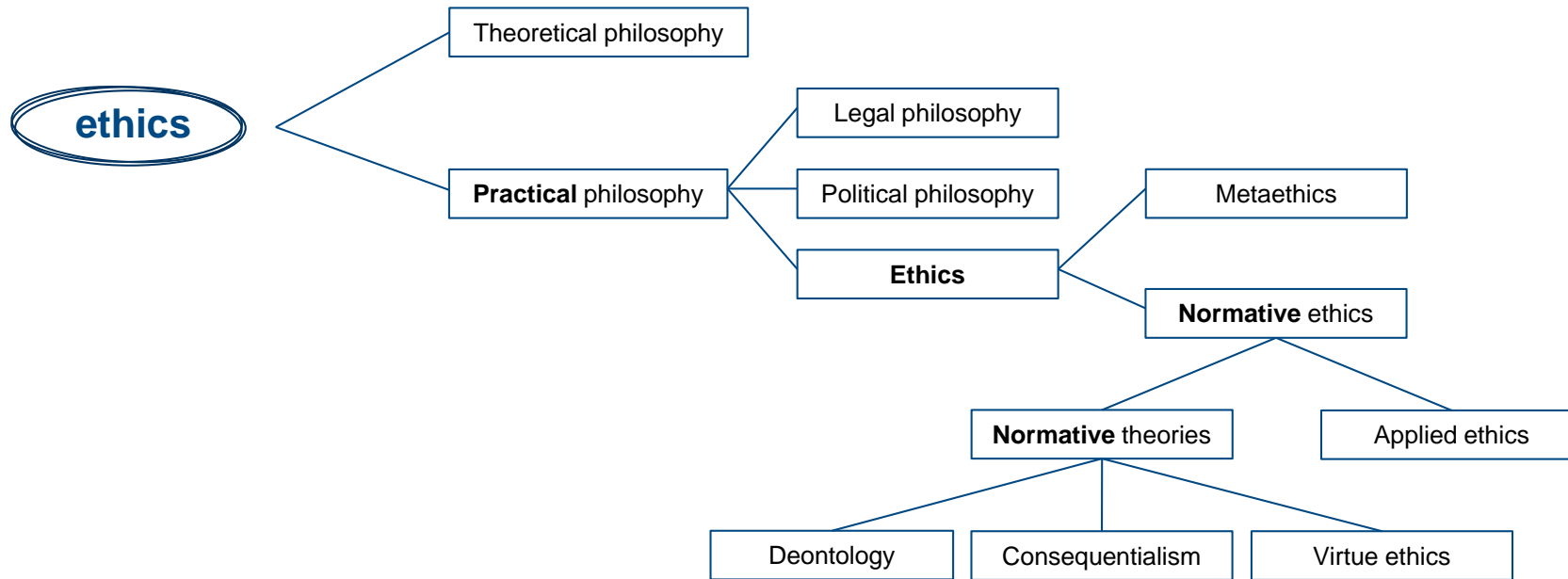
Source: Frischhut, 2019, p. 10

- 1. References only as an argument against **interference** from the EU
- 2. References only as a **supportive** argument for a certain legal solution
- 3. References in order to create a **parallel** ethical assessment (besides the legal one)
- 4. Determination via ethics **committees**, at EU or at national level
- 5. Determination via **codes of conduct**, at EU or at national level
- 6. Determination via references to **other** (international) **documents**
- 7. **Determination** in document itself (some hints with regard to the content or understanding of ethics)
- 8. **No** determination at all.



