

Kant Yearbook

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Karl Ameriks

Dignity Beyond Price: Kant and His Revolutionary British Contemporary

“All these considerations, however, were below the transcendental dignity of the Revolution Society.” (Burke 1955, 10).

Abstract: Despite their contemporaneity and obvious similarities, Richard Price and Immanuel Kant are rarely discussed together. This essay examines the common background of their work, similarities in their methodology and principles, and their common concern with connecting rationalist philosophical systems with knowledge at the level of ordinary life and politics – all this despite their lack of reference to each other. Their normative principles are assessed in connection with major documents and political events in their revolutionary era. A concluding section evaluates their work in relation to contemporary discussions that concern the relationship between pre-reflective and reflective levels of moral knowledge. The essay draws on the work of contemporary scholars such as Danielle Allen, David Brink, Robert Audi, Sarah McGrath, and Thomas Kelly.

1 A Common Background

The sharp sarcasm of Edmund Burke’s highly influential rebuke of Richard Price’s philosophical endorsement of the French Revolution has yet to receive an adequate reply.¹ Burke was responding to Price’s widely circulated speech, on November 4, 1789, to the liberal British *Revolution Society*, which was celebrating the centennial of the agreements safeguarding the advantages gained by Parliament in Britain’s Glorious Revolution of 1688 (Price 1991, 176–196).² Price

¹ Wollstonecraft (1997) provides a vigorous defense of Price, but it is a tribute to his inspiring character as a mentor rather than an exposition of his philosophy.

² Burke writes as if Price endorses the violence in later French developments, even though Price’s speech is just about the initial events when Louis XVI himself accepted the authority of the National Assembly. (Kant also notes this acceptance (*DR*, AA 6:341)). Burke’s account anticipates the violent chaos that quickly developed in France, but Price (1991, 187) also warns that even egalitarians should maintain respect for figures in authoritative positions. And Burke errs, for example, in claiming France would soon become a negligible military power (cf. de Tocque-

combined his praise of 1688 with a hearty endorsement of the momentous changes in his own time, when sovereignty had just been transferred to the National Assembly in France. Price's stirring speech, *A Discourse on the Love of our Country*, was an immediate sensation but no surprise, for his general position was well-known. He was already famous for his support of the claims of the American colonists, a cause that Burke had in part shared with him.

Price's activism followed naturally from his long-standing commitment, as a Dissenter, to liberal religious and political movements. It was also rooted in the philosophical doctrines of his 1758 treatise on moral principles, which carries on the rationalist tradition of Ralph Cudworth and Samuel Clarke (cf. Price 1974).³ In addition, Price was a distinguished member of the Royal Society, a world-class economist and probability theorist who was asked to serve as an editor of Bayes' works. Among his closest friends were Joseph Priestley, Lord Shelburne (who served briefly as Prime Minister), and Benjamin Franklin. His writings gained the close attention of no less than John Adams (who frequented his sermons), Thomas Jefferson, George Washington, and leading French figures such as Turgot and Mirabeau. His reputation brought him invitations to take on important tasks in America as well as Britain and, although he declined official appointments, he had a considerable influence on major governmental policies. Rarely has a first-rate mind had such an eminent position in the world at large while also forcefully articulating a prescient philosophical plea on behalf of many of the most valuable progressive movements of the future.

Given Price's extensive worldly experience, it is shocking to see Burke attacking him for not appreciating the actual complexity of politics and being drawn to an out of touch philosophy contaminated by, of all things, a notion called *transcendental dignity*. To our ears – although there is no evidence that this was its intent – Burke's memorable insult naturally appears to bring Price (1723–1790), and his revolutionary concern with the self-evident dignity of human beings as such, into connection with the most famous philosophical exponent of the notion of dignity then, namely, Immanuel Kant (1724–1804). There is, astonishingly, no evidence that either philosopher took any note of his distinguished contemporary.⁴

ville 2008, 18). Alasdair MacIntyre (1966, 228) takes note of Burke's perception of non-revolutionary motives (to save monarchy) behind the events of 1688, but this does not invalidate Price's basic point that the Bill of Rights of 1689 changed British politics in a democratic direction. Kant mentions the 1688 Revolution at R 8043, R 8044 (*Refl.*, AA 19:590–591), and (*CS*, AA 8:303).
³ See also Peterson (1984).

⁴ Kant began writing in the 1740s but did not publish anything in his early days comparable to Price's 1758 treatise on morals. After reading Rousseau in 1762, Kant lectured regularly on prac-

The Critical Kant of the 1780s and 1790s was, just like Price, deeply concerned with political events as well as technical philosophy. He was well known as the founder of transcendental philosophy and a supporter of the regime change in France. Kant's theoretical philosophy is based on the metaphysical doctrine of transcendental idealism, and his practical philosophy is marked by a special emphasis on the inviolability of human dignity. It thus easily lends itself to talk of *transcendental dignity*, although Kant's writings stress these two words separately rather than explicitly conjoin them. As a rationalist like Price, what Kant holds, above all, is that the *capacity* to appreciate the strict moral demands of pure reason is what gives *every* human being a necessary and even *unconditional* value (unlike happiness), which he vividly characterizes as a *dignity beyond price*.⁵ This view contrasts with much of ordinary language and traditional practices going back to figures such as Cicero, according to which dignity is a matter of *degree* and is typically ascribed to particular agents in proportion to the contingent fact of their elevated social rank or inspiring manner (cf. Rosen 2012; Bieri 2017; Waldron 2017). For Kant dignity is fundamentally an *all or nothing* feature, one that we human beings – and only beings like us – all have from birth, given our faculty of *Wille*. This is a technical term that he uses to signify practical *reason*, which is not mere rationality but necessarily includes the capacity for elevating oneself above conditioned goods by respecting the moral law and treating all others as ends in themselves.

This faculty is part of our unique *transcendental*, that is, necessary for experience rather than accidental, nature, and for this reason a Kantian can hold that we are all endowed with a kind of transcendental dignity. The notion of capacity is crucial here, and I take it to mean – contrary to interpretations by some astute philosophers⁶ – that Kant does not restrict moral status and dignity to persons who exercise their rationality to a *high degree*. Even a very disabled child can be said to retain its distinctive capacities (e. g., to learn a language) because these are such that, since it is a human being, its disablement could in principle be removed without change in the child's species and personal identity (cf. Zylberman 2018, 749).

tical philosophy but did not publish a treatise on morals until the *Groundwork* (1785). Price was influenced by the British legal tradition rather than by Rousseau. According to Micheli (1990, 211): “The first references to Kant appeared in the English periodical press in [...] 1787”.

⁵ Kant (G, AA 4:434–435; cf. G, AA 4:426; REL, AA 6:46): “elevated above any price [...] an inner worth, that is, dignity [*über allen Preis erhaben* [...] *einen inneren Werth, d.i. Würde*]”.

⁶ E. g., Wolterstorff (2008, 328): “[for Kant] what counts for the grounding of human rights [dignity] is [...] how well one exercises that [rational] capacity”.

Although this strictly universal notion of human dignity is a metaphysical notion, rooted in religious tradition, it also has a political meaning appreciated in secular contexts throughout the world and in large part because of Kant's writing. This notion is behind Kant's calling attention to the striking phenomenon of the dismantling of aristocratic privileges in the French Revolution being *widely welcomed* not only by the oppressed but also by many of the privileged (*SF*, AA 7:85). Kant takes this phenomenon to show that the claim of universal human dignity is becoming not only an accepted truth for rationalist philosophers but also a notion with broad popular significance and a sign that fundamental moral/political progress could be rationally hoped for after all. Just as Kant and Price would have wished, the notion has come to be enshrined in the German federal constitution and thereafter in numerous other charters throughout the world.

2 A Disappointing Disconnect

Even though Price, like Kant, was not a fundamentalist but a critic of enthusiastic religious movements, he offered an exceptionally optimistic reading of the political upheavals of the eighteenth century. He took the *American* as well as the French revolts to herald nothing less than a turning point in global history, one of millenarist significance.⁷ There was in his time, as he concluded in his speech – and as has been echoed recently in the title of a major book on the international impact of American independence – a “light [that] after setting America free, reflected to France, and there kindled into a blaze that lays despotism to ashes and warms and illuminates Europe!” (Price 1991, 196)⁸. Despite these deep similarities in endorsing the revolutionary character of the age, Kant – contrary to what many scholars have believed – never (even in what we have of his private writings) discussed, let alone defended or praised, either the *American* struggle for independence or the dignity-oriented writings of its well-known advocates (cf. Ameriks 2021b; forthcoming). Although Kant appears not to have studied works in English,⁹ Price's writings, as well as those of his American acquaintan-

⁷ Price's position is *millenarist* rather than *millennarian* in holding that a millennium of moral improvement has begun in his day, followed by *infinite* reward in heaven (cf. Thomas 1991, xi; *EAT*, AA 8:327–339; Ameriks 2019).

⁸ Price's remark is the source of the title chosen for Israel's (2017), *The Expanding Blaze: How the American Revolution Ignited the World, 1775–1848*.

⁹ In a letter of November 1768 (AA 10:77), Herder recommends Burke's book on the beautiful and the sublime, and he adds for Kant's benefit that the book is now available in French.

ces, were widely translated and discussed on the continent, and events in America at that time dominated publications throughout England, France, the Netherlands, and Germany.¹⁰ Kant's famous 1784 essay on enlightenment makes direct reference to some church developments in the Netherlands but passes over directly mentioning the political uprising in Amsterdam at that time, which was inspired by events in America.¹¹

Elsewhere, I have discussed several of the long-standing ramifications of Kant's strange blindness to the political significance of the United States despite the considerable attention that other German writers, including some of his best students, paid to matters such as the burning issues of American independence and European colonialism.¹² In the present context, my primary aim is simply to draw attention to this unappreciated historical complication as background for a consideration of some more straightforwardly philosophical aspects of a comparison of the thought of Price and Kant. Kant's status as a philosopher of the highest rank has remained fairly constant ever since the 1780s, but Price's reputation, especially after Burke's attack and then the general rise of anti-rationalism in British philosophy, has more often waned than waxed.¹³ Despite an impressive growth of interest within analytic philosophy in the history of modern ethics, Price still gets limited attention from leading experts, who tend to just quickly acknowledge that he deserves credit for expressing a kind of rationalist intuitionism that W. D. Ross and others eventually resurrected as one of the main options in contemporary ethics (cf. Darwall 1995, 10; McNaughton 1996, 217–224; Schneewind 1998, 380–388; Rawls 2000, 77; Irwin 2008, 719–753).¹⁴ None of these experts focuses in full detail on Price on his own and the international impact of his lifework. The considerable philosophical similarities and parallel practical agendas of Price and Kant certainly deserve further attention, and es-

10 Price's February 1776 essay on the war with America went into twenty editions and was a best-seller on the continent as well as America (Peach 1979, 9). See Dippel (1977) on the widespread familiarity in Germany with American events at that time.

11 Kant (cf. *E*, AA 8:38–39) argues that the vote of a Dutch church council has no right to make a rule aiming to compel conscience by oath. Price certainly would agree.

12 Most notably, Friedrich von Gentz, who in 1794 translated Burke's book on the French Revolution and then wrote a comparison of the American and French revolutions, with a fluid translation by John Quincy Adams. Gentz (2010, 73n.) mentions Price briefly, and Adams calls this book the "clearest account of the rise and progress" of the war in America (Gentz 2010, 3).

13 However, Hastings Rashdall (1924, vol. 1, 80n.) calls Price's *Principles* "the best work published on ethics in recent times" and claims it "contains the best of the Kantian doctrine without Kant's confusions".

14 For a systematic view compatible with Price but presented as a broadly Kantian contemporary defense of moral realism and intuitionism, see Audi (2004).

pecially in ways related to their being the major spokesmen of progressive thought in their respective countries right in the era of the most dramatic shifts from feudal to enlightened modes of political structure.

In addition to the similarities between Kant and Price in the underlying rationalist *substance* of their general philosophy and the progressive themes of their conceptions of politics and history, there is a significant *methodological* similarity in their view of the relation of philosophical treatises to the more concrete contexts of practical life. This relation is a major issue throughout the Enlightenment era, and it is not surprising that a recent work on the era bears the title, *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy* (Israel 2010). Kant and Price each thematize the importance of the *relationship* between different *levels* of thought, the rise of the influence of abstract thought on radical change, and the need to address the nature of moral awareness at a pre-systematic level.

A direct concern with different levels of thought is evident, for example, in the transitions indicated by the titles Kant gives to the first two sections of his most widely read work, the *Groundwork of the Metaphysics of Morals*, namely, *Transition from Common to Philosophical Moral Rational Cognition* and *Transition from Popular Moral Philosophy to the Metaphysics of Morals*. These titles distinguish a number of fundamental levels in moral thinking. There is, first, the level of *basic* common sense or *healthy understanding*, which Kant addresses by discussing reactions to a series of examples from experience such as different ways of being motivated to give change to a customer. There is then a transition from this popular level to the recognition that some kind of more systematic and philosophical “rational cognition” of such cases is needed, one that connects them with a general view of moral principles. At this point, however, Kant argues that instead of going directly into a proper metaphysics of what is required for morals, there is a need to evaluate what he calls “popular moral philosophy”, which is only a first level of “philosophical cognition”. This philosophy, which is presented as expressed in four traditional alternatives that Kant rejects, is treated as an unfortunate hybrid of popular thought and philosophy. As *heteronomous*, it is riddled by long-standing misconceptions – traditional versions of empiricism or broadly rationalist dogmatism – that not only corrupt it at a philosophical level but also reinforce bad attitudes at the level of ordinary life. Even though it at least has the merit of being expressed at a systematic level, this kind of philosophy needs to be replaced by an appropriate Critical metaphysics of morals, one based on the proper autonomous perspective that Kant believes underlies both true philosophy and a virtuous life.

Kant recognizes that the exposition of a philosophical system does not by itself generate virtuous citizens, but he holds that it can be a crucial factor,

from the top down, in properly energizing citizens and protecting them from being seriously misled by dangerous abstract doctrines. At the same time, and from the bottom up, more informal writings and talks – such as Kant’s political essays and Price’s Revolution Society speech – can function as popular instruments for directly countering modern forms of superstition, relativism, skepticism, and extremism. For this reason, it can be said that the writings of Price as well as of Kant are especially relevant for political thought because of how well they exemplify a methodological feature analogous to a characteristic Mozart nicely captured. He said his work contains “passages here and there that only connoisseurs can derive satisfaction from; but these passages are written in such a way that the less learned cannot fail to be pleased, though without knowing why” (Mozart 1938, 182)¹⁵. Transposed into a philosophical key, this becomes the idea that an exemplary philosopher is someone who can not only embed his main ideas in a system worthy of the highest level of professional recognition but can also succeed in presenting them in a way that gives them a direct and lasting effect at a popular level. Price and Kant are clearly both exemplary in this rare sense, and especially because of how the intended impact of their pamphlets and popular essays is appropriately *connected* to their systematic emphasis on the concept of human dignity and related notions such as *liberty*, *equality*, and *self-evidence*.

Kant was not as directly involved with heads of state as Price was, but in Germany he was a writer widely admired for his style and a popular teacher who influenced numerous students who went on to significant positions in public life. His essays on aesthetics, enlightenment, history, religion, and peace are carefully crafted works that immediately had a broad public impact. Kant’s lecture hall and lunch table eventually became a pilgrimage destination for idealists and future politicians. Somewhat similarly, the Newington Green church and activist community that Price organized had a significant effect on later luminaries such as Mary Wollstonecraft and John Stuart Mill (Botting 2016). Henri Laboucheix, the leading French expert on Price’s work, goes so far as to claim that, in comparison with Franklin, Adams, Paine, and Turgot, Price was the “best theoretician” of American independence from the moral and political points of view (Laboucheix 1982, 111). Laboucheix also argues that Price’s writing deserves a place of honor in *literary* history – comparable to Milton (one of Kant’s main heroes) – because of its powerful rhetorical effect on a wide range of minds. He calls Price a “philosophical artist” who understood how to make the most effective

¹⁵ In a letter to his father, December 28, 1782.

use of philosophy's midway position between art and science (Laboucheix, 1982, 5, 11).

On the basis of this sketch of the common background of Kant and Price's era and their similar methodological orientation, Section 3 will offer a more detailed comparison of the substance of their moral philosophies. Sections 4 and 5 will focus on the notion of self-evidence and how a distinction between different levels of moral cognition relates to some *contemporary* discussions of moral *knowledge* that bear on evaluating the political philosophies of Price and Kant.

3 Overlapping Philosophical Positions

In even a brief comparison of Price and Kant, it is helpful to focus on four main components essential for understanding any practical philosophy, namely, its account of the *content*, *motivation*, conditions of *possibility* (which involve not only metaphysics but also religion, history, and politics), and mode of *knowledge* crucial to a proper life. The topic of moral *knowledge* is an especially important one, and its discussion will be deferred to later sections except for a few preliminary remarks here. Price and Kant are often contrasted by caricaturing Price as a dogmatic intuitionist and Kant as married to an abstract categorical imperative procedure – a procedure that continues to be bedeviled by disputes concerning alleged formal contradictions in universalizations of maxims. Rather than revisiting those issues, it is worthwhile to explore a different kind of perspective by noting that these dismissive approaches tend to overlook an important feature that Price and Kant share, namely, a “contextual” approach to morality,¹⁶ that is, an appreciation for pre-philosophical healthy understanding, empirical factors relevant to the application of principles, and the contingent conditions favorable to developing what Barbara Herman calls “the practice of moral judgment” and “moral literacy” (Herman 2007)¹⁷.

This is not at all to deny that Price focuses also on *a priori* aspects of the *content* of morality. His rationalism makes him a Kantian *avant la lettre*¹⁸ in a way that builds on elements of the British tradition. He starts from Clarke's

¹⁶ This term comes from the title of Purviance (2005).

¹⁷ See also work by Onora O'Neill and the flood of recent scholarship on Kant's anthropology. Price's career-long work as an influential educational reformer is also relevant in this context, as is Kant's extensive concern with pedagogy.

¹⁸ Laboucheix (1982, 80) speaks of “the moral law, as it emerges from Price's work [...] before Kant”.

idea that the mind's self-motion makes it unlike matter, as well as Cudworth's earlier claim that self-determination is of primary importance and has a libertarian meaning that is essential for distinctively moral blame and praise. Above all, Price accepts Locke's moral realism and the view that there are moral truths that are necessary and evident, even though, like Kant, he sharply rejects details of Locke's account and his theory of empirical knowledge.¹⁹ Price also agrees with Butler's distinction between the power and the authority of feeling, and he accepts a basic distinction between conditional instrumental value and what is necessarily good in itself (cf. Price 1974, 43; Laboucheix 1982, 47). Necessary value is central to Price's concept of our inalienable human dignity, which he ties to the consciousness of equality that each person has through awareness of a capacity to choose what is right and condemn what is evidently unjust, such as the mistreatment of the innocent (cf. Price 1991, 30, 66, 86)²⁰. As a late child, smarting from the experience of a strict father who favored a first son from an earlier marriage, Price likes to stress that the "superiority of a parent", and of what in general happens to be older or more powerful, is not the same thing as "true dignity" (Price 1991, 171, 182, 186). Against the argument that the colonists owe continued allegiance to their "mother country", Price points out that children grow up and eventually deserve independence (Price 1991, 39).

There are obvious parallels here with Kant's insistence on our "innate equality" and his call for emergence from "self-incurred" immaturity (*MM*, AA 6:237; *E*, AA 8:35). Also like Kant is Price's stress not on individual acts but the tendencies of one's character, its "temper" and "habits" (Price 1991, 82; 1979, 278). Although both philosophers closely link the values of individual and political independence (in international as well as domestic contexts), there is an odd disconnect in the fact that Price heralds the United States, with its rejection of aristocracy, as the first country with this kind of civil equality in its founding document (cf. Price 1991, 125, 146), whereas Kant ignores this crucial development. Price makes clear, however, that he is not tied to radical democracy. He regards the checks and balances system of common law constitutionalism as the best model for his own country (cf. Price 1991, 165; Cone 1952, 184),²¹ even though

¹⁹ Irwin (2009, 166–172) offers a valuable account of Kant as, like Price, not a constructivist about moral value. McGrath (2019) unfortunately does not question the constructivist reading of Kant.

²⁰ On regarding notions such as equality as "immediately accessible to all", see also Laboucheix (1982, 20, 49, 143).

²¹ Price stresses freedom of conscience, jury trial, free press, elections, and a constitution where law is above royalty.

he always stresses that it needs considerable reform so that Parliament can become truly representative. Kant agrees with this general orientation²² but regards the actual working of the British system as too corrupt to serve as a model. At that time in Germany there was, in any case, no likely approximation to it and nothing like the tradition of 1688 and before in England.

What remains most important here is that both philosophers hold that political power ultimately derives from the consent of the governed (cf. Price 1991, 16, 29, 88; *E*, AA 8:39–40). Kant certainly would agree with Price's general stress on liberty and his basic distinctions between *physical*, *civil* (a voice in government), *religious* (freedom of conscience and worship), and *moral* liberty (free will as a precondition for virtue), with this last form being the most important but requiring for its full realization the protection of all the other kinds (cf. Price 1991, 21–23). There is also an obvious overlap in their general conception of our duties. Price's list of basic headings consists of duties to self (prudence), God (and others with authority), beneficence, gratitude, veracity (i.e., honesty), and justice (cf. Price 1974, 217ff.). This is close to matching Kant's four basic headings: imperfect duties of self-development and practical love for others in the form of beneficence, and perfect duties involving self-respect and respect for others by treating them honestly and justly. Kant does not initially discuss gratitude but he eventually gives it a place as a distinctive kind of duty (cf. *MM*, AA 6:454–456). He also discusses duty to God but prefers to speak of respect for the moral law in oneself and, like Price, he takes this law to be central to the divine intellect, not a matter of arbitrary will (cf. Price 1974, 138; *MM*, AA 6:443–444).

Objections are often made to the rambling nature of Price's list and the non-systematicity of intuitionism, and yet, after all the problems that grand theories have had, it can be considered a realistic advantage now that Price does not claim to have a complete list of important duties. Similarly, and despite his overly systematic reputation, any close look at Kant's *Metaphysics of Morals* will reveal that he seems open to an indefinite extension of significant duties and hardly takes their disclosure to be a matter of linear deduction. Moreover, in addition to being willing to agree on the claim of self-evident human equality, Price and Kant can give a unifying substance to that claim, and also to their lists of duties, by connecting them all with the notion of dignity, as spelled out by the doctrines of moral liberty in Price and persons as ends in themselves in Kant.

²² See Zoeller (2018) for an excellent comparison of many similarities between Kant's views and James Madison's constitutional ideas.

When it comes to an account of moral *motivation*, Price's general view does not match caricatures of it as holding to a purely theoretical view of reason, where that signifies the odd belief that moral value for us can be understood independently of what is reasonable for persons to choose in a situation of a plurality of finite and dependent beings. This is not to say, however, that for him a deliberative *process* is essential to our most basic experiences of moral motivation. Price can appear to hold a simplistic form of rationalism when he states "the perception of right and wrong does *excite* to action and is alone a sufficient *principle* of action" (Price 1974, 313). But matters are not so simple. Price goes on to call judgment the first "spring" of action, but he adds, it is "often not prevailing", and he frequently stresses a need for the assistance of inclination and feeling (Price 1974, 318).

Kant's account of motivation is similar but more complex. Although he is often characterized as someone who believes that rationality is sufficient all by itself to motivate right action, this does not do justice to his full view. What Kant actually holds is that, *if* rational agents *add* a commitment of will to their perception of what the moral law demands in a particular situation, this can lead to right action – but this does *not* mean that *mere* reason is sufficient by itself to motivate. In the *Groundwork* Kant declares that reason needs not only to work together with will but to do so by being supplemented (after the intellect's judgment) by a unique *feeling* of respect for the moral law (cf. *G*, AA 4:401n.; Ameriks 2006). Only with a properly generated feeling of respect is there an active motivation (somewhat analogous to how a proper judgement of taste grounds a feeling of disinterested satisfaction) that can finally lead to right acts. Hence, even though for Kant an attempt at right action *ultimately* follows if all goes well with the direction of *pure* reason, it does not follow from our mere intellectual faculty. Kant realizes that persons who limit themselves to mere prudence, and may have some feeling of respect for the moral law but ignore it, are not without rationality. Something more radical holds for those who are much worse than even imprudent. Kant takes evil to be a corruption that goes beyond avarice, stupidity, or mere harm. It is always something for which *rational* agents themselves bear untransferable responsibility and so is a matter of will rather than unclear intellect or dim feeling. The faculty of *reason*, which is more than mere understanding, is present even in "the most hardened scoundrel" (*G*, AA 4:454). It provides a mode of access for wicked human beings to perceive the moral law within us all – and this justifies their condemnation – even when they nonetheless choose self-conceit and, at least sometimes, need not actually be moved toward morality. (Unlike devils, though, they can be led, *after* reflection, to have *wishes* in a moral direction.)

Details like this are not found in Price's account, and unfortunately he falls back on some troublesome formulations. Sometimes when Price describes what happens when serious wrong occurs, he does not mention its being self-incurred by one's evil will but speaks simply of the "tyranny" of the passions and their overcoming one's understanding (Price 1991, 23). Even though at times Kant has been misunderstood as also holding something like this position, a moment's reflection should make it clear that this kind of deterministic language is directly counter to the fundamental libertarian orientation, and concern with strict blame, of Kant's philosophy and Price's most basic beliefs as well.

This point is another indication that for these philosophers the primary condition of the *possibility* of moral action is the transcendental, or *absolute*, freedom of the human will. It is crucial that they both understand this not as bare freedom of choice among just any alternatives but as choice in a context constantly *governed* by the real options of acceptance or rejection of the demands of moral law (cf. Price 1991, 22). Price's account is, to be sure, not as systematically developed as Kant's. The metaphysics of transcendental idealism is hardly part of Price's philosophy, and Price does not make use of the distinction between *Willkür* and *Wille* that Kant works out, let alone anything like Kant's complex account of different degrees of culpability in radical evil (*REL*, AA 6:29–32). Nonetheless, both philosophers take moral error very seriously, and yet – contrary to common criticisms – they also both affirm a basic human orientation toward happiness as such that is natural and good (cf. Price 1974, 45, 70; *G*, AA 4:415).²³ Problems arise only when one goes so far as to follow self-conceit and go against duty. Furthermore, Kant affirms a basic human orientation, and even a duty, in favor of self-development. For this reason, one could say, as David Brink has recently argued, that there is a sense in which Kant's ethics can be read as open to being understood in a "normative perfectionist" manner – "normative" because of its focus on rational agency rather than an order in mere external nature (Brink 2019).²⁴ It is true that the Critical Kant says only negative things about what he treats as perfectionism (cf. *REL*, AA 6:4n.), but this is arguably because he focuses only on the inadequate forms of it in his day, construed as making moral value depend on a dogmatic teleology of nature or particular *conditional* forms of skill or happiness.

²³ In saying human beings necessarily have an interest in happiness, Kant does not mean they have to give it priority.

²⁴ Irwin (2008, 538) contends that "Kant [...] rejects [...] the harmony of self-love and conscience". Here one might defend Kant by considering his contrast between self-love and self-conceit and his view, like Price's, that being moral is a matter of heeding what ultimately serves one's *true self*.

Given the above considerations, it is worth noting that there is, in many contemporary circles, a popular but questionable non-perfectionist way of reading Kant that attaches moral value to bare choice. Against this reading, imagine a world in which there are groups of beings consisting only of *totally* lethargic drones (perhaps just playing video games) or capricious goons who might even *all choose* to sign on to a pact licensing their attitudes in a libertarian political manner. If confronted by such a thought experiment, *defined* in terms of agents whose *capacities* do not at all go beyond these, Kant – like Price – would, I believe, insist that something more, some kind of capacity for responding to broadly perfectionist duties is essential for being a moral agent, properly speaking. Kant surely would not assign any *moral* value to beings defined by the bizarre attitudes just described if all they can have are crude intentions limited by their odd minimal power of free choice (which does mean they should be treated inhumanely). Kant regularly mocks the moral value of a life of *mere play*, and there is an understandable reason for that. He assumes that in fact we understand ourselves not as mere drones or goons, let alone brutes, for we are not totally neutral but all have from the start a “good seed” (*E*, AA 8:41). This seed is part of our basic practical capacity, and it involves not only free causality but also a “compass” pointing toward morality – just as our basic epistemic capacity is not neutral but is truth-oriented (McGrath 2019, 12).

Price’s largely similar positive understanding of our rational capacities is rooted not in scholastic teleology but in an orientation that begins, as Kant’s does, in a fascination with the achievements of mathematical physics (cf. Price 1991, 161; Laboucheix 1982, 79). Price’s view, however, is that modern physics is basically just a doctrine of matter in impelled motion and, therefore, it cannot by itself account for everything. He sees no way to avoid positing the existence of non-material self-propelled activity, as metaphysically required by considerations of the world in general and also as internally evident from the mind’s awareness of its own nature: “Activity and self-determination are as essential to spirit as are the contrary to matter” (Price 1974, 26). Unfortunately, although Price adds a spirited critique of determinism in a debate with the quite different kind of religious metaphysics espoused by his scientific materialist friend Priestley, Price’s arguments still do not go beyond broadly Cartesian considerations of the kind that Kant is famous for criticizing. By the time of the second *Critique* Kant backs off from any suggestion that mere theoretical considerations entail the claim that we have absolute spontaneity, and he turns to the moral “fact of reason” as our “*only*” *ratio cognoscendi* for this claim (*CprR*, AA 5:4n., 5:32). In this systematic way Kant goes significantly *beyond Price* – even though *politically* he unfortunately tends not to go as far as his British contemporary.

The philosophical debate concerning determinism remains unsettled. Contemporary compatibilists (like quasi-Kantian successors such as T. H. Green) would argue that whatever one thinks of absolute free choice, it may not make much difference to the *content* of one's ethics, political policies, or everyday practices. The most remarkable fact here is that nevertheless *both* Price and Kant – unlike most contemporary philosophers – continue to assume that libertarianism is *clearly* the constant – and proper – default position at the level of *popular* thinking. This assumption is another reason why it is important to try to get clear on how they understand the status of thought at a popular level and how this relates to moral knowledge relevant to politics.

Extra complications arise from the fact that both Price and Kant ultimately hold that much more than absolute freedom, pure reason, and respect are needed for a full moral life. They both claim that agents can continue to proceed rationally in their moral commitment only if there is some sensible ground for hoping that their moral actions will eventually help lead to appropriate happiness. For this reason, and although he expresses it in the mode of confident assertion rather than mere rational hope, Price accepts all the conclusions of Kant's postulates of practical reason: our free acceptance of the moral law needs to be supplemented by the positing of a God who (with our free cooperation) can found a situation of thorough justice in the long run. On this view, anything less than belief in a real chance for progress toward this highest good – overall happiness in proportion to virtue and some kind of accompanying afterlife, which only a divine power can ground – would eventually undermine the rational motivation of any human being on the path of a life of serious moral effort.²⁵

The ground for connecting this forward-looking view specifically with Christianity and history is a basically Arian belief that Jesus's life is the original long-range catalyst for radical moral change on a *global* scale. His teachings and treatment of all kinds of people as equals with each other are seen as the decisive model that inspires the passage from tribal customs and local political claims to an eventual observance, from pure free will, of what the moral law declares as appropriate for the respectful treatment of all human beings on account of their mere personhood (cf. Price 1991, 90, 130, 150). Whatever one thinks of this theological interpretation of events, Price and Kant are hardly alone (Jefferson's views, for example, are quite similar) in the late eighteenth century in tak-

²⁵ Price (1974, 250): "happiness is the *end* [...] of God's providence [...] [God] pursues this end in subordination to rectitude". For a contemporary defense of the main idea of Kant's postulates, see Hare (1996). The Critical – but not the Pre-Critical – Kant would reject Price's (1974, 86) *theoretical* arguments for God's existence, e.g., from the need for something to support infinite "knowables".

ing there to be a deep connection between these religious ideas and many of the epoch-making liberation movements of their revolutionary age. And yet – while for Kant the events of 1789 are the turning point of the age, for Price it is the struggle for American independence that already introduces a “new era” fundamentally unlike any other, the greatest event since the life of Jesus (Price 1991, 119, 183; 1979, 173).²⁶

In addition, both philosophers insist that the way to work toward the highest good is through forswearing *absolute* commitment to the ceremonies of any official church – an attitude that at that time only the United States fully protected. Instead, they advocate the development of a (presumably providentially enabled) liberal Christianity that takes the form of socially active cosmopolitanism, an “invisible church” that renounces all entanglement with nationalism and traditional power politics (Price 1991, 162, 168), (*REL*, AA 6:101). They take this to be a genuinely religious movement but one ultimately independent of all traditional church organizations. Instead, both Price and Kant see the Scientific Revolution as the crucial prerequisite for future progress,²⁷ although it requires a long incubation period before it can stimulate a full moral/religious revolution with universal scope. The crucial initial step in this revolution’s last phase, which occurs for Price in a kind of “Copernican turn”, is the breakthrough that follows when people begin to *universally accept* that the testimony of past authorities (Aristotelian science, Scholasticism) and naive sense experience has to be replaced by what our *reason* discerns – by which he means at first the pure theoretical accomplishments of modern physics (Price 1991, 158–161). Price emphasizes the need for a *deferred* process of continued education and improvement here, presumably also involving something like the economic-political progress outlined in Kant’s *Idea of a Universal History with a Cosmopolitan Aim* (1784).