Law and ethics

# Different philosophers & philosophies



Source: Frischhut, 2019, p. 10

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# Different philosophers (excerpt)

**Michael Sandel (1953- )**



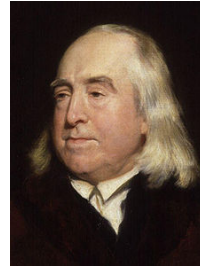
Picture credit: <http://www.justiceharvard.org/about/michael-sandel/>

**John Rawls (1921-2002): A Theory of Justice (1999)**



Picture credit: [https://en.wikipedia.org/wiki/John\\_Rawls](https://en.wikipedia.org/wiki/John_Rawls)

**Jeremy Bentham (1748-1832)**



Picture credit: [https://en.wikipedia.org/wiki/Jeremy\\_Bentham](https://en.wikipedia.org/wiki/Jeremy_Bentham)

**Immanuel Kant (1724-1804)**



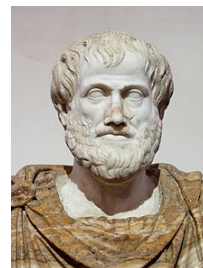
Picture credit: [https://en.wikipedia.org/wiki/Immanuel\\_Kant](https://en.wikipedia.org/wiki/Immanuel_Kant)

**Charles-Louis de Secondat, Baron de La Brède et de Montesquieu (1689-1755)**



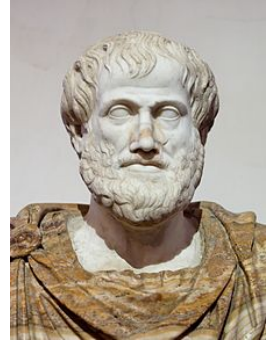
Picture credit: <https://en.wikipedia.org/wiki/Montesquieu>