4 Declaring the Self-Evident

All these bold claims lead back to the epistemological issue of what kind of *knowledge* Price and Kant take to be fundamental in this kind of social revolution and in leading a proper moral life in general. The famous events of the era provide an obvious clue here. There is perhaps no clearer statement of the relevant epistemic attitude than the opening words of the *Declaration of Inde-*

²⁶ On Kant’s account of the main historical stages of our moral/religious development, which features Rousseau rather than the British or Americans, see Ameriks (2012).

²⁷ Hence, Price and Kant are not vulnerable to Rosenfeld’s (2011, 256) worry about political appeals to common sense that take the form of crude populism and reject all learning.

pendence's second paragraph: "We hold these truths to be self-evident, that all men are created equal [...]" (Allen 2014, 27). Obviously, the issue of what "self-evident" means here, and how it involves "all" of us and our innate equality, is central. Danielle Allen has recently provided a highly original analysis of the document and persuasively argued that the terms 'we' and 'hold' are also very significant (cf. Allen 2014). Here the verb 'hold' can be read as part of an autonomous and performative divorcing *act*, one not needing external permission, and roughly equivalent to: we *now take* these truths as authorizing us to *hereby* declare ourselves independent. The Declaration as a whole is an *official* speech act in which a new state is thereby brought into existence – a state with historical uniqueness in its universal political import (Price 1991, 117). The term 'we' is used not in an authoritarian figure's edict but simply by a new *group of elected representatives*, and it is a reminder of the fundamental phenomenon of political pluralism, creative teamwork, and solidarity. Furthermore, the 'we' stands not just for the individuals assembled in Philadelphia then, or even the states they represent, but ultimately humanity in general and its self-legislative capacity. The Declaration speaks with a "universal voice" in a sense somewhat like that of the concept Kant uses in his *Critique of the Power of Judgment* (CJ, AA 5:216). What is expressed by 'we' and 'all' here is not simply *for* the benefit of all but concerns a perspective that in principle *all can and should take* – and, in this case, *upon their own essence*.

When Kant indirectly employs the notion of a universal voice in politics, this occurs not only in his characterization of the reaction to the French Revolution but already in his remarks in the Enlightenment essay (often misread as defending blind obedience) about the "public use" of reason (E, AA 8:37). Like Price, he calls for proper respect for authorities under ordinary conditions, but he also makes clear that this is a matter of limited and conditional rather than categorical obedience. The genuine *public* use of reason, in contrast, is founded on a presumably a priori claim about how a "public should enlighten itself" (E, AA 8:36) through representatives of "the society of *citizens of the world*" (E, AA 8:37, emphasis added). Given his situation in Germany, which is without significant representative government at that time, Kant is thinking of these representatives in the only way he can, as writers who use popular means to address, and try to speak for, the entire public, as he does in this essay. The key point is that the "touchstone" of the principles advocated in public reason should be "whether a people could impose such a law upon itself" (E, AA 8:39). This is not a matter of whatever might be simply imposed in fact. Rather, it concerns the reasonable "collective will of the people" in such a way that "the people" can work "eventually even upon the principles of *government* [...] keeping with his [a human being's] dignity" (E, AA 8:42).

One cannot help but wonder how audacious claims like this, which were hardly universal at that time, let alone before then, could be connected with terms such as ‘self-evidence’. The notion of evidence, and especially the strong form that is called ‘self-evidence’, is often associated with the special capacities of scientists, experts, and dogmatic philosophers claiming certain insight. Such an intellectualist attitude is often ascribed to rationalists such as Price and Kant, but that does injustice to their general philosophy and it surely would not be fair to ascribe to the framers of the Declaration or their French successors. ‘Self-evident’ happens to be a term that Price frequently uses and that Franklin was familiar with from his close friendship with Price. It is considered likely that it was Franklin who at the last moment suggested that Jefferson substitute the word ‘self-evident’ for ‘sacred’ at this point in the Declaration (cf. Laboucheix 1982, 105). This substitution can be taken as a reminder that these Enlightenment figures were looking for terms that could most easily resonate then with all the public rather than any particular sect, party, or special authority.

For present purposes, it would be a mistake to take anything to depend philosophically on the specific word ‘self-evidence’. Kant uses just the term *Evidenz*, and basically for mathematical intuitions: “mathematical propositions are evident. But we are certain of many things without their having evidence” (*V-Lo/Blomberg*, AA 24:150). Price and others sometimes use ‘self-evidence’ not for something like a special extra look at, or sorting out, of evidence but as similar to how contemporary “*non-evidentialist*” epistemologies (Plantinga 1993) understand basic beliefs, which spontaneously arise as obvious, as in the deliverances of recent memory or simple math.

Rather than having a dogmatic tone or presumption of expertise, the Declaration’s use of the simple verb ‘hold’ is a confession that what is being advanced is basically a claim. That is, it is not presented as the conclusion of any argument and attempt at explicit justification, let alone a scholastic syllogism or appeal to expertise. Nonetheless, the confident use of the term ‘hold’ here can be taken as an indication of being in a condition that is presumed to be manifestly *justified* even though its assertion itself is a result of an *activity of justification*. The Price scholar Bernard Peach connects the self-evidence referred to in the Declaration with Price’s philosophy and concludes that for Price self-evidence is to be “interpreted in terms of the occasions on which a process has culminated in the acceptance of a principle (or imperative) and become submerged through frequent acceptance and unexceptional use [...] there is a rationally *justified* acceptance but the *process* of eliciting, displaying, or considering the justification is unnecessary or irrelevant.” (Peach 1979, 39, my own emphasis). This does not mean that what is said to be self-evident could never *also* be supported by some form of demonstration. For example, although Price takes the injustice of slavery

to be self-evident, he also indicates that one *could argue* with a slaveholder. One could begin by pointing out that if the slaveholder insists that human beings can be treated as slaves, then it is only fair for other persons to claim, as a *reductio*, that he should admit that he too could be enslaved (cf. Price 1991, 150).

This line of argument is not sufficient by itself, but it is a reminder that there are different levels in Price's constant opposition to slavery. Allen cites a dramatic remark by Locke (1698, section 20, paragraph 210) that compares one's subjection to a nonrepresentative and oppressive government with the situation of being shipped off to a slave auction – a passage that Price and Franklin likely would have known and seconded (cf. Allen 2014, 112). Price's abolitionist convictions come out clearly in his writings, although at one point they fall prey to wishful thinking in implying that Jefferson and others would move quickly toward the elimination of slavery in the United States (cf. Price 1991, 56n.; Cone 1952, 113). Kant shows no sign of this kind of optimism. He does not comment on slavery in the States, but he harshly criticizes the treatment of the natives in North America and the colonial slave practices in the Caribbean. It is *possible* – although we have no evidence of this – that qualms about slavery in the United States are one reason for Kant's strange silence on the Declaration and related documents (and yet this did not keep other Germans from discussing American independence). He surely would have been, like Price, strongly in favor of the statutes instituting separation of church and state. There are, however, other complications in Kant's views, and elsewhere I have discussed some of the more disturbing aspects of his relations to racism, anti-Semitism, colonialism, and northern European cultural chauvinism (cf. Ameriks 2020). In this context I raise the equality and slavery issue simply as an instance – like that of Price's similar rejection of divine right theories as a “stupid scheme” and “insult to common sense” (Price 1991, 87, 129) – of a *general epistemological* problem. It is a problem relevant for all advocates of enlightenment who would rely on basing rejections like this on considerations invoking notions such as self-evidence, especially in a world that still exhibits a large variety of attitudes on what is permissible.

The problem here is a deep one, and not only for Price and Kant. Their kind of appeal might seem simplistic, but issues like this are not at all easy to resolve given difficulties that afflict alternative approaches. Even stronger objections to utilitarianism, for example, can immediately be made here. It is no accident that the main government response to Price's defense of the Declaration lies in a very unappealing document composed by John Lind and Jeremy Bentham, which

haughtily mocks political uses of the notion of human equality.²⁸ In contrast, and in favor of rationalism, it is rarely appreciated how much Price's moral theory, like that of similar contemporary Kantian rationalists such as Robert Audi, balances appeals to pure reason and common sense with an explicit stress on defeasibility, the fallibility of conscience, and the consideration of consequences and contingent factors in difficult judgments about how to respect persons in specific cases. Price holds that although "*general duties* [regarding liberty] [...] are obligatory [...] [there is] perfect indifference with regard to the *particular action* in view" (Price 1974, 122); and "It is by attending to the different relations, circumstances, and qualifications of beings, and the natures and tendencies of objects [...] that we judge what *is* or *is not to be done*." (Price 1974, 165).²⁹

This point is supported by the fact that an interest in consequences follows naturally from Price's assumption that human beings constantly have a rational concern with happiness, a matter on which Kant agrees. Hegel and others have claimed that Kant's argument for pursuit of the highest good involves an inconsistent or even hypocritical concern with happiness. This is to misunderstand Kant's argument and to overlook the fundamentally realistic nature of his anthropology. There are numerous ways in which Kant recognizes the significance of consequences and the value of happiness. Kant's basic duties of beneficence and self-perfection can only be understood in terms of the thought that bringing about an appropriate better natural condition in persons is valuable in a way that goes beyond the moral worth of one's intentions in that direction. Furthermore, the moral hope for one's own happiness in the situation of the justice of the highest good is immediately undermined if one's ulterior motive is impure.

It is only rational, Kant and Price both believe, for agents committed to a life of moral activity to need to hope that the *general effects* of their efforts will not be fundamentally futile even though, on account of our finitude, there is no way for us to know that this will be the case. However much we try to help others, it is always quite possible that these efforts will actually cause more moral inequities than we could ever anticipate. Not only is it beyond our ken to *know* who in fact most deservedly needs our help, but the means for best bringing about overall help in the long run are ultimately just as uncertain for us as even medium-term forecasts of politics are unreliable.³⁰ Even the best-intentioned progressive movements and technological innovations can often result in harmful repercus-

28 For a critique of Lind and Bentham for missing the point that the relevant notion of equality concerns fundamental human capacities, not talents or achievements, see Ameriks (forthcoming).

29 See also Peach (1979, 19–20, 37–40), Purviance (2005, 13, 16), and Audi (2004).

30 Adams (1995) makes this point in a way that applies to many kinds of moral theories.

sions and catastrophes of enormous proportions (cf. Ord 2021). In hoping for an actual balance of moral efforts and proper happy results, a fully rational agent needs to think about a better *entire* future world, and then it is only natural, and not selfish, to include the hope that such a balance is connected with oneself as well. Kant holds that it is the eventual satisfaction of the human species, rather than of one generation or individual, that it is most appropriate to try to be hopeful about. Price, in contrast, goes beyond rational philosophy at this point by holding to the religiously influenced mathematical view that even the slightest possibility of *infinite* gain (or loss) in an otherworldly hereafter for oneself can clearly outweigh all other considerations (cf. Price 1974, 271–275).

Despite the fact that this is no longer such a widely shared view, most current philosophers should agree with the rarely noted contextualism that dominates most of Price's moral philosophy. He elaborates his position on judgments about particular situations with a valuable distinction between “practical virtue”, which is a matter of acting on the basis of the best evidence that one has, and “absolute virtue”, which corresponds to what one would do if one had, *per impossibile*, fully adequate evidence (Price 1974, 177; cf. Laboucheix 1982, 64). This distinction could be developed in a Kantian manner by using the notion of absolute virtue as something like a regulative idea to guide us in improving specific judgements. In addition, Price's recognition of our fundamental limitations, and our need to focus on rules of thumb, the details of particular situations, and *basic* common sense is similar to how Kant often proceeds, with his recognition that philosophy has significant limitations and agents constantly have to fall back on proper education, patient casuistry, and interpretive judgment. For both Price and Kant, the main aim of practical philosophy is not to insist on a new system for everybody to study; its aim is to publicly combat overly abstract schools and reductive dogmatic theories, which cloud the deliverances of sound human understanding by begging open questions, claiming naturalistic reductions of normativity, proposing only one kind of value, or turning to extremism. Kant and Price both take sound understanding to be at least as immediately clear on *basic practical* issues, such as common moral decency, as in regard to manifest *non-practical* truths, such as the existence of an external world with a common spacetime framework.³¹

A similar perspective can be found in a classic study by Morton White, which argues persuasively that the Declaration's appeal to the “self-evident” is meant

³¹ Price (1974, 43f., 253, 285) sometimes makes this point using the term ‘common sense’, and sometimes by saying, e.g., “Tis self-evident that virtue *ought* to be happier than vice”. McGrath (2019, 3, 79) notes contemporary philosophers making similar claims.

as a *contrast* to the invoking of any authoritarian or demonstrative *process* of intuition that would be available only to experts rather than “laborers” using common sense (White 1978, 59, 114, 129; cf. Ameriks forthcoming).³² It is precisely with regard to the advantages of a broadly commonsense approach that one can find some of the most valuable connections between the work of Price and Kant and insights in contemporary moral epistemology. These insights, as developed recently in important work by Sarah McGrath, are the focus of our brief concluding section.

5 Contemporary Considerations

The main relevance here of McGrath’s book, *Moral Knowledge* (2019), concerns a problem that can be called the paradox of self-evidence. The paradox comes from the fact that after 1776 we may have reached a point where it appears very difficult to live *without* reliance on something like self-evidence, and yet – given problems that become apparent upon reconsideration of influential documents such as the Declaration – it seems not easy to live *with* it either.

Many theories try to ignore invoking self-evidence and moral intuition and proceed at a reflective level. In earlier collaborative work, McGrath raises a fundamental objection to the most influential current methodology along this line, namely, John Rawls’ reflective equilibrium procedure (*RE* hereafter). The objection is that *RE* is inadequate *if* taken in an *ambitious* meaning that claims it can by itself provide necessary and sufficient conditions for *moral knowledge* (Kelly & McGrath 2010). Even though *RE* incorporates restrictions, such as starting with “considered judgments” and non-“interested” inputs, its procedure can only yield results indicating what positively coheres with its given data, and thus it cannot exclude manifestly odd results with agents who begin from deep attachments to bizarre initial judgments (McGrath 2019, 34 ff.). *RE* also fails here as a necessary condition. McGrath argues that “substantial moral knowledge” often comes originally and *pre-reflectively* from the immediate social context in which one is brought up (McGrath 2019, 59). Although *RE* can be helpful at the theoretical level of ideal philosophical justification, it misses the fact that moral knowledge occurs already at the level of what Kant calls “ordinary understanding” (*G*, AA 4:404; cf. McGrath 2019, 82). Like Kant and Price, McGrath ac-

³² On positive connections between Kant, Reid, and common sense, see Ameriks (2005). Contemporary theorists often link Price’s intuitionism with G. E. Moore’s commonsense realism (cf. Korsgaard 2008, 306). A general pre-reflective approach that draws on Moore is defended in McGrath (2019) and also in works (some co-authored) by Thomas Kelly.

cepts that persons can be in a “justified state” of knowledge even when they are not engaged in “an activity of justifying” and even when, as with children, they have not developed the skills for such reflective activity (McGrath 2019, 61 ff., 97). People can know something is true without being at the level of knowing *why* it is true.

McGrath goes on to explore special difficulties with moral knowledge. One problem is that moral knowledge claims do not seem to *converge* in the relatively easy way we find in other fields of knowledge. A second problem is that agents often feel a need to make significant corrections in what they seemed to know earlier. They often make revisions dependent on nonmoral empirical knowledge or defer to others who appear to know better on moral issues. McGrath notes that moral *deference* is understandable in many instances, but there also cases where this is not clearly appropriate in the way it is for non-moral claims, where independent calibrating of expertise is common. If adults allowed “full-blooded moral experts” to simply overrule their own *basic sense* of right and wrong, this would be tantamount to sacrificing autonomy (McGrath 2019, 100). To illustrate permissible deference, McGrath discusses common contemporary examples of correcting moral claims given new empirical evidence, such as when rationally changing one’s views on sexual practices by paying attention to practices of friends one already esteems. Matters remain more complicated when one considers claims made at a *basic a priori* level. Should we now be open to correction of the Declaration’s claim, which Price and many others support fighting for, that it is true and self-evident that all are created equal? McGrath adds a footnote against the assertion that it was *ever* “all things considered reasonable for anyone to believe slavery is morally acceptable.” (McGrath 2019, 133n. 36). Relying on mere social-empirical processes of knowledge alone, however, would not refute such an assertion in a society that converges on enforcing slavery. As McGrath notes, convergence does not guarantee truth, and lack of convergence alone does not undermine realism (cf. McGrath 2010). In general, truth can be evidence transcendent.