**Aristotle (384-322 B.C.)**



Picture credit: <https://en.wikipedia.org/wiki/Aristotle>

# Philosophers | Aristotle (384-322 B.C.)

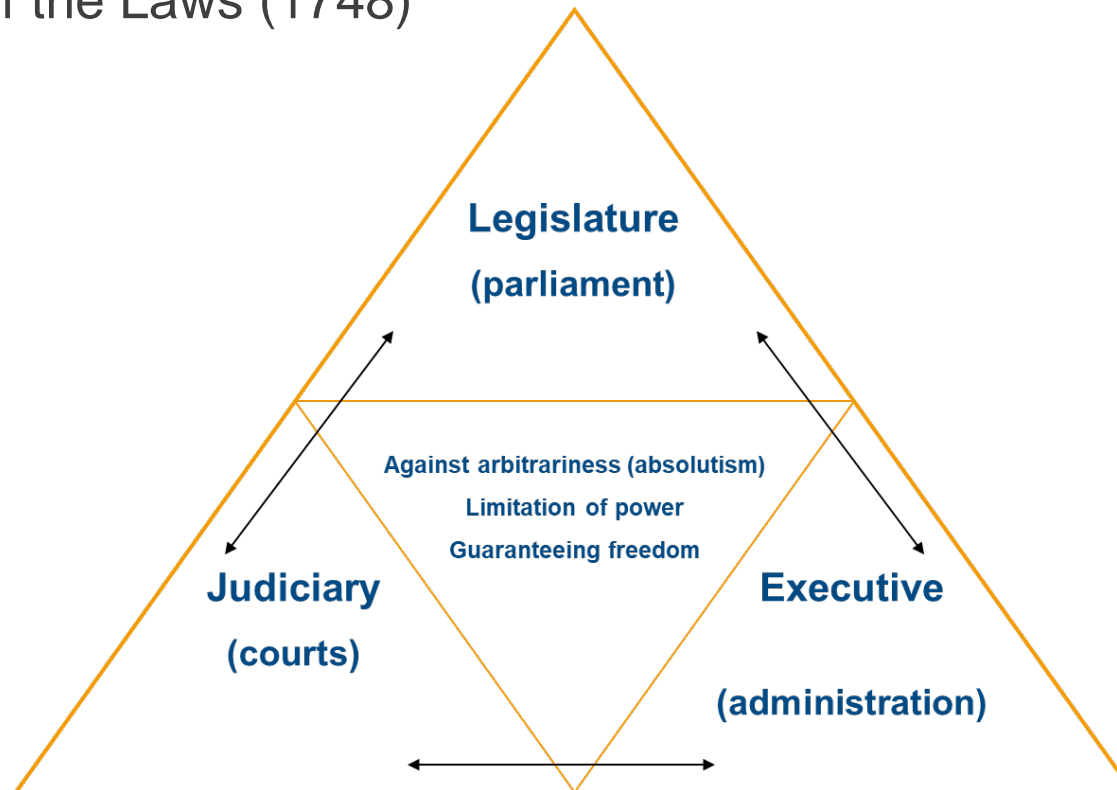


Picture credit:  
<https://en.wikipedia.org/wiki/Aristotle>

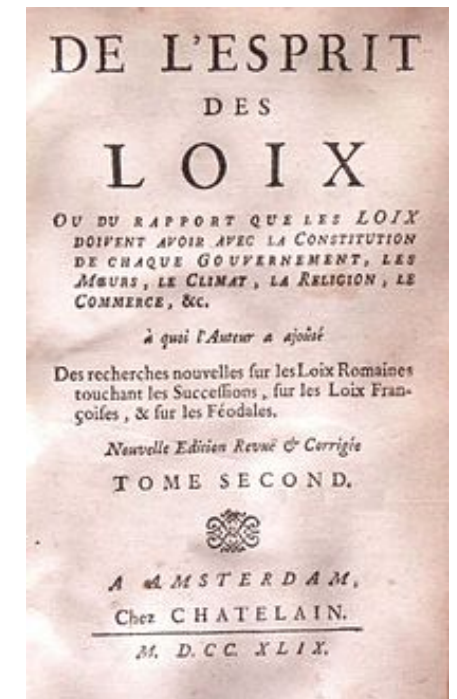
- Nicomachean Ethics: one of the most important historical philosophical works
- Humans striving to live in a **political community** (*‘zoón politikón’*) (Luf, 2014, p. 9)
- This society needs some kind of order by law (Luf, 2014, p. 10), as the objective (telos; see *infra*) of this political community is the ‘good life’
- **Virtue ethics**; virtue: **golden mean** between conflicting parameters
- “Aristotle taught that virtue is something we cultivate with practice: ‘we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts’” (Sandel, 2012, p. 128)
- Teleological (telos = goal, purpose) reasoning, not deontological -> for questions of distribution, we have to consider the goal, the purpose of what should be distributed (cf. flute example)

# Philosophers | Montesquieu (1689-1755)

- Theory of the separation of powers
- Influence on the French revolution and the US Constitution
- The Spirit of the Laws (1748)



Picture credit:  
<https://en.wikipedia.org/wiki/Montesquieu>



# Philosophers | Kant (1724-1804)

- “**Maxims** of supreme moral worth take the form of what Kant calls ‘**categorical imperatives**,’ that is, they are necessary, and of the unconditional form ‘Do X,’ not of the contingent form ‘If you want Y, do X.’” (Hallgarth, 2012, p. 609)
- “Kant’s criteria for determining whether a maxim for action is a genuine universal moral principle, remember, must be grounded in a priori principles”, i.e. **before** we can evaluate the **consequences** (Hallgarth, 2012, p. 609)
- “His **three criteria** rely on the principle of contradiction, and each is a necessary condition to ascribing categorical moral value of the maxim at stake.
  - **Universalizability**: Act only on that maxim through which you can at the same time will that it should **become a universal law**.
  - **Means/ends**: Act in such a way that you always **treat humanity**, whether in your own person or in the person of any other, **never** simply **as a means**, but always at the same time an end.
  - **Autonomy**: Act so that you treat the **will of every rational being** as a will that makes universal law.” (Hallgarth, 2012, p. 609)



Picture credit:  
[https://en.wikipedia.org/wiki/Immanuel\\_Kant](https://en.wikipedia.org/wiki/Immanuel_Kant)

# Philosophers | Kant (1724-1804)



Picture credit:  
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- **Categorical imperative (excerpt) | Kant, 2014**
  - “act only according to that maxim through which you can at the same time will that it become a universal law” (basic formula | p. 71)
  - “so act as if the maxim of your action were to become by your will a UNIVERSAL LAW OF NATURE” (formula of the universal law of nature | p. 71)
  - “So act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means” (formula of humanity | p. 87)
  - “to do no action on a maxim other than in such a way, that it would be consistent with it that it be a universal law, and thus only in such a way that the will could through its maxim consider itself as at the same time universally legislating” (formula of autonomy | p. 97)