One reason to focus on the claim that *we* hold truths about equality to be self-evident is that this approach is *meant* to avoid deference and divergence because it is a matter of expressing some claims supposedly so elementary that *all* agents can in principle see them as such, no matter what their starting point. McGrath remarks, however, that in mathematics only the *most* elementary claims clearly have this status (McGrath 2019, 85–148). There are many claims that are said to be *evidently* true to those who have the skills to work through the proofs for them, but this requires training and does not correspond to what is meant by *self-evidence* in the sense most relevant for Price and Kant. They can concede that philosophical skill is needed to construct their *a priori* accounts of specific

headings of duties, and hence controversies and some lack of self-evidence can be expected there. But Price and Kant would presumably add that, under unclouded conditions, most relevant *basic* duties – such as not to enslave people – can still be self-evidently known at a *common* level even though the account that organizes them all is at a less certain higher level (this point mirrors the division of levels noted earlier in Kant’s *Groundwork*).

McGrath emphasizes that many truths are learned from others early in life, and even with arithmetic the original source can be elementary school. With morality we begin even earlier and rely on the actions as well as the testimony of those closest to us from the start. McGrath defends this socially generated process as providing paradigm instances of moral knowledge taken up largely without reflection. If one considers the huge variety of moral views obtained this way in the course of ‘our’ history, however, the problem of divergence still can appear severe. Unlike the truths of arithmetic, insistence on doctrines such as equality, universal dignity, freedom from slavery, and even free will, is largely absent in revered ancient cultures. Moreover, the addition of Judeo-Christian and liberal humanist views has resulted, according to Alasdair MacIntyre and others, in an anarchy of current values and value theories that can *seem* to undermine claims to knowledge at all concerning doctrines arrived at simply from one’s upbringing or alleged common sense.

This is an especially serious problem for moral rationalists like Price, Kant, and Jefferson, who advance their basic claims in the context of what are explicitly presented as *revolutions*. Their bold belief in self-evident truth here may be appealing, but is it too naive? There is, admittedly, cause for concern when one recalls that, even in the era of Händel and Hanover, these ‘cosmopolitan’ thinkers take practically no note of each other’s traditions. In such a situation, can Anglophone philosophers really say what is self-evident even to contemporary Germans or vice-versa? There remain, in the end, reasons for remaining critical in reaction to knowledge claims arising simply from what McGrath calls “*our* moral inheritance” (McGrath 2019, 60 ff., my own emphasis). The most ‘advanced’ countries of the modern world have instituted horrific racial and eugenic practices in movements with huge public support, even from prize-winning scientists. Millions have been raised in twisted surroundings that deeply convinced practically their whole society that they were *obviously* doing the right thing. This issue of a ‘sick’ inheritance is much too complex to begin to settle in this context. Nonetheless, it would be hasty to jump to skepticism. I conclude instead with two positive thoughts concerning the long arc of enlightenment.

One point is that the development and dissemination of science is a long-term but encouraging process. It has already led to irreversible moves in dismantling some superstitions that pushed people into morally monstrous beliefs they

may have understandably treated as self-evidently proper. The witch-craze involved numerous eyewitness claims of demonic forces. But once demons were cleared away from the realm of plausibility by modern education, witch-hunts practically disappeared. If people are regularly led to believe that witches – or people of a different religion or race – have ingrained devilish traits, then harsh treatment of them can become so popular it seems self-evidently correct. Fortunately, many cultures have learned over time from the better informed and come to change their ways about grievous errors in once prevalent causal attributions. Something similar has happened at the political level with the disappearance of the attribution of divine power to secular leaders, which now does seem self-evidently absurd. The test of time gives us something of a tool, after all, for calibrating normative judgments. Bad ‘scientific’ claims behind racism, social Darwinism, and eugenics have largely been put into our past. Moreover, philosophical historians of science such as William Whewell have shown that modern science itself does not support the non-cognitivist/positivist denial of necessary moral truths but relies on intuitive ‘Ideas’ of reason and can be regarded as a possible (although independent) partner for rationalist morality.

This point leads into a second Enlightenment thought, namely, that the diversity of fundamental views in our moral history can be reconceived as a *complex ascending spiral* rather than a plurality of disconnected cultures. Despite worrisome divergence and questionable deference, one can rationally postulate, between the most elementary and the abstruse, a realm of the *eventually* self-evident to all, made explicit in the course of genuine revolutionary progress. Looking back, one can appreciate history as a dialectical *self-correcting* process where, through asymmetric causal and intentional links that involve *more than science* alone, later societies come to understand themselves in political ways that incorporate the best of their tradition while leaving deep errors behind. Feudalism is not coming back, and all effective political movements feel obliged now to at least pay lip service to democratic values. Much disagreement in higher-level practical thinking remains, but this is also ultimately true of science to this day.

In Price’s and Kant’s historical remarks, there are illustrations of this ultimately progressive perspective, albeit in still relatively simple multistage accounts of the rationalization of Western religion and politics.³³ In our own era, it is worth keeping in mind that the United Nations has come into existence and been supported in enforcing – even though in a limited way – many broadly recognized moral standards that reflect the language of the Declaration and Kant

33 On more complex views of change in science and philosophy, see Ameriks (2021a).

as well. None of this means that the millennium is here yet, or *even near* – and at least on *that* commonsense political thought, Kant goes one good bit ‘beyond’ even Price.³⁴

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Bo Fang

Kant's Political Philosophy as *ausübende Rechtslehre*

Abstract: Based on Kant's own concept of politics, it is possible to construct his political philosophy that is related to but also different from his metaphysics of right. Politics is the practice of realizing the principles of right in experience; therefore, Kant's political philosophy must explore the general conditions that make this practice possible. These conditions, such as political judgement, publicity and the enlightenment of the people, are indispensable to Kant's thinking about human external freedom but do not belong to the metaphysics of right. Kant's metaphysics of right is undoubtedly a liberal theory, but we can also identify some republican elements in his political philosophy. In this way, Kant provides us with a very instructive programme to absorb republican elements within a liberal theory.

Introduction

In her lectures on Kant's political philosophy, Hannah Arendt asserts that Kant "never wrote a political philosophy" (Arendt 1982, 7). The very existence of a large amount of contemporary literature on Kant's political philosophy seems to be sufficient to refute this assertion. However, Arendt's assertion is based on a premise that she, like Schopenhauer, regards Kant's *Doctrine of Right* as a "boring and pedantic" work (Arendt 1982, 7). She thus tries to use Kant's other texts, especially the resources from the *Critique of the Power of Judgement*, to reconstruct a Kant's political philosophy, while most interpreters of Kant's political philosophy mainly focus on the *Doctrine of Right*. Arthur Ripstein, for example, states at the beginning of his *Force and Freedom* that

My aim in this book is to develop and defend Kant's own statement of his political philosophy, particularly as he articulates it in the *Doctrine of Right*, the first part of the *Metaphysics of Morals*. (Ripstein 2009, ix).

Contemporary Kant studies have provided good evidence to refute Arendt's underestimation of the *Doctrine of Right*. Nonetheless, her approach can still in-

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spire us to think about the following question: is it truly possible to construct Kant's political philosophy in addition to the metaphysics of right articulated in the *Doctrine of Right*?

The more important reason for raising this question is that in *Toward Perpetual Peace*, Kant distinguishes between right and politics and defines politics as an “ausübende Rechtslehre” in contrast to the metaphysics of right as a “theoretical doctrine of right” (*PP*, AA 8:370).¹ Most interpreters actually do not pay sufficient attention to this concept of politics. Some may think that it is related only to empirical practice and is therefore not a proper subject of political philosophy. Other interpreters realize that Kant's political thinking also contains empirical elements, and they thus assert that when talking about his political philosophy, we also need to give a little attention to these elements. Regarding Kant's political philosophy, whether we refer to the metaphysics of right or something else is normally an issue of naming that does not affect our understanding of Kant. However, this issue sometimes reflects a lack of awareness of a more explicit distinction, that is, a lack of awareness that there are two levels within Kant's thought about human external freedom, i.e., a priori principles of right derived from reason and the possible conditions for their realization in experience. As a result, either the latter level is ignored² or the two levels are confused.³ Certainly, there are also some interpreters who attempt to explore Kant's political theory based on his concept of politics. Volker Gerhardt provides a creative reading based on this concept, but his interpretation too closely follows the structure of *Toward Perpetual Peace*; therefore, its “political” character has largely been obscured (Gerhardt 1995). Reinhard Brandt's demonstration starts directly from Kant's concept of *ausübende Rechtslehre*, but it seems that he has no intention of constructing a systematic theory (Brandt 1995). Bernd Ludwig correctly notes that the aim of politics is to create institutions that can realize the concept of right, but he claims that this is “basically a one-dimensional process” led by the head of state (Ludwig 2000, 196). More recently, Luigi Caranti has also tried

1 Unless otherwise indicated, all references to Kant are according to the translation of the Cambridge edition. Literally, what Kant defines as the theoretical doctrine of right is morals, but given his further division of morals into ethics and the doctrine of right (*PP*, AA 8:386), the theoretical doctrine of right actually refers to the metaphysics of right. In addition, since there is no proper translation of “ausübende Rechtslehre”, I maintain the German form.

2 Heiner Bielefeldt, e.g., criticizes that Kant “largely fails to take into account the role of judgement and experience for the development of concrete norms” in his philosophy of right (Bielefeldt 1997, 543–544).

3 Christoph Horn's argument for Kant's political philosophy as a theory of non-ideal normativity would be more convincing if he were to recognize this distinction (Horn 2016).

to “reconstruct a theory of political agency that is both inherently consistent and harmonious with the rest of Kant’s philosophy”, but the key to his interpretation, as he claims, is “a close analysis of the Kantian ‘character’ of the ‘moral politician’” (Caranti 2017, 11–12). Similar to Ludwig’s interpretation, this reconstruction misses Kant’s more important philosophical insights about politics.

My aim in this article is to sketch a framework of Kant’s political philosophy that is related to but also different from his metaphysics of right. It is based on Kant’s own concept of politics and focuses on the general conditions under which the principle of right can be realized in experience. First, I argue that a political philosophy in this sense is not only possible but also necessary in Kant’s system. Second, I analyse the basic elements of Kant’s political philosophy, such as political judgement, publicity, enlightenment, etc. These concepts obviously do not belong to the metaphysics of right but are indispensable to Kant’s thinking about human external freedom. Finally, as an example of the application of this distinction, I attempt to clarify the liberal and republican elements in Kant’s thought.

1 Possibility and Necessity of Political Philosophy

Some interpreters, although they also notice Kant’s concept of politics, actually deny the possibility of constructing a political philosophy based on it. Ernst Vollrath, for example, claims that

The practical philosophy of Kant is ‘metaphysics (!) of morals’. In its framework, a political philosophy has no place as an independent programme. Politics is nothing more than the ‘mechanism for administering right’ (Vollrath 1987, 92).

Vollrath actually makes two assertions here. First, politics is merely a mechanical application of the rules of right; second, there is no space for an independent philosophical doctrine of politics in addition to the metaphysics of right in Kant’s system.

For Kant, politics is obviously not the application of positive laws but rather the application of the principles of the metaphysics of right to empirical cases. Kant claims that the metaphysics of right is a “system outlined *a priori*”, namely, “a system derived from reason” (*MM*, AA 6:205); therefore, it only contains the principles that can be cognized *a priori* by reason. Admittedly, there are also empirical contents in the *Doctrine of Right*. However, further classification is re-

quired to determine the roles of the different types of these empirical contents in the metaphysics of right. There are at least four types as follows.

(I) Anthropological propositions that serve as the premises of the entire system, such as human beings are rational and natural beings in plural, they live on a spherical and finite earth, etc. (Höffe 1995, 128–130). These propositions certainly cannot be excluded from the metaphysics of right.

(II) Concepts drawn from experience. But some propositions that are made up of these concepts may also be a priori, as Kant distinguishes in the *Critique of Pure Reason*:

Among *a priori* cognitions, however, those are called pure with which nothing empirical is intermixed, e.g., the proposition ‘Every alteration has its cause’ is an *a priori* proposition, only not pure, since alteration is a concept that can be drawn only from experience (*CPR*, B 3).

Most propositions of the metaphysics of right can only be a priori in this non-pure sense, insofar as their necessity can be formally derived from the concept of right. In the *Doctrine of Right*, Kant provides a good example, that is, money, which is obviously an “empirical concept” but can still be brought into

an intellectual concept by looking only to the form of what each party provides in return for the other in onerous contracts (and abstracting from their matter), thereby bringing it to the concept of right in the exchange of what is mine or yours generally (*commutatio late sic dicta*), so as to present the table above as a dogmatic division a priori, which is appropriate to the metaphysics of right as a system (*MM*, AA 6:289).

(III) Empirical facts that are hidden in Kant’s arguments. For example, the fact that there are plural sovereign states in the world; this cannot be derived a priori from the concept of right, but it is crucial for Kant’s division of the metaphysics of right. Without this fact, the idea of a world republic would be derived directly from Kant’s argument for civil condition; in this case, the right of states and the cosmopolitan right would be superfluous. In *Toward Perpetual Peace*, Kant concedes that “the positive idea of a world republic” is “what is correct *in thesi*” but contradicts the idea of the right of states (*PP*, AA: 8:357); this also shows that the right of states is not a priori necessary and should therefore not belong to the metaphysics of right in a strict sense.

(IV) Particular empirical examples. Kant requires distinguishing these examples from the metaphysics of right, but they do not appear only in remarks as Kant declares (cf. *MM*, AA 6:205). For example, Kant claims that the state should “support organizations providing for the *poor*, *foundling homes* and *church organizations*” for its own preservation (*MM*, AA 6:326). These organizations are

empirical examples that are not a priori necessary and do not exhaust the means that the state can take. Thus, they do not belong to the metaphysics of right.

Despite these empirical contents, the *Doctrine of Right* still presents a system with highly abstract (if not purely formal) principles. These principles certainly need to be applied in experience, but they do not contain rules of action that can be directly applied to empirical cases. As Dieter Henrich states,

The concept of right itself does not provide any guidance on action. It must be combined with the interpretation of the situation of a world so that it can become a program for political action (Henrich 1967, 35).

The application of the principles of right thus cannot be only mechanical because a mechanical application must presuppose a complete system of rational rules (Gerhardt 1996, 482). Moreover, due to its a priori character, the metaphysics of right does not take into account the possible conditions for their application in experience; it is a pure theory of right according to Kant's definition in *On the Common Saying*:

A sum of rules, even of practical rules, is called theory if those rules are thought as principles having a certain generality, so that abstraction is made from a multitude of conditions that yet have a necessary influence on their application (*Ausübung*). Conversely, not every doing is called practice, but only that effecting of an end which is thought as the observance of certain principles of procedure represented in their generality (CS, AA 8:275).

There can be different levels of theories according to their degree of abstraction. Among them, the metaphysics of right is undoubtedly the purest one because it should abstract from all empirical conditions for its application; it is therefore the "theoretical doctrine of right", while its practice is precisely politics in Kant's sense. Politics is not a mechanical application of existing rules, instead, the possible conditions of the practice of right still need to be explored in an *ausübende Rechtslehre* as the doctrine of political practice. In his terminology, Kant actually does not strictly distinguish between politics as a doctrine of practice and politics as practice itself. Sometimes, politics is defined as an *ausübende Rechtslehre*, and sometimes, it is the application of the principles of right to empirical cases. Here, we should make an explicit distinction. Politics is the practice of realizing the principles of right in experience, while an *ausübende Rechtslehre* must explore the possible conditions for this political practice.

Kant claims that even between a complete theory and its practice, a determinant use of judgement is still required to determine whether specific empirical cases can be subsumed under a rule. However, such completeness does not

yet exist in the metaphysics of right; its application still requires some intermediary *Grundsätze*. In this sense, Kant obviously agrees with a proposition of Benjamin Constant:

Every time [...] that a principle proved to be true seems inapplicable, this is because we do not know the intermediary principle (*Grundsatz*), which contains the means of application (*RLP*, AA 8:427).

These intermediary *Grundsätze* do not belong to the metaphysics of right, and, insofar as they should aim at the application of the principles of right, they also differ from empirical political science. Therefore, to realize the principles of right in experience, we must

progress from a metaphysics of right (which abstracts from all conditions of experience) to a *Grundsatz* of politics (which applies these concepts to cases of experience) and, by means of this, to the solution of a problem of politics in keeping with the universal principle of right (*Rechtsprinzip*) (*RLP*, AA 8:429).

Kant makes here a terminological distinction between *Grundsatz* and *Prinzip*; this naturally reminds us of his definition of the analytic of *Grundsätze* in the first Critique:

The analytic of *Grundsätze* will accordingly be solely a canon for the power of judgment that teaches it to apply to appearances the concepts of the understanding, which contain the condition for rules *a priori* (*CPR*, B 171).

This definition indicates that *Grundsatz* does not focus on the deduction of a priori rules but their application in experience. Politics, insofar as it is related to an external coercive order of a large society, certainly cannot be concerned only with the problem of cognition and judgement. A doctrine of politics, as an analytic of political *Grundsätze*, must explore the general conditions for the realization of the principles of right in experience.

The further question is the following: is it still the task of a philosopher to explore such conditions? This question relates to whether we can regard the *ausübende Rechtslehre* as Kant's political philosophy. Vollrath's claim implies a judgement that philosophy can only be a system of metaphysics or a priori cognitions; therefore, there can be no place for a political philosophy in Kant's system. Indeed, Kant sometimes defines philosophy as the "*cognition of reason from mere concepts*", which "*must be a priori*" (*Log.*, AA 9:23). However, this does not prevent him from accepting a philosophy based on empirical principles. As he states in the first Critique, "All philosophy, however, is either cognition from

pure reason or rational cognition from empirical principles. The former is called pure philosophy, the latter empirical" (*CPR*, B 868). He also mentions "a politics cognizable a priori" (*PP*, AA 8:378), but in view of his flexible use of "a priori" in *Toward Perpetual Peace*, we cannot assume that this can be equated with the metaphysical a priori. Nonetheless, Kant undoubtedly believes that it is possible to draw rational cognitions from empirical principles, which although they are not a priori necessary, can still be a subject of philosophical inquiry. For this reason, a philosopher, in addition to providing the principles of freedom and equality, needs to further raise

a problem of how it is to be arranged that in a society, however large, harmony in accordance with the principles of freedom and equality is maintained (namely, by means of a representative system); this will then be a *Grundsatz* of politics, the arrangement and organization of which will contain decrees, drawn from experiential cognition of human beings, that have in view only the mechanism for administering right and how this can be purposively established (*zweckmäßig einzurichten*). Right must never be accommodated to politics, but politics must always be accommodated to right (*RLP*, AA 8:429).⁴

This passage clearly illustrates the relation of politics to right. The task of politics is to realize the self-organization and institutionalization of a society in accordance with the principles of right. Politics indeed aims at establishing a mechanism for administering right, but the internal operation of this mechanism is not politics itself. The point is how to purposively establish and improve such a mechanism. Logically, once this task is completely accomplished, politics is no longer needed, as "the best constitution is that in which power belongs not to human beings but to the laws" (*MM*, AA 6:355). However, this is only an idea of reason, which cannot be fully realized in experience; therefore, politics will be a permanent enterprise. Kant certainly does not think that philosophers need only to raise the problem; rather, they must also contribute to the proper solution to this problem. As Gerhardt notes, "political philosophy not only needs to develop argument for ideas and models, it must also make a statement about the conditions of the realization of its normative expectations" (Gerhardt 1995, 48). Gerhardt still understands Kant's political philosophy in a broad sense. He makes a distinction between right and politics but does not make a corresponding distinction between the metaphysics of right and political philosophy. Here, I make a further distinction: the metaphysics of right, as Kant demonstrates in the *Doctrine of Right*, is only concerned with the a priori principles de-

4 "Zweckmäßig einzurichten" is falsely translated as "be managed appropriately" in the Cambridge edition.

rived from reason, whereas the political philosophy in Kant's sense should explore the general conditions that make possible the realization of the a priori principles of right in experience.

2 Basic Elements of Kant's Political Philosophy

How can the principles of right be realized in experience? In the *Idea for a Universal History*, Kant claims that to establish a perfect constitution, at least three conditions are required, namely, "correct concepts of the nature of a possible constitution, great experience practiced through many courses of life and beyond this a good will that is prepared to accept it" (*IUH*, AA 8:23). These three conditions correspond to principles, judgement, and decision. The first condition can be provided by the metaphysics of right, whereas the latter two are obviously not contained in the metaphysics of right; instead, they relate to two basic elements of political practice: the political judgement to integrate the principles of right with empirical conditions and the political will to promote the realization of these principles. The construction of Kant's political philosophy should revolve around these two elements.

Both political judgement and political will must primarily face the same problems: whose judgement and whose will? For Kant, a state of nature is not the starting point of politics; it is just an idea of reason in the metaphysics of right. In reality, we are already in a civil condition from the beginning. Therefore, the task of politics is not to establish a new constitution but to continuously improve the existing constitution to make it more consistent with the principles of right. Politics in this sense is the politics of reform. In this regard, the judgement and will of the sovereign or the head of a state are certainly indispensable for politics. Admittedly, according to the principles of right, sovereignty can be attributed only to the united will of the people, but this is also an ideal that may not have been realized in reality. Even in a democracy, people do not always directly exercise political power; politicians are therefore indispensable for political practice. Kant thus also discusses the *moral politician*. However, this discussion does not imply that Kant, as Caranti claims, appeals to "the morality of individual politicians" (Caranti 2017, 242). Kant's demonstration of the moral politician has nothing more than what is indicated in his elucidation of the relation between right and politics: every politician has a duty to promote political reform according to the principles of right. This description of political duty is derived directly from the definition of politics; it does not imply that Kant places the hope of political progress on the individual morality of politicians. In contrast, he refutes regarding individual morality, whether the ruler's or the sub-

ject's, as a premise of political progress. As he states in the *Idea for a Universal History*,

The human being is an animal which, when it lives among others of its species, has need of a master. For he certainly misuses his freedom in regard to others of his kind; [...] Thus he needs a master, who breaks his stubborn will and necessitates him to obey a universally valid will with which everyone can be free. But where will he get this master? Nowhere else but from the human species. But then this master is exactly as much an animal who has need of a master (*IUH*, AA 8:23).

The ruler is also a human being who would therefore misuse political power without restraint. This is the most difficult problem for politics. Given such a pessimistic judgement of human nature, Kant certainly would not appeal to the good will of a ruler. His solutions to this problem, whether it is the enlightenment of the people as described in *Idea for a Universal History* or publicity as described in *Toward Perpetual Peace*, all point to the people or the public as the real subject of political practice.

Certainly, some statements on publicity in *Toward Perpetual Peace* are indeed misleading. Here, Kant appeals to publicity to reconcile the disagreement between morals (right) and politics. He claims that this process can occur “as if by an experiment of pure reason” because once an unjust maxim is publicly declared, it will inevitably arouse the “a priori foreseeable” resistance of everyone (*PP*, AA 8:381). If this is the case, then publicity would merely require that a politician should actively examine the justice of laws or policies in his or her self-reflection to promote political reform. However, as Allen Wood analyses, the a priori foreseeability here only means that one can foresee the consequence of his or her action through experience before this action is actually carried out (Wood 2014, 78). Therefore, when Kant claims that politicians can a priori foresee the opposition of everyone against an unjust maxim, this simply means that they can foresee this through previous experience. However, unless the public has expressed a general consensus on this issue or a similar issue before, politicians cannot acquire the relevant experience to foresee this consequence. In this case, it would be the public, not a solitary politician, that would provide the judgement on the justice of laws or policies. However, this scenario actually presupposes the existence of a rational public sphere in which people have not only the ability to use their own reason to judge the justice of laws or policies but also sufficient courage to publicly express their opposition against unjust laws or policies; this means that the public must be enlightened, and political judgement can therefore only be public judgement or public reason.

The revival of the concept of political judgement in contemporary political philosophy and Kant studies must largely be attributed to Arendt, who success-

fully reveals some political implications of Kant's third Critique. Nonetheless, Arendt's understanding of politics is obviously different from that of Kant. For Kant, the political use of judgement is to integrate the principles of right with empirical conditions to obtain specific rules or programmes for action. Therefore, strictly speaking, the political judgement in Kant's sense is neither reflective nor determinant judgement and can only be somewhere in between or be a synthesis of them.⁵ Under the premise of underestimating Kant's *Doctrine of Right*, Arendt draws an analogy between political judgement and aesthetic judgement. As a result, her interpretation, as Höffe criticizes, lacks a "feature of modern politics, namely, its relation to universalist principles, such as basic and human rights" (Höffe 2001, 63–64). Compared with political judgement, public reason is a more popular concept in contemporary political philosophy and is also closely related to Kant. The resources on public reason in Kant's texts have been fully explored in Kant studies (Keienburg 2011). For Kant, reason in all its use should be public because its claim is "never anything more than the agreement of free citizens" (*CPR*, B 766); thus, his statements on public reason or the principle of publicity are not just for politics, although they receive the most attention in contemporary political discourse. Certainly, public reason must be understood in a broad sense here; it refers to the human cognitive abilities in general, including reason, understanding, and judgement. In Kant's context, the political use of public reason is the same as political judgement, and they both primarily aim to apply the principles of right to empirical cases. In this regard, Habermas, based on his discourse theory, has reason to accuse Kant of deducing these principles from a monological perspective (Habermas 1994, 123). However, as Rawls argues, any theory of justice must make certain substantive assertions; the point is that these assertions, as a part of the ongoing public discussion, can be further examined by public reason (Rawls 1995, 141). The principles of right certainly need to be further examined in ongoing public discussion. This examination is necessary not only because of cognitive reason but also because the realization of principles of right also requires their acceptance in public consciousness; the a priori principles

still require a judgment sharpened by experience, partly to distinguish in what cases they are applicable and partly to provide them with access to the will of the human being and efficacy for his fulfilment of them (*G*, AA 4:389).

⁵ See Annemarie Pieper's analysis of pure practical judgement in *Critique of Practical Reason* (cf. Pieper 2011).

As Kant's demonstration of *sensus communis* in § 40 of the third *Critique* shows, this can be possible only in the public sphere.

To realize the principles of right in experience, political will is also required as the driving force of political reform. However, Kant offers no solution other than publicity to reconcile the disagreement between right and politics. This may indicate that in his view, publicity already involves sufficient conditions for solving this problem. Publicity, as a mechanism for people to reach consensus and form collective will, can also act as a driving force for political reform. In this regard, Kant actually relies on the critical function of the public sphere. In the public sphere, first, people can make use of their own reason to participate in public discussion and thereby not only continuously enlighten themselves but also approximate rational consensus on public affairs. Second, people's publicly expressed opposition can also force rulers or politicians to promote political reform. Freedom of speech is therefore an important condition for political practice; it is even described as "the sole palladium of the people's rights" (CS, AA 8:304) and the "single gem remaining to us in the midst of all the burdens of civil life, through which alone we can devise means of overcoming all the evils of our condition" (OT, AA 8:144). However, the question is, is this also an ideal model? Georg Cavallar, for instance, claims that this interaction among publicity, enlightenment, and politics can occur only in a republican government (Cavallar 2015, 142). In a non-republican government, since the people do not hold political power and do not have the right to resist the government, criticism in the public sphere cannot necessarily generate political effects. Ciaran Cronin thus criticizes that Kant fails to overcome the tension between enlightenment and political power (Cronin 2003, 54).

Kant is of course aware of this problem, but his solution is often overlooked. In *What is Enlightenment*, he offers the following proposition:

What a people may never decide upon for itself, a monarch may still less decide upon for a people; for his legislative renown (*Ansehen*) rests precisely on this, that he unites in his will the collective will of the people (E, AA 8:39–40).⁶

Interpreters, including Cronin, usually regard this proposition as a statement of social contract. However, if we note that Kant refers here to the legislative *Ansehen* rather than the legislative *Autorität*, then we should realize that this is an empirical political proposition, which is later articulated by Max Weber as the proposition of belief in legitimacy:

⁶ "Ansehen" is translated in the Cambridge edition as "authority".

Experience shows that in no instance does domination voluntarily limit itself to the appeal to material or affectual or ideal motives as a basis for its continuance. In addition, every such system attempts to establish and to cultivate the belief in its legitimacy (Weber 1978, 213).

The continuance of political domination in any society requires the people's belief in its legitimacy, and Kant believes that in the age of enlightenment, only one type of this belief is possible because reason grants its unfeigned respect "only to that which has been able to withstand its free and public examination" (*CPR*, A XI). This relation is also implied in the positive formula of publicity, which claims that all maxims whose "end is to be attainable only through publicity, that is, by the removal of all distrust toward the maxims of politics, [...] must also be in accord with the right of the public" (*PP*, AA 8:386). This is also the reason why Kant has such great confidence in the enlightenment of the people; he believes that

this enlightenment, however, and with it also a certain participation in the good by the heart of the enlightened human being who understands the good perfectly, must ascend bit by bit up to the thrones and have its influence even on their principles of government (*IUH*, AA 8:28).

Certainly, the realization of both the people's self-enlightenment and political reform must be a gradual historical process. In this regard, Kant's distinction between the form of sovereignty and the form of government provides a more feasible route for gradual political reform. It is still possible even for a monarchy to continuously republicanize its constitution without immediately changing its form of sovereignty. On this basis, a slow but peaceful transition from a republicanized monarchy to a republican democracy is more possible. However, in this process, the driving force of continuous political reform does not depend on the good will of a monarch but ultimately comes from the people who continuously enlighten themselves.

3 Liberalism and Republicanism in Kant's Thought

The analysis above has revealed that in addition to the metaphysics of right, there is still space for Kant's philosophical doctrine of politics. Of course, whether to consider this doctrine alone as Kant's political philosophy or regard it as part of Kant's political philosophy in a broader sense would normally be an

issue of naming. Nonetheless, a further classification is not only more in line with Kant's terminology but also sometimes more convenient for resolving some of Kant's apparent contradictions. Therefore, I advocate a strict distinction between the metaphysics of right and political philosophy in Kant's context. While Kant follows a metaphysical logic of right in the metaphysics of right, he follows in political philosophy a political-practical logic that mainly focuses on the possible conditions for the realization of the principles of right in experience. As a result, these two branches also present different theoretical characteristics in some aspects. In the following, I attempt to resolve the dispute surrounding liberalism and republicanism in Kant studies through this distinction.

Kant is usually regarded as one of the founders of liberalism (Guyer 1997). In his political writings in the broader sense, it is not difficult to observe his uncompromising insistence on the priority of individual freedom that is explicitly defined as the negative freedom of external action in the usual sense. What serves as the unique starting point and the normative end of the entire order of right is the sole innate right:

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity (*MM*, AA 6:237).

Correspondingly, an ideal state is that

which has the greatest freedom, hence one in which there is a thoroughgoing antagonism of its members and yet the most precise determination and security of the boundaries of this freedom so that the latter can coexist with the freedom of other (*IUH*, AA 8:22).

However, recently, some interpreters have placed more emphasis on the republican character of Kant's thought. Republicanism here is not what Kant himself defines as one of the forms of government; rather, it refers to a theoretical tradition that has been competing with liberalism for a long time. Liberalism usually gives priority to specific individual freedom and rights to define the purpose of the state and the boundary of political power, whereas republicanism insists instead that only through the general political participation of citizens can the political values, which should constitute the purpose of the community, be determined and guaranteed; "in this tradition, the active and equal political participation of citizens are seen as the core guarantors of liberty, equality, and solidarity" (Leipold & Nabulsi & White 2020, 1). From this perspective, some elements demonstrated above, such as the enlightenment of the people, the participation of the people in the public sphere and their public use of reason, are indeed more closely related to republicanism than to liberalism. How-

ever, they all belong to Kant's political philosophy rather than the metaphysics of right. The republican interpretations of Kant's theory often confuse these two levels, and some of them even appeal to ethical arguments from Kant's moral philosophy. Heiner Bielefeldt's approach of introducing "the challenges of moral self-responsibility and republican commitment" by interpreting Kant's theory as "a fighting liberalism" is a typical example (Bielefeldt 1997, 525). Howard Williams's argument is actually the same (Williams 2003, 276–279).

Aside from the approach of demonstrating a Kantian republicanism directly based on the concept of moral autonomy, interpreters who try to argue for the republicanism in Kant's metaphysics of right usually appeal to his statements on the legislative general will. In §46 of the *Doctrine of Right*, Kant claims that "the legislative authority can belong only to the united will of the people" (*MM*, AA 6:313). In *Toward Perpetual Peace*, he also defines external freedom as "the warrant to obey no other external laws than those to which I could have given my consent" (*PP*, AA 8:350). These statements can make us naturally think of Rousseau's concept of *volonté Générale* (Maus 1992, 185). However, a further classification of the generality of legislative will is necessary in Kant's context as follows: (I) the general binding force of legislative authority; (II) the general acceptability of the legislative outcome; and (III) general participation in the legislative process. (I) is of course indispensable for a civil condition. However, between (II) and (III), Kant obviously places more emphasis on (II) in the metaphysics of right. He even claims that the practical reality of the idea of a social contract lies merely in that it can

bind every legislator to give his laws in such a way that they could have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will (*CS*, AA 8:297).