# Philosophers | Kant (1724-1804)

- **Categorical imperative**

- “Basing morality on interests and preferences destroys its dignity.”  
(Sandel, 2010, p. 107)
- “For Kant, respecting **human dignity** means treating persons as ends in themselves.” (Sandel, 2010, p. 110)
- “Persons are rational beings. They don’t just have a relative value, but if anything has, they have an **absolute value**, an **intrinsic value**. That is, rational beings have dignity.”  
(Sandel, 2010, p. 122)

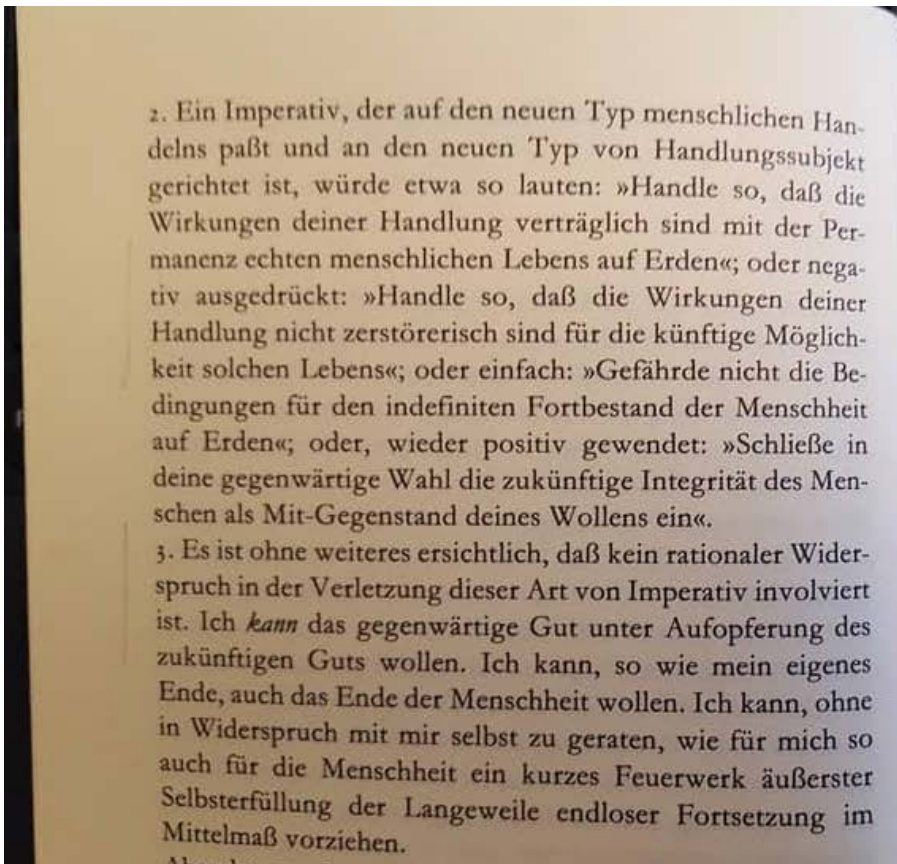


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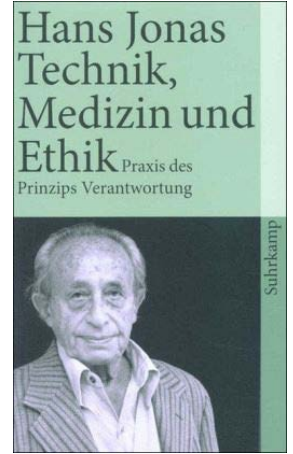
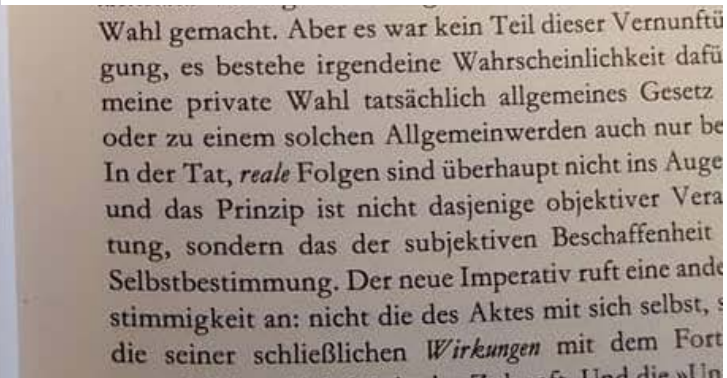
# Philosophers | Jonas (1903-1993)