In §46 of the *Doctrine of Right*, Kant also claims that not all members of the community have the right to participate in legislation. Therefore, it is clear that when he talks about "the united will of the people", he actually gives more attention to the general acceptability of legislation rather than the general participation in legislation. This already makes his thinking essentially different from republicanism. Another important difference is that for Kant, the rational concept of right or the a priori principles of right logically precede the legislative general will; that is, the legislation of general will must conform to the rational concept of right to obtain its a priori normativity (LeBar 1999, 240). For Kant, the state as a civil condition is not purely instrumental; instead, it has constitutive significance for the realization of the concept of right, since only under a general legislative power can the external freedom of everyone and the conditions for its

general coexistence be realized. Nonetheless, such a community is derived for the sake of individual rights. Kant's theory about human external freedom actually contains the following three-level structure: (I) the innate right of human beings as the normative source of an external coercive order; (II) a priori principles in private right and public right for the realization of the innate right in idea; and (III) possible conditions for the realization of these principles in experience. Both the legislative general will and the idea of the social contract are at the second level; they are not empty ideas because they should always aim at defining and protecting everyone's innate right (the freedom of external action). Habermas's criticism of Kant, which was mentioned before, is derived precisely from Kant's insistence on the priority and the a priori character of the innate right.

Other evidence that has often been used to argue for Kant's republicanism is his concept of civic self-efficiency, which is described in *On the Common Saying* as one of the three a priori constitutive principles of civil society and in the *Doctrine of Right* as one of the three attributes of a citizen. Based on this concept, Kant also proposes his concept of the positive citizen, which requires a quality of *sui iuris* in two senses: a citizen must have not only the freedom of external action but also the capacity to independently participate in legislation. Civic self-sufficiency in this sense is indeed closer to the republican freedom of non-domination (Koukouzelis 2009, 859). However, as Manfred Riedel notes, here, Kant himself confuses the a priori and empirical elements (Riedel 1976, 139). First, self-sufficiency is an a priori principle, which is, however, based entirely on empirical grounds by Kant. Kant claims that only those who are not dominated by any others in economic relations are self-sufficient and are therefore qualified to participate in legislation. According to his empirical criterion, not only women and children but also all labourers employed by private persons or organizations are also excluded from participating in legislation. Second, self-sufficiency is a constitutive rather than a regulative principle of civil society; therefore, self-sufficiency is not a goal that every citizen should strive for but rather a criterion to distinguish citizens from non-citizens. Kant here obviously confuses the right and the capacity to participate in legislation. As a constitutive principle of civil society, self-sufficiency should be determined a priori. Accordingly, everyone should be entitled to citizenship to participate in legislation merely by virtue of the quality of *sui iuris* contained in his or her innate right. Regarding the capacity to participate in legislation, since this is only an empirical concept that can only be empirically judged, it should not belong to the metaphysics of right.

Kant undoubtedly takes a liberal position in the metaphysics of right, but his emphasis on publicity and public reason in his political philosophy indicates a

requirement for the enlightenment of the people and their public participation, which more closely resembles a republican position. The realization of principles of right in experience, namely, the reconciliation of the disagreement between right and politics, needs to be carried out through publicity, which further requires each individual to make use of his or her own reason to participate in political discussion in the public sphere, thereby continuously enlightening himself or herself and simultaneously promoting the improvement of the current constitution according to consensus in the public sphere. A basic proposition of Kant's political philosophy is that each individual should actively participate in shaping the community to realize his or her rights,

for in such a whole each member should certainly be not merely a means, but at the same time also an end, and, insofar as it contributes to the possibility of the whole, its position and function should also be determined by the idea of the whole (*CJ*, AA 5:375).

In this way, we can even redefine Kant's distinction between positive and passive citizens. Every member of the community should be attributed citizenship to (directly or indirectly) participate in legislation merely by virtue of the quality of *sui iuris* in the innate right. However, this is only a juridical self-sufficiency, and citizens in this sense are only passive citizens. On the contrary, active citizens are only those who have not only the right but also the courage and capacity to make use of their own reason to (directly or indirectly) participate in legislation; they are enlightened citizens who have the quality of political self-sufficiency. Kant insists that political progress does not depend on the improvement of individual morality, but it does require some type of civic virtue: everyone should "become a good citizen even if not a morally good human being" (*PP*, AA 8:366). A good citizen is a person who has realized through enlightenment that the community is indispensable for realizing his or her rights and enlightened interests, and he or she therefore actively participates in shaping the community. In contrast, even in a representative system, if the people do not oppose unjust laws or policies through their representatives in the parliament for a long time, for Kant, "this would be a sure sign that the people is corrupt" (*MM*, AA 6:322).

In *Drafts for On the Common Saying*, Kant makes the following statement:

The civil constitution, as a rightful condition under public laws, contains full freedom of every member of the community as the first condition (not ethical, not even just juridical, but political freedom). This consists in that everyone can seek his own welfare according to his concepts and also cannot even be used by others as a means to the end of his own happiness and according to their concepts, but only according to his own (*DCS*, AA 23:129, my own translation).

Here, Kant conceptually distinguishes between juridical and political freedom. Wolfgang Kersting believes that this political freedom is precisely what Kant proposes in *Toward Perpetual Peace*, that is, “the warrant to obey no other external laws than those to which I could have given my consent” (Kersting 2007, 286). However, this is a misreading caused by ignoring Kant’s own concept of politics. Around this passage, there is no discussion related to freedom in this positive sense. In contrast, the connotation of this freedom is clear in this passage; it is also described as the freedom of everyone as a human being in *On the Common Saying*:

No one can coerce me to be happy in his way (as he thinks of the welfare of other human beings); instead, each may seek his happiness in the way that seems good to him, provided he does not infringe upon that freedom of others to strive for a like end which can coexist with the freedom of everyone in accordance with a possible universal law (i.e., does not infringe upon this right of another) (CS, AA 8:290).

This freedom is certainly juridical, but regarding its function in experience, it is also political. Because allowing others to take care of one’s own happiness according to their concepts is nothing other than depriving him or her of the possibility of self-enlightenment. A government that governs in this way is a paternalistic government,

in which the subjects, like minor children who cannot distinguish between what is truly useful or harmful to them, are constrained to behave only passively, so as to wait only upon the judgment of the head of state as to how they should be happy and, as for his also willing their happiness, only upon his kindness – is the greatest despotism thinkable (a constitution that abrogates all the freedom of the subjects, who in that case have no rights at all) (CS, AA 8:290–291).

In such a state of general guardianship, the possibility of continuous political reform would also be stifled. Precisely in this sense, Kant regards this freedom as “not even just juridical, but political freedom”.

Accordingly, Kant’s metaphysics of right is a liberal (although not necessarily a libertarian) theory, while republican elements are more likely found in his political philosophy. However, given the subordinate status of politics to right, these republican elements must naturally be limited by and serve the realization of the principles of right. Kant is therefore a liberal, not a republican. Nonetheless, he provides us with a very instructive programme to absorb republican elements within a liberal theory. The distinction between the metaphysics of right and political philosophy can offer a proper framework to understand this programme.

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Kant's *Naturrecht Feyerabend*, Achenwall and the Role of the State

Abstract: Kant's *Naturrecht Feyerabend* has recently gained more sustained attention for its role in clarifying Kant's published positions in political philosophy. However, too little attention has been given to the lecture's relation to Gottfried Achenwall, whose book was the textbook for the course. In this paper, I will examine how Kant rejected and transforms Achenwall's natural law system in the *Feyerabend Lectures*. Specifically, I will argue that Kant problematizes Achenwall's foundational notion of a divine juridical state which opens up a normative gap between objective law (prohibitions, prescriptions and permissions) and subjective rights (moral capacities). In the absence of a divine sovereign, formal natural law is unable to justify subjective natural rights in the state of nature. In the *Feyerabend Lectures*, Kant, in order to close this gap, replaces the divine will with the "will of society", making the state necessary for the possibility of rights.

Introduction

Kant's lectures on natural right, as recorded in the lecture notes known as *Naturrecht Feyerabend*, have recently been receiving more sustained attention.¹ Kant's lectures engage heavily with Gottfried Achenwall's (1719–1772) *Ius Natur-*

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¹ Some include Guyer (2000) on Kant's concept of freedom in the introduction of *Feyerabend*; Hirsch (2012) compares the legal philosophy in *Feyerabend* and *Mongrovius Lectures* to the *Metaphysics of Morals*; Zöllner (2015) on bindingness and obligation; Rauscher (2015) on state sovereignty and revolution and Kleingeld (2019) on the relation of the lectures to the *Groundwork* concept of freedom. See also two recent edited volumes on the lectures: Ruffing et al. (2020) and Hüning et al (2021). For some of the problems that led to the lectures being ignored until recently, see Hinske (2020).

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ae, which was assigned for the course, while also making original moves that would set the groundwork for his published *Metaphysics of Morals* years later.² However, most of the attention has focused on the *Feyerabend's* introduction, where Kant gives a sustained treatment of his foundational concept of freedom.³ Yet, with respect to Kant's relation to Achenwall's natural law, scholars have either left their relationship in the *Feyerabend* lectures undetermined or suggested that while Kant changes the foundational value (freedom) which he uses to justify rights, the justificatory relationship between natural laws and coercive rights is essentially the same as in Achenwall.⁴ This paper will challenge this latter picture by focusing on the role of the state in Kant and Achenwall. Specifically, I will argue that Kant's rejection and reformulation of Achenwall's foundations of natural law problematizes rights in the state of nature. Once we understand this, it is clear that Kant's rejection of Achenwall includes the necessity for an alternative justificatory strategy for rights.

For Achenwall, there are two aspects of *ius*, objective law and subjective right. Objective laws (propositions containing obligations) and subjective rights (permissible actions that can be coercively enforced) are both given a firm foundation in the will of God. God is not only the normative foundation but also the sovereign enforcer of rights, attaching divine punishments and rewards to obligations to respect each other's rights. Thus, concrete subjective rights are immediately justifiable in light of objective laws grounded in God's will. Kant, I will argue, rejected Achenwall's normative foundations and therefore opened a normative gap between objective law and subjective rights in the state of nature that was foreign to Achenwall. By 'normative gap' I mean that it is no longer possible to immediately justify subjective rights in light of objective laws. What is missing is an authoritative will that can determine genuinely universal and reciprocally enforceable external laws and rights. This, Kant suggests, is only possible in the

² See Byrd and Hruschka (2010, 15–19) and Guyer (2020) for Kant's use of Achenwall's textbook.

³ For instance, Willaschek (2018); Bordoni (2020); Grapotte (2020).

⁴ See Caranti (2020) and Guyer (2016, 427–429); Guyer (2012, 113–114) where Guyer seems to argue that both Kant and Achenwall follow the same justificatory path to rights from different foundational norms, for Achenwall self-perfection/happiness, for Kant, the foundational value of freedom. This is connected with, what Guyer has called, his "normative essentialism" (Guyer 2016, 428). For non-essentialist readings of the *Feyerabend* introduction, see Willaschek (2018) and Bacin (2020). However, Willaschek and Bacin do not look beyond the introduction. Bacin comes the closest in the existing literature to the goal in this paper by contrasting Achenwall's "voluntarism" about rights (see my issues with this term in note 10 below) and Kant's "end-in-itself" (Bacin 2020). However, Bacin misses what I take to be the persistent difficulty for Kant, namely the absence of an authoritative external will.

civil condition where an authoritative will can put all others under obligations. Thus, the state becomes a necessary component for grounding rights. Therefore, Kant's insistence that we have an obligation to enter into a civil condition can be traced back to his rejection of Achenwall in the *Naturrecht Feyerabend*.

In the first section, I will introduce Achenwall's foundations for natural law and natural rights. I will focus on how he justifies the immediate relationship between laws, obligations and rights and how this effects the role of the civil state in his system. Then, in part two, I will lay out the commitments in Kant's critical system that reject foundational elements of traditional natural law in general and Achenwall's natural law in particular. In the third part I will explain how the rejection of fundamental aspects of Achenwall's natural law problematizes rights in the state of nature in new ways and how, in order to close the normative gap between objective law and subjective right, Kant makes the state a necessary condition for the possibility of rights generally.

1 Achenwall's *Ius Naturae*

Achenwall began his studies in Jena and studied briefly at Halle before earning his master's degree at the philosophical faculty at Leipzig.⁵ Achenwall went on to teach at the University of Göttingen from 1748 to his death. Achenwall published the popular textbook *Ius Naturae*, in 1750. The fifth edition of the work, published in 1763, is the edition that Kant owned and used for his course.⁶

1.1 Achenwall and the Foundations of Natural Law

The aim of Achenwall's text is to give a comprehensive and systematic introduction to natural law. Achenwall defines natural law in the opening sentence of his text as "the knowledge of perfect natural laws, or the knowledge of external natural rights and obligations" (Achenwall 2020a, 7). In other words, for Achenwall, natural law is the general body of knowledge that concerns a set of laws, rights and obligations. Achenwall defines "law" as "a proposition stating an obligation" (Achenwall 2020a, 8) and an obligation is "the necessity that arises from a distinct representation (motive) of a true good, to determine a free action,

⁵ Significantly, Achenwall studied law at Halle from 1740 to 1742 which overlaps with the return of Christian Wolff to Halle in December 1740. Achenwall was no doubt influenced by the great natural law theorist, but also the Wolffian department at Leipzig.

⁶ See Guyer (2020, xvi – xvii) and Streidl (2003, 30 – 33) for more detail.

i. e., it is the moral necessity that springs from some rational goal” (Achenwall 2020a, 8). The moral ability one has, given one’s moral and physical restraints and obligations, is called a moral right (Achenwall 2020a, 11).⁷

Natural laws, obligations and rights are, for Achenwall, types of moral law.⁸ Moral laws and obligations in general are “norms for free actions which God obligates us to observe” (Achenwall 2020a, 11). Moral laws are natural insofar as they can be known from philosophical principles, i. e. without specific divine revelation. However, as Achenwall makes clear, natural laws, though indeed without the need for divine revelation, are still grounded on the *existence* of a God with specific attributes and a “sufficient knowledge” of his will, understood as “God’s aims that are manifest through creation” (Achenwall 2020a, 12). Therefore, Achenwall’s general principle of natural law comes out looking very dependent on knowledge of the actual will of God:

act in accordance with the will of God as much as you can in all actions in which you are able to *know that will by reason alone*; Live, therefore, in accordance with God’s perfections and aims; illustrate God’s glory, seek the best of mankind, the best for yourself, and your own and other’s happiness; don’t do what goes against the preservation of another man; perfect yourself and preserve yourself” (Achenwall 2020a, 12).

This serves as the general principle through which we deduce all other natural laws and obligations (Achenwall 2020a, 12). Achenwall’s natural laws do not rely on divine revelation, yet, the normative basis for natural laws is located in comprehension of divine will in nature(s) and the divine origins of human reason. Thus, though Achenwall suggests that the discovery of natural laws is an act of reason alone, he clearly thinks that the normative force of natural laws lies in their origins as commands of a partly knowable deity.⁹ This has three important and related implications.

⁷ Achenwall uses the word *ius* for both the objective law and the subjective right. This is an interesting departure from Wolff who used the word *lex* for the objective natural laws and *ius* for the subjective capacities of right. Achenwall does distinguish between the two components, objective and subjective, but the terminological choice might reflect the immediacy that Achenwall sees between objective natural laws, natural obligations and natural subjective rights. For an argument about how Kant collapses brings both of these under *a priori* knowledge in the *Rechtslehre*, see Tomassini (2018b).

⁸ Joachim Hruschka has pointed out that Achenwall’s relation of concepts forms a deontological hexagon, see Hruschka (1986).

⁹ Bacin calls this Achenwall’s “voluntarism” since Achenwall’s moral theory is dependent on God’s commands (Bacin 2020). I have chosen not to adopt this terminology given that it seems Achenwall never commits himself to a voluntarist conception in the sense of the medieval voluntarist/intellectualist debate. A commitment to the necessity of knowledge of God’s will for

First, Achenwall is able to justify subjective rights directly from natural laws. Natural laws (objective) are propositional statements to direct our actions in accordance with God's will. These laws define natural obligations that we have, i.e. to pursue my own perfection. These obligations then ground my natural rights. My (subjective) rights are immediately justified because my natural obligations to pursue certain ends *contain* the permission to seek out the means necessary to pursue these ends. I have a perfect right (the ability to coerce another by force of external law) if my right corresponds to a natural obligation, i.e. the right to pursue my perfection. So, if one has a natural obligation to pursue some rational end, then one also has the natural right to prevent interference in the pursuit of that rational end (Achenwall 2020a, 14). This is true not only of obligations but also of permissions. Natural law grounds permissions, i.e. the permission to acquire things, which in turn ground rights, i.e. the right to enforce my ownership. These rights are directly and concretely established without the need for further elaboration other than their deduction from natural laws grounded in God's will.

Second, Achenwall sees natural laws as not only general moral laws but also *juridical laws* (Achenwall 2020a, 16). Juridical laws, according to Achenwall, are "made by a superior and obligate the subjects with the threat of punishment". Since, "all men are God's *subjects*, hence God is the *superior* of all mankind" (Achenwall 2020a, 16) and "strict natural law [...] is imputed by God as the legislator, by punishing" (Achenwall 2020a, 15), perfect natural laws are also juridical laws. In other words, natural laws are juridical because they are legislated *by God to subjects* in the context of a community subjected to the authority of God. Thus, the difference between natural and positive law is only the difference in legislator (source of obligation) (Achenwall 2020a, 16). For Achenwall, objective laws immediately ground coercive subjective rights non-problematically because even in the state of nature there exists an authoritative and legitimate legislator that can enforce my rights. Human juridical states can add to the obligations I have by legislating positive law, but are ultimately only contingently relevant for the validity of subjective coercive rights.

Third, Achenwall, because of the immediate justificatory relationship between objective natural laws and natural subjective rights, is able to ground private property rights in the exercise of a unilateral will. Achenwall distinguishes between absolute and conditional natural law, where absolute natural laws are

knowledge of natural laws, or even the authority of natural laws, is wholly compatible with an intellectualist position. Achenwall surely thought that the divine will was the *source* of moral obligations (Achenwall 2020b, 40–41; Achenwall 2020a, 11) but I take voluntarism to be a claim that *X* is obligatory *only in virtue of* God's command. The latter is a more complicated claim that Achenwall does not straightforwardly defend. See also Streidl (2003, 204 ff.).

those that precede a rightful act and conditional natural laws are those that follow a rightful act (Achenwall 2020a, 39). This is the distinction between innate and acquired right, which Achenwall gets from Thomasio and that Kant adopts. For Achenwall, acquired right is grounded directly on my innate or absolute right to acquire things. Achenwall denies the claim of Grotius and Pufendorf that there needs to be an original community holding things in common in order to validate my right to acquire things. Achenwall says, “for an ownerless thing to become my own legitimately, the added will of other men is not required” (Achenwall 2020a, 41). This is because one’s permissive natural right to acquire external objects would *not be a right* because the right would be conditional on the consent of others (Achenwall 2020a, 41).¹⁰ Rather, my right to acquire things, as a subjective capacity, is grounded directly in the objective law. My innate right to occupy things is the title by which my act of occupancy is rightful. In order to acquire ownerless things, all I need is to occupy them (Achenwall 2020a, 42–43). Achenwall defines occupancy as consisting in an act “by which someone brings a thing into his power to the exclusion of other” and the intention “to make it one’s own”. The former, bringing something under one’s physical powers, is called natural possession and the latter, the added declaration or intention to make the possession one’s own, is juridical possession. Thus, the rightful occupant only needs to take physical possession of a thing along with some declaration (though for Achenwall the seizure and the declaration are, at least sometimes, the same thing (Achenwall 2020a, 44)).

Furthermore, the possession of a thing through occupation creates both a right on the part of the occupant to the specific object, and an obligation on the part of others to respect not only your occupancy (Achenwall 2020a, 44–45) but also the judgement of the occupant about the rightfulness of his possession “by force of his natural liberty” (Achenwall 2020a, 42–43).¹¹ Achenwall is able to claim 1) that exercising my innate right to possession create obligations in others and 2) that we have to respect the judgement of the occupant only because Achenwall finds the foundations of natural right in natural laws legislated and enforced by a divine will. If my innate rights are juridical rights in the sense explained above, then any use of that right is also protectable and obligations created by its use enforceable. Achenwall grounds the legitimacy of rights to specific things (conditional rights to things) in the origins of our absolute, innate rights in a divine juridical community.

¹⁰ See Tierney (2014, 145 ff) for the place of Achenwall in the development of a permissive natural laws.

¹¹ See also Streidl (2003, 238–243).

To summarize the points I have made thus far, Achenwall takes the principle of right as agreement with the will of God which grounds natural obligations toward rational ends (preservation/perfection) and justifies natural rights as capacities to pursue those ends. As a consequence, Achenwall is able to directly justify rights under objective natural laws because the divine origin of natural laws gives us a legitimate and authoritative legislator.

1.2 Achenwall and the Role of the State

Achenwall begins part two of *Ius Naturae* by stating that while the first part focused on the *natural* state of individual men, the second part will look to those natural rights and obligations derived from the *social* state of man, that is, man as he is in society with others. Achenwall defines “society” as “the union of several people to pursue a common, non-transient goal, i. e., it consists in that enduring state of several people by which they strive to obtain the same goal with joint or united resources (forces, powers)” (Achenwall 2020a, 111).

Thus, in every society we can think of the following:

1) the common goal, and thus for the union of will and the common good, for the obtaining of which all the associates join their resources so that it will flow to all once it has been obtained; 2) the union of resources, as the means to the society’s end, and hence the cooperation of all associates to give each other mutual help (assistance), I §. 273, in all those things without which the goal of the society cannot be achieved; 3) many social affairs, i. e., affairs serving the society’s goal, which the associates have to conduct. (Achenwall 2020a, 111–112).

The basic elements of a society are the association to the pursuit of a *common goal*, the union of resources as means for achievement of that *common goal*, and certain common affairs (such as cultural gatherings, military ventures, etc.), again serving the society’s *common goal*. Given the emphasis he puts on the common goal, it is not surprising that Achenwall suggests that societies mainly differ with regards to the common goal they pursue. A society’s welfare “consists in its unimpeded progress towards its social goal” (Achenwall 2020a, 112). The society’s welfare is, Achenwall suggests, the supreme law of society (Achenwall 2020a, 113).

Universal social law is “natural law applied to societies, it teaches the natural rights and obligations that may be conceived once a particular society has been established.” (Achenwall 2020a, 112). The social rights and obligations we have are the obligations and rights to perform those actions that pertain to the common good, the social goal, that our society has adopted (cf. Achenwall

2020a, 112–113). Achenwall attaches all our social rights and obligations to furthering the social welfare of a society, which consists in its ability to pursue its social goal.

Achenwall distinguishes between two different types of society: equal and unequal. An unequal society is defined by the role of overlordship (cf. Achenwall 2020a, 116). This means that one of the associates has the right to subject the others to laws, to coerce the others by his will alone and that others (the subjects of the overlord) are obligated to obey the will of the overlord. The equal society, then, is simply the absence of overlordship. Achenwall then defines different types of societies which go from most simple to most complex. The basic societies are marital, parental and master societies. These three basic societies combine to create the composite society of a family (cf. Achenwall 2020a, 133). The goal of a family is then to further the goals of the marital, parental and master societies and so the welfare of all the societies that make it up. Families are necessarily unequal societies with an overlord whose will rules over the family (cf. Achenwall 2020a, 134).

Finally, we reach the state, which Achenwall defines as “an unequal society of several families for the pursuit of external happiness” (Achenwall 2020a, 135). Therefore, the structure of Achenwall’s state has an overlord, whose will is authoritative and subjects, which are family-societies obligated to obey the overlord of the state (cf. Achenwall 2020a, 137–138). Here I will argue for two points about Achenwall’s state, (1) that the state’s role is a contingent one, emerging from empirical factors about the maintenance of our right to external happiness and (2) that the validity of the state is ultimately grounded on the immediate relationship between objective laws and subjective rights explained above.

First, as pointed out in his definition, the state emerges because “the goal or primary and supreme purpose of all men is happiness; and in particular, whenever of course one is not thinking of beatitude and life after death, external happiness (prosperity)” (Achenwall 2020a, 135). Thus, when we are not concerned with internal happiness (beatitude) we are “busy preserving external goods [...] and increasing them with ever more goods” (Achenwall 2020a, 135). Thus, the means to pursue external happiness are security, for existing goods, and sustenance, to increase their external goods. The pursuit of these means led men into pre-state societies. When these societies became insufficient for the maintenance of security and sustenance, men “started to strive for external happiness directly by joining forces” (Achenwall 2020a, 135). Achenwall continues that the state has been proven, through experience, to be the most perfect way to maintain the necessary means to achieve external happiness: security and sustenance. Therefore, entrance into the state is due to circumstances that make the state, through our own experience, the best configuration for security and

sustenance. In fact, Achenwall leaves open whether there will be some other configuration that might better serve the purposes of men, or whether the family or some other less complex society would have to first fail to maintain security and sustenance for us to move to the state. The entrance into the state, for Achenwall, is the outcome of contingent factors that lead to the state being the most expedient and efficient option for our continued pursuit of external happiness.

Second, the universal laws of the state, like the universal laws of societies before it, are “nothing else than natural law applied to the state” (Achenwall 2020a, 135). The rights and obligations in the state are derived directly from the natural laws established prior to the state. Thus, the state simply “passes on the laws that the civil subjects and the civil overlord by nature must observe with respect to one another” (Achenwall 2020a, 137). However, Achenwall is clear that the authority of the overlord and the power of the state refer back not to God, but to the “civil pact of subjugation” which is the agreement that individuals entered into to transfer their natural liberty to the civil overlord for security and sustenance (Achenwall 2020a, 140). What Achenwall calls “natural liberty” is the freedom from overlordship by nature (Achenwall 2020a, 132–133). Civil overlordship is by nature with the people who then transfer their natural liberty to the overlord through a pact (cf. Achenwall 2020a, 140–141). The civil overlord has *valid* authority only if he can trace his authority back to a *valid* civil pact of subjugation. Thus, the right of the overlord to obligate his subjects to things that concern the social welfare of the state, and the subject’s obligation to submit to the authority of the overlord, are derived directly from the civil pact (cf. Achenwall 2020a, 142). While Achenwall does, indeed, separate the authority and power of the overlord from natural laws and attribute it to a historical pact, it is still the case that the civil pact is valid only in relation to natural law and that the agreements of the pact are merely natural law applied to a particular social reality. The immediacy between objective law and subjective right, grounded in God’s will still forms the foundations and defines the legitimacy of the state. This is because for an individual to transfer his right to pursue his external happiness to the overlord he must already possess a right to alienate. Remember that, for Achenwall, the transfer in the civil pact is a historical event where the subjects transfer their rights to the overlord. Therefore, for Achenwall, the state does nothing to validate rights but only transfers rights from subjects to overlord. As we have seen, the right of the overlord comes from the civil pact. However, the right of the overlord is only valid because the peoples right was already valid before the pact was made; the civil pact is only a shifting around of rights. The civil pact relies on previously valid natural rights grounded in the divine will.

In this section, I have outlined Achenwall's foundations for natural law and the role of the state in Achenwall's system. In the next section, I will show why and how Kant rejects the foundations of natural law asserted by Achenwall. Here we will take a step back in order to see that Kant's systematic commitments are at odds with Achenwall.

2 Kant's Problems with (Achenwall's) Natural Law

The discussion here will give us an idea of some of the reasons that Kant could not go along with key notions of Achenwall's natural law theory. In the next section, I will outline how the departure from key tenets in natural law created new problems for Kant's system of right.

2.1 Laws of Nature vs. Laws of Freedom

The first remark to be made is that Kant makes a distinction between laws of nature and laws of freedom. In the natural law tradition, by contrast, obligating laws are called laws of nature. Laws of nature can obligate us *because* of our rational nature. For Achenwall, as well, we are obligated by laws of nature because we are rational beings, and it is in virtue of our rationality and freedom that we can recognize the binding force of the law and act in accordance with them.

Kant had already committed himself to the distinction between laws of freedom and laws of nature in the critical investigation carried out in the *Critique of Pure Reason* four years prior to the *Feyerabend*. There, Kant claims that we can think of causality only in two ways: according to nature or according to freedom (*CPR*, A 532/B 560). From the point of view of transcendental idealism, the dialectic which opposes transcendental freedom to the necessity of nature disappears, and both propositions become possible. Kant's aim is not to prove the reality of freedom in the theoretical sense (*CPR*, A 557/B 585) but to show that freedom must have its *own* causality that is not in conflict with nature.¹²

¹² The contrast between nature and freedom is, of course, not this simple in the *Critique of Pure Reason*. Kant makes a distinction within the notion of nature between material nature (objects in the phenomenal world) and formal nature (the real/logical essence of something). In this latter sense, Kant could call laws of freedom natural laws, but the point here is to follow Kant's terminology in the *Feyerabend* where he attempts to distinguish himself from natural law theorists.

In the *Feyerabend Lectures* Kant points out the distinction between the laws of nature and laws of freedom and suggests that the natural law tradition has confused them:

Laws are either laws of nature or laws of freedom. If freedom is to be under laws it must give the laws to itself. If freedom took laws from nature then it would not be freedom [...] It must itself be a law. Comprehending this appears to be difficult and on this point all the theorists of natural law have erred. (*V-NR/Feyerabend*, AA 27:1322).

Kant observes that natural law authors have missed the connection between law and free will. The idea of a free human will governed by the laws of nature would be contradictory, because a will subjected entirely to natural causality would not be free. Therefore, freedom and nature must make up two distinct causalities which follow distinct laws. Kant is unable to accept natural laws as obligating moral laws because they are deficient with respect to the two criteria of laws-in-general: legislation by a proper authority and categorical necessity.¹³

First, laws need to be legislated by some legitimate authority. As noted above, the modern natural law tradition has been distinguished from its medieval counterparts by its attempt to have natural laws independent of revelation. However, many natural lawyers, including Achenwall, still relied on God as the legitimate authority who authoritatively legislates the law. For Achenwall, as for the wider natural law tradition, there was a distinction between active obligation (to obligate) and the passive obligation (to be obligated). This seems to imply that there is one person who is obligated and *another* person or will that obligates. Achenwall, and other natural lawyers, fill the active role with the divine will.¹⁴ Kant accepts the traditional distinction between passive and active obligation but denies that the notion of God is needed. Kant reformulates the distinction along the lines of the critical philosophy by appealing to the difference between the human being considered as a being subject to laws of nature (*homo phaenomenon*) and the human being considered as a moral being (*homo noumenon*).¹⁵ Kant argues that if we want to identify the source of law with a moral person, this person cannot be God, because if the obligator is to be per-

¹³ This criterion is from Watkins (2019, 11–29). Tomassini (2018a) also argues in a similar way from Watkins criterion.

¹⁴ See Kant's discussion in *V-MS/Vigil* (AA 27:510). Kant at least assumes that Baumgarten and Crusius also give the divine will the role of active obligation, though in the case of Baumgarten, in a more indirect way.

¹⁵ See Tomassini (2018a) where she makes a similar argument for Kant's reformulation of natural law.

sonified as an ideal being, this must be the human being himself by virtue of his lawgiving reason. If law were grounded in God's will, the law would lose its legislative authority.

The second criterion of law is its necessity. For natural law theorists like Achenwall, laws of nature are rational norms that express the necessity to act according to our rational ends, given by our rational nature. Laws necessitate us, therefore, through our rational natures. Kant however, makes an important distinction between divine and human wills:

The human will is not the kind in which the subjective rules of volition correspond with the objective [...] A human being can choose good and evil, thus in human beings the good will is a contingent will. As for God his good will is not contingent. [...] Necessitation of an action that is in itself contingent through objective grounds is practical necessitation, which is different from practical necessity (*V-NR/Feyerabend*, AA 27:1322–1323).

The laws of freedom are objectively necessary for a purely rational being, such as a divine or holy will, because the will coincides spontaneously with reason. Human beings are not purely rational beings, having both a rational and sensible nature. The *law* is objectively necessary but whether human beings *act* in accordance with it is subjectively contingent; we can act, and judge, otherwise through the influence of inclinations. Therefore, we perceive the law as a form of constraint (*necessitation*, *Nöthigung*). The constraint the law imposes on us is an obligation. Kant suggested that obligations according to natural lawyers are merely hypothetical imperatives. This means that the necessity of law is conditioned on the previous adoption of some end. Kant agrees that human beings have an end by nature: happiness (*G*, AA 4:416). Yet, prescriptions to strive for our natural end are only precepts of prudence. Precepts of prudence are elaborated on empirical knowledge concerning the best means to achieve our happiness. Therefore, such imperatives cannot command objectively but can only counsel certain means (*G*, AA 4:418). In the *Mrongovius Lectures*, given just before Kant's recorded lectures on Achenwall, Kant gives a sustained objection against Wolff and Baumgarten for making the mistake of taking precepts of prudence, hypothetical imperatives, as moral laws (*V-MO/Mron*, AA 27:626). These sorts of laws contain the wrong kind of necessity. In order to be considered commands, laws need an unconditional and universal character. This can only be achieved by categorical imperatives that express the necessity of an action by itself, without referring to any desired end (*G*, AA 4:414). Only these precepts have the objective and unconditional necessity, and hence universal validity, needed to be a command (*G*, AA 4:416).