- From the categorical to the ecological imperative (Jonas, 1979)



“Act so that the effects of your action are compatible with the permanence of real human life on earth.” (translation)

“Handle so, daß die Wirkungen deiner Handlung verträglich sind mit der Permanenz echten menschlichen Lebens auf Erden.” (p. 36)

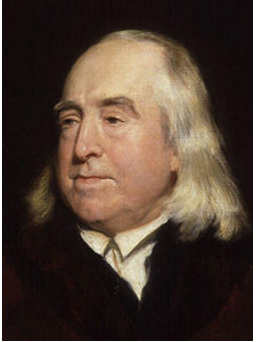


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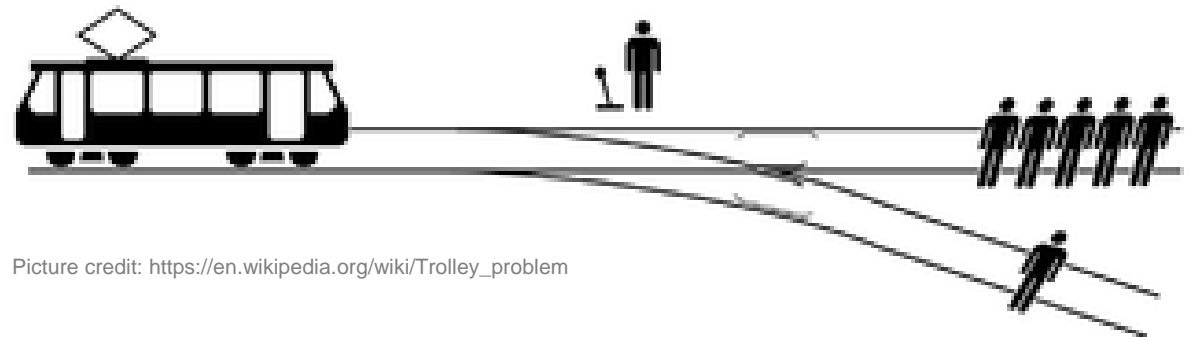


# Philosophers | Bentham (1748-1832)

- Founder of modern **utilitarianism**: the greatest happiness of the greatest number defines what is right or wrong
- **Utility**: “whatever produces pleasure or happiness, and whatever prevents pain or suffering” (Sandel, 2010, p. 34)
- Pain and pleasure are our “sovereign masters”; they govern us in everything we do and also determine what we ought to do (Sandel, 2010, p. 34)
- Has had a “powerful hold on the thinking of policy-makers, economists, business executives, and ordinary citizens to this day” (Sandel, 2010, p. 34)



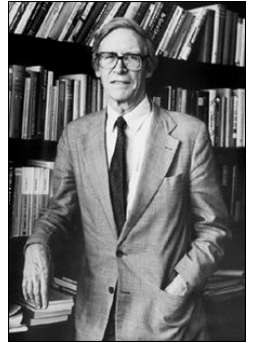
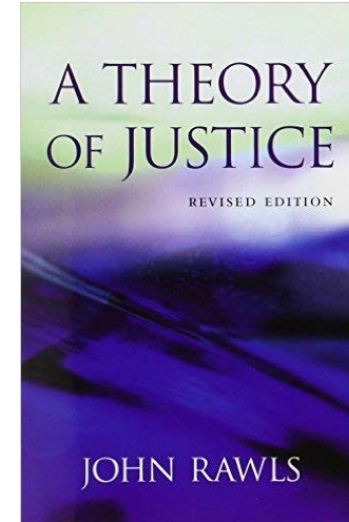
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[https://en.wikipedia.org/wiki/Jeremy\\_Bentham](https://en.wikipedia.org/wiki/Jeremy_Bentham)



Picture credit: [https://en.wikipedia.org/wiki/Trolley\\_problem](https://en.wikipedia.org/wiki/Trolley_problem)

# Philosophers | Rawls (1921-2002)

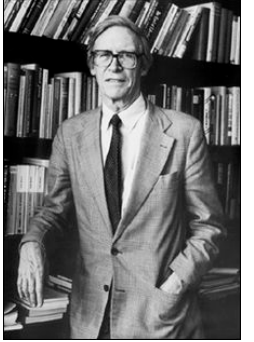
- On **distributive** justice | A Theory of Justice (1999)
- Rawls sees **society** as a system of collaboration, which shall foster the interests of every single member – not only of some of them (Luf, 2014, p. 90)
- In this system, justice shall be established by **fairness**; this can result in advantages or disadvantages for the individual (Luf, 2014, p. 90)
- Important that there is **consensus** about the fundamental structure of a society (Luf, 2014, p. 91)
- Based on the classical social contract theories of Rousseau and Kant, he creates a **thought experiment** of a “original position”, where people forget about certain standpoints that support their actual situation; i.e. the hypothetical situation of the “**veil of ignorance**” (Luf, 2014, p. 92)



Picture credit:  
[https://en.wikipedia.org/wiki/John\\_Rawls](https://en.wikipedia.org/wiki/John_Rawls)

# Philosophers | Rawls (1921-2002)

- This leads to **two principles** of Justice (to some extent egalitarian)
  - “First: each person is to have an **equal right** to the **most extensive** scheme of equal basic liberties compatible with a similar scheme of liberties of others. [= egalitarian liberalism]
  - Second: social and economic **inequalities** are to be arranged so that they are both (a) reasonably expected to be to **everyone’s advantage**, and (b) attached to positions and offices **open to all.**” (p. 53)



Picture credit:  
[https://en.wikipedia.org/wiki/John\\_Rawls](https://en.wikipedia.org/wiki/John_Rawls)

## Philosophers | Sandel (1953- )

- “I do **not** think that **freedom** of choice – even freedom of choice under fair conditions – is an adequate basis for a just society. What’s more, the attempt to find **neutral principles** of justice seems to me **misguided**. It is not always possible to define our rights and duties without taking up substantive moral questions; and even when it’s possible it may not be desirable.” (Sandel, 2010, p. 220)
- “A **just society can’t be achieved simply by maximizing utility** or by securing freedom of choice. To achieve a just society **we have to reason together** about the meaning of the good life, and to create a **public culture hospitable to the disagreements** that will inevitably arise.” (Sandel, 2010, p. 261)
- “Justice is not only about the right way to distribute things. It’s also about the right way to **value** things.” (Sandel, 2010, p. 261)



Picture credit:  
<http://www.justiceharvard.org/about/michael-sandel/>

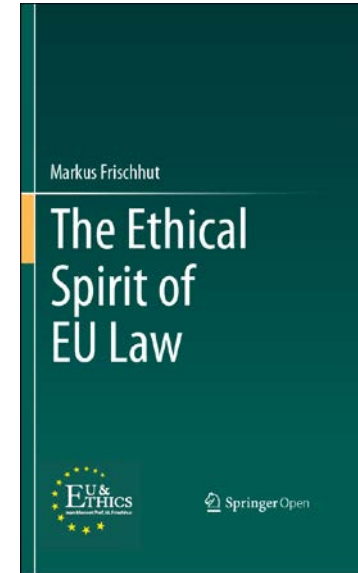
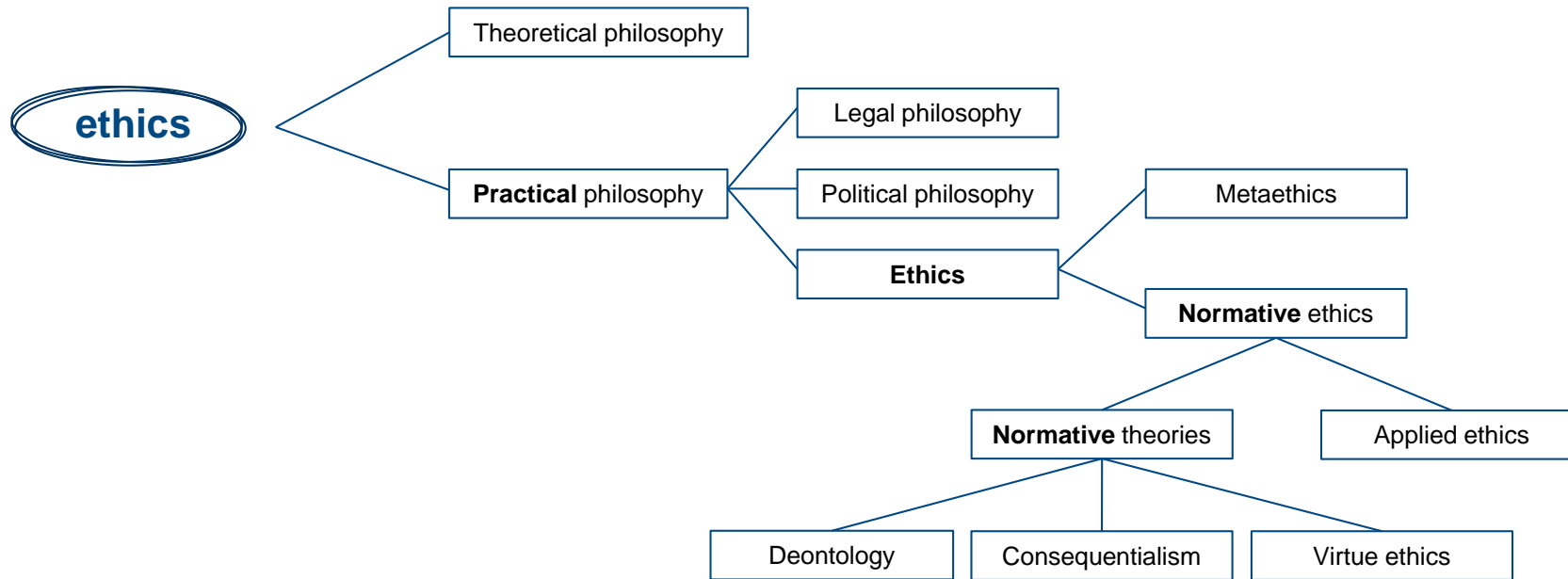
# Philosophers | Sandel (1953- )

- 1. Citizenship, sacrifice, and service | **communitarian**
  - “If a just society requires a strong sense of **community**, it must find a way to cultivate in citizens a concern for the whole, a dedication to the **common good**.”  
(Sandel, 2010, p. 263)
- 2. The moral limits of markets | **also of the EU single market?**
  - “[...] we need a **public debate** about the moral limits of justice.” (Sandel, 2010, p. 265)
- 3. Inequality, solidarity, and civic virtue | **‘skyboxification’**
  - “Too great a gap between rich and poor undermines the **solidarity** that democratic citizenship requires.”  
(Sandel, 2010, p. 266) “[...] inequality can be corrosive to **civic virtue**.” (Sandel, 2010, p. 267)
- 4. A politics of moral engagement | **importance of public discourse**
  - “A more robust public engagement with our moral **disagreements** could provide a **stronger, not a weaker**, basis for **mutual respect**.” (Sandel, 2010, p. 268)



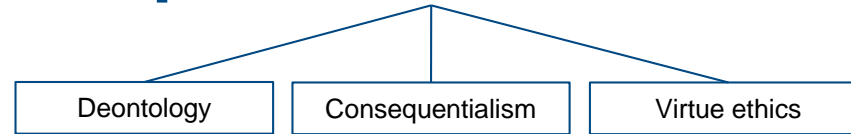
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# Deontology, consequentialism & virtue ethics



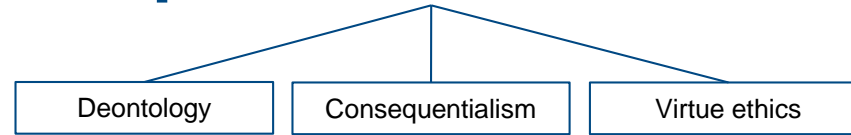
Source: Frischhut, 2019, p. 10

# Deontology, consequentialism & virtue ethics



- **Deontology:** rather focuses on the **act** | **Kant**
  - “Deontology A type of moral theory that asserts that certain acts or types of act exhibit intrinsically right-making features in themselves, **regardless of the consequences** that may come after them. (From the Greek *deon*, that which is binding.)” (Louden, 2012, p. 503)
- **Consequentialism:** focuses on the **outcome** of an act | **Bentham**
  - “Consequentialism refers to any of a class of normative theories that will argue that morally right action is action that produces good **results**.” (Hallgarth, 2012, p. 602)
  - Thus, a **teleological** type of theory (Hallgarth, 2012, p. 602); i.e. referring to the *telos* (goal, purpose)
  - Most prominent example:
    - “**Utilitarianism** An ethical theory, the central conclusion of which is that agents should always act in a way calculated to bring about the best possible outcomes overall, where the goodness of any outcome depends on the amount of happiness realized in that outcome.” (Chappell, 2012, p. 343)
- **Virtue ethics:** focuses on the **agent** itself | **Aristotle**

# Deontology, consequentialism & virtue ethics



- **Deontology:** rather focuses on the **act** | **Kant**
- **Consequentialism:** focuses on the **outcome** of an act | **Bentham**
- **Virtue ethics:** focuses on the **agent** itself | **Aristotle**
  - **“Virtues** Traits of character that are judged to be **morally admirable or valuable.**”  
(Louden, 2012, p. 503)
  - **“Virtue ethics** An ethical theory that says that the central concept for ethical theory is that of a virtue, a disposition **needed for human excellence or flourishing.**” (Chappell, 2012, p. 343)



# Literature mentioned on slides



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## □ What is the relationship of (EU) law and ethics?

- ✓ EU law often refers to ethics (and morality), but often it is difficult or even impossible, to determine (based on these documents) what this should mean in the end.

## □ Which approach did Aristotle provide for ‘virtue ethics’?

- ✓ “The ethical principle that virtue consists in following a course of action somewhere between the extreme of too much (excess) and that of too little (defect)” (Slomski, 2002, p. 353)
- ✓ “Aristotle points out that the mean for one person in one situation will differ from the mean for someone else in a different situation.” (Slomski, 2002, p. 353)
- ✓ “To possess an ethical virtue is to know how to strike the mean.” (Slomski, 2002, p. 354)
- ✓ “A virtue is a trained disposition to express a particular emotion, through behaviour, to a degree that is neither deficient nor excessive relative to a given agent in a given situation.” (Wilcox, 2002, p. 52)



## □ What is the ‘categorical imperative’?

- ✓ “So act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means.” (Kant, 2014, p. 87) N.B. See also the other formulas, as mentioned above.

## □ What is ‘utilitarianism’?

- ✓ The greatest good for the greatest number (N.B. Simplified version).

## □ What is the ‘veil of ignorance’ proposed by Rawls?

- ✓ Shall help people to forget about certain standpoints that supports their actual situation, in order to reflect about a just solution.

## □ What is ‘communitarianism’?

- ✓ The idea of Sandel, that in order to achieve a just society “we have to reason together about the meaning of the good life, and to create a public culture hospitable to the disagreements that will inevitably arise.” (Sandel, 2010, p. 261)



- How to differentiate ‘deontology’, ‘consequentialism’ and ‘virtue ethics’?
  - ✓ Deontology: rather focuses on the **act** (e.g. Kant)
  - ✓ Consequentialism: focuses on the **outcome** of an act (e.g. Bentham)
  - ✓ Virtue ethics: focuses on the **agent** itself (e.g. Aristotle)