Thus, Kant rejects the natural law assumptions about the source of law and type of necessitation. First, he rejects the natural law account of the source of

law as being legislated by a divine will. He replaces this with the idea of a will that gives laws to itself. Second, he rejects as insufficient the connection between rational natures and necessity and suggests that the moral law must necessitate subjectively contingent wills through categorical imperatives.

2.2 Against Achenwall's Eudemonism

Kant rejection of natural law assumptions is followed by his rejection of a natural obligation to happiness as a proper foundation for rights. In the *Feyerabend Lectures*, Kant rejects Achenwall's instrumentalization of rights for the achievement of happiness. For Achenwall, rights are means through which to achieve our natural ends of perfection, preservation and happiness.¹⁶ Kant's view of the state rejects this instrumentalism: "What is the end of a *republique*? Some say happiness, but that is as false as it is to say that God created human beings for their happiness" (*V-NR/Feyerabend*, AA 27:1382). Kant cannot maintain the role of the state as having an end in happiness. As his rejection of God's involvement in the validity of the law suggest, the foundations of rights cannot be the divine law oriented toward our happiness.

Neither happiness nor a command of duty but freedom is the cause of Right. The author [sc. Achenwall] has grounded it in his *Prolegomena* by saying that it is a divine law and that we would be made happy through it but that is not here [in my system] at all (*V-NR/Feyerabend*, AA 27:1329).

Kant insists that the foundation of right must be freedom (*V-NR/Feyerabend*, AA 27:1324). Freedom must give itself laws and thus the state and right cannot be foundationally dependent on external divine commands or precepts of prudence. Kant goes on to criticize Achenwall's connection of self-preservation and perfection with right. Recall that for Achenwall, rights are capacities that we have in light of natural obligations to seek our natural ends. So Kant rejects Achenwall according to the distinction he makes to explain the necessary nature of law rehearsed above. Kant says,

The author says that I am bound by my nature to preserve my life; this would be the principle of Right. But that does not belong to Right at all for in Right I can do with my life whatever I will [...] Each is obligated as far as he is able to refrain from anything that interferes with the self-preservation of others, *scil. Moraliter* (namely morally), says the au-

16 For more on Achenwall's eudemonism, see Hruschka (1987, 161–163).

thor. This is indeterminate from the start for I do not know how far it goes. If someone is indebted to me but has nothing at all I cannot take what is owed me – that is certainly not a juridical proposition [...] I am required only to resist his freedom [...] In right I must direct everything in accordance with laws of freedom, otherwise everything would be chaotic (*V-NR/Feyerabend*, AA 27:1334).

Right is not based on a natural obligation of pursuing our self-preservation. For Achenwall, rights are based squarely on the natural obligations. Achenwall claims this also creates obligations in others to not interfere with the pursuit of this end. However, as Kant points out, such a natural obligation cannot be the justificatory foundation for rights. This is for three reasons:

First, rights consist in negative omissions, rather than positive commissions. The “supreme law *neminem laede* is of course negative” (*V-NR/Feyerabend*, AA 27:1334). Right cannot be grounded on a principle of positive obligation because right is only the limitation of particular freedom so that universal freedom can exist (*V-NR/Feyerabend*, AA 27:1334). In other words, right must refer to *limitation* on external actions. Despite Achenwall’s insistence that natural obligations are all negative (cf. Achenwall 2020a, I §82), that we are all obligated by nature to preserve ourselves is a positive commission toward a substantial end. Kant insists that rights are *only* limitations defined by the free action of another.

This leads to the second reason that natural obligations do not belong to right: rights are relational. This is best summed up in the pithy remark, “how does his self-preservation concern me?” (*V-NR/Feyerabend*, AA 27:1334). Kant claims that the obligation to self-preservation just concerns the actions of the individual person, who has an individual obligation to seek his own self-preservation. Rights, according to Kant, have to do with the compatibility of a multiplicity of particular expressions of freedom with universal freedom. Therefore, rights are relational at least insofar as they concern the compatibility of the freedom of individuals with each other and universal law. Achenwall’s notion of rights grounded on natural obligations would require that I respect everyone’s individual right to his own self-preservation. However, Kant says that all I must do is “resist his freedom” (*V-NR/Feyerabend*, AA 27:1334) because rights deal with the *interaction* of individually pursued ends. Therefore, a natural obligation to a specific end cannot ground rights.

Third, natural obligations cannot ground rights because there is no shared criterion about what it is that belongs to self-preservation: everyone can interpret it in his own way (*V-NR/Feyerabend*, AA 27:1334). This is because of the contingent nature of the criterion of self-preservation. What counts as self-preservation, and what this looks like for each person, is a merely subjective criterion that underdetermines what my rights are in cases of conflict. However, this is not simply

a problem with the criterion of self-preservation. Natural obligations to ends are merely hypothetical imperatives and therefore cannot rise to the level of objectivity and necessity needed for laws. Moreover, Kant must recognize the distinction he draws between necessity in God and necessitation in *mixed* rational beings. As noted above, rational beings with a rational and sensible nature experience the moral law as a constraint in contrast to God who intuitively acts according to the law.

This suggests two things. First, that we can, because of our sensible nature, make false judgements about what we ought to do. We are not holy wills and therefore must make fallible judgements about what the moral law entails. Second, that in order to secure external compliance to the demands of right, the imperative itself is insufficient. This is in contrast to Achenwall who insists that our natural obligations are grounded in insight into the divine will and enforced through divine authority. Therefore, Kant suggests that natural obligations in general, and not just the particular ambiguity of self-preservation, insufficiently determine the realm of external action.

In the next section I will argue that these moves away from natural law theory creates problems for Kant that Achenwall did not have. Then I will offer an analyses of Kant's peculiar reformulation of the concept of right in the wake of his rejection of Achenwall's foundations.

3 Problems and Solutions in the *Feyerabend Lectures*

Even though the *Feyerabend Lectures* closely follows Achenwall's treatise, Kant also gives a positive account of his own system of right. Here I will focus on the point where Kant offers his own foundational principle of right after his rejection of Achenwall's principles. I will argue that Kant's move to make the state necessary is in response to the problems that arise after rejecting Achenwall's natural law. However, we first need to clearly define what these new problems are.

3.1 New Problems for Kant

Whenever one rejects the systematic foundations of one system, it always re-opens problems that the system was meant to address. Kant's rejection of Achenwall's foundations in *Ius Naturae* is no different. Let us first identify some key benefits of Achenwall's system.

First, as mentioned above, Achenwall is able to ground natural rights on natural obligations we have. We have natural laws based on God's will and validated by God's authority. This gives us natural obligations to pursue rational ends. These obligations directly ground concrete and enforceable rights to pursue these obligatory ends. Second, natural rights are also juridical rights, meaning they are enforceable and coercible by a legitimate authority: God. As I argued above, this is true of conditional natural rights or acquired rights. In order to have acquired rights we need juridical rights that are punishable. Because Achenwall suggests that natural rights are juridical rights under God, rights are never non-enforceable. Third, natural rights are determinable. Achenwall connects natural rights directly to natural obligations/laws. My natural rights are deducible directly from the God-given insights into my natural obligations, themselves grounded in the objectively valid will of God. Furthermore, since everyone is naturally obligated to the same end by nature, everyone, in virtue of their knowledge of natural law, can recognize a valid claim to a right, since rights are valid insofar as they are grounded in a natural obligation.

As we have seen, Kant rejects all three of these and so creates three corresponding problems: the normative problem of obligating others through a unilateral will, the problem of effective coercion (punishment) and indeterminacy.¹⁷ The state of nature for Kant is the pre-judicial state, which, as Kant would say later, is a state "devoid of justice (*status iustitia vacuus*)" (*DR*, AA 6:312). For Achenwall, the state of nature was a place where the objective moral law directly determined our subjective natural rights, and so we could have genuine pre-judicial rights. However, this is not so for Kant.

The first problem is the normative problem of obligating others through an act of individual choice. Rights necessarily include obligating others to respect my rights. Kant's principle of right is, "if an action can coexist together with the freedom of all in accordance with a universal law this action is allowed and we have authorization [to coerce]" (*V-NR/Feyerabend*, AA 27:1332). Here we are provided with the objective principle for determining rights, which specifies that an action must be brought into agreement with the freedom of *all others under a universal law*. However, Kant says that "I do wrong to others if I will to make my will into their law" (*V-NR/Feyerabend*, AA 27:1338). The subjective judgement about my right cannot obligate others, who may have judged otherwise (*V-NR/Feyerabend*, AA 27:1337). In other words, any specific claim to rights is insufficient to establish a right since the subjective will lacks the authority to

¹⁷ These follow the three problems with the state of nature that Ripstein identifies (cf. Ripstein 2009, chpt. 3).

make general laws that obligate all others. Since no authoritative will exists in the state of nature, the state of nature *lacks* an authoritative will which could obligate all others. This points directly to the developing gap between objective laws (principles of right) and subjective rights (claims to rights). Since there is no authoritative will in the state of nature there is no way to move directly from objective laws to subjective rights. All we have is the subjective judgements of individual agents, which lack the ability to determine the validity of rights under objective principles.

The second problem is the problem of punishable wrongs. For Achenwall, wrongs against the natural rights of others is immediately punishable by God. Therefore, Achenwall's system can accommodate the punishment of rights in the state of nature. Kant is blocked from this solution because of his rejection of the role of God in validating rights. Rather, because there is no legitimate authority in the state of nature, and individual claims to right are subjective judgements, righting wrongs by punishment in the state of nature is impossible.

The third problem is the indeterminacy of our rights. This problem turns on the possibility of disagreement in the state of nature. For Kant, unlike Achenwall, there is no direct correspondence from objective principles of right to specific and concrete coercive rights. The principles of right do not and cannot determine these rights. Of course, there is a limited sense in which Achenwall's natural law also leaves things *underdetermined* (e. g. which side of the road we ought to drive on), but Kant faces a more severe form of *indeterminacy*, where there are no determinate rights *at all*. Objective principles of right, are insufficient for determining judgements, "For I judge what is right, others could judge otherwise, and they do not act in accordance with my judgement" (*V-NR/Feyerabend*, AA 27:1337). Kant gives the example of a hunter who shoots a wild animal which runs onto another's land. The hunter can claim the animal as his, but the land owner can also claim the animal. These disputes can arise because the state of nature, with subjective claims to right, is unable to determine specific rights.

All three of these problems show that the issue in the state of nature is the lack of a legitimately authoritative will which can legislate external laws that are binding on all. Without the divine will as the authoritative sovereign, the state of nature becomes "not a state of unease but a state of injustice" (*V-NR/Feyerabend*, AA 27:1383). That is, a state where claims of justice and injustice lack legitimacy in the absence of an authoritative will.

In this section, we saw that Kant's rejection of key foundational claims in Achenwall's *Ius Naturae* creates problems for Kant that were foreign to Achenwall. Specifically, Kant problematizes rights in the state of nature, separating objective law and subjective right through his critique of Achenwall's invocation of

God to validate rights and the grounding of rights in rational ends. Next, I will show how Kant, in the *Naturrecht Feyerabend* shifts the role of the state in order to accommodate the normative gap in the state of nature.

3.2 The Role of the State in the *Naturrecht Feyerabend*

In addressing public right, Kant argues that the state of nature should not be contrasted with “the state of *socialis* but *civilis*” (*V-NR/Feyerabend*, AA 27:1382). Kant rejects Achenwall’s emphasis on organic, pre-state society, such as the domestic family. Achenwall suggested that the state of nature is properly contrasted to society, in which individuals enter into interdependent groups, such as the domestic family, who then proceed into a state. However, Kant suggests that the state of nature must be contrasted directly with the rightful condition. This is because the state of nature is not a condition of unease but injustice (*V-NR/Feyerabend*, AA 27:1383).

For Kant, the end of the state is not happiness or even self-preservation but public justice: “Not individual happiness but the state of public justice is its main point” (*V-NR/Feyerabend*, AA 27:1382). Unlike Achenwall, who sees the state as a means toward the natural end in happiness (perfection and self-preservation being included in this), for Kant the state is interested only in public justice. The state of nature is “a condition of childhood, *status justitiae privatae*” (*V-NR/Feyerabend*, AA 27:1381). As we have seen, the state of nature is caught in a condition where there are merely subjective claims to right. Therefore, the contrast between the state of nature and the civil condition is between private justice (subjective judgements of right) and public justice (rights determined through an authoritative will).

This is because “in order for a judgement or right to be valid for another we need...an explicit condition in which what is right for everyone is determined externally” (*V-NR/Feyerabend*, AA 27:1381). Rights and juridical judgements cannot be valid in pre-state society because, for Kant, there is no objective criterion in the state of nature which can immediately justify subjective rights: “each can have a different opinion about right” (*V-NR/Feyerabend*, AA 27:1381–1382). Thus, in the state of nature “*what right is* cannot be determined so that it is universally valid” (*V-NR/Feyerabend*, AA 27:1390). This is what Kant means, earlier in the lectures, by the suggestion that natural laws are alone insufficient for execution (*V-NR/Feyerabend*, AA 27:1338). In the state of nature, we have objective laws (principles of right) and subjective rights (individual claims to rights) but no clear way to validate subjective rights under objective law. There is a gap between the requirements of the objective laws and the claims of subjective rights.

Kant's shift in the foundations for natural law creates a normative gap between objective laws and subjective rights and problematizes the state of nature. Kant's rejection of God's will as the foundation for natural rights makes the state of nature a condition of merely subjective judgements enforced only by individual, arbitrary use of power. What is needed, then, is a will which can make an objectively valid judgment which justifies subjective rights under objective law. This will must be both legitimate in its form and authoritative in its scope.

In order for a will to give *external* laws, that is, laws that govern our actions toward others, it must be a will that is *authoritative* for all persons. This is what Kant will later call the difference between unilateral and omnilateral legislation (*MM*, AA 6:435). In order to establish authoritative external laws, there must be a will that can legislate omnilaterally, from a universal perspective, and not just unilaterally, from an individual or limited perspective. In the state of nature, unilateral judgement, as we have seen, is merely *subjective* judgement. Unilateral judgement lacks the authoritative scope to obligate others. When I judge unilaterally, I judge from a subjective perspective. Omnilateral judgements, in contrast, are those judgements that judge from a universal perspective and so have the authoritative scope to obligate others. An authoritative will is one that legislates for *all* and so legislates omnilaterally.

Kant defines a *legitimate* authority as “the authority of those whose will is at the same time a law” (*V-NR/Feyerabend*, AA 27:1337). Kant here connects the legitimate will with the autonomous will. As argued earlier, Kant insists that freedom can be subject only to its own laws (*V-NR/Feyerabend*, AA 27:1334–1335). Freedom can only respect the authority of, and so be subjected to, laws of its own. Therefore, legitimately authoritative external laws must be the product of a will that can legislate laws for itself. This is what Kant means by a will which is at the same time a law.

So, to close the gap between objective laws and subjective rights, Kant must provide a solution in the form of a will that is *autonomous* in form and *omnilateral* in scope.

Kant introduces the state as just such a will. Kant is clear that, given the gap between subjective right and objective law, “in order for one judgment or right to be valid for another, we still need a separate condition, according to which it is determined externally what is right for everyone”¹⁸ (*V-NR/Feyerabend*, AA 27:1381) and so “outer laws must be established by the will of society” (*V-NR/*

¹⁸ This is my own translation. Rauscher renders *apparter* as *explicit* which, it seems to me, obscures the fact that Kant here is emphasizing that the state of nature is insufficient and so a *separate* condition must be added in order to have valid universal rights.

Feyerabend, AA 27:1337). Thus, the validity of rights can only be saved through the establishment of the will of society in a civil condition. As Kant says, “there also can be no other condition [other than the civil condition] where a law could be just” (*V-NR/Feyerabend*, AA 27:1382). For Kant, the civil condition is, at its most basic, the constitution of a *public will* that can legitimately, and so autonomously, and authoritatively, and so omnilaterally, justify subjective rights under objective laws. Here Kant seems to explicitly link the introduction of the civil condition with the normative gap present in the state of nature.¹⁹

The will of society is *authoritative* because civil unions are all grounded on the idea of an original contract that, as the representation of “all laws in civil society as given through the consent of all” (*V-NR/Feyerabend*, AA 27:1382), legitimizes law as the autonomous expression of the will of the *all* the people. In other words, the will of society is genuinely a *public will*, it legislates *omnilaterally*: on behalf of all people.²⁰

The will of society in a civil condition is *autonomous* in its form in the sense that it gives laws only to *itself*.²¹ Kant maintains that the civil will is nothing but the collective will of the people, “the *summus imperans* is always the people” (*V-*

¹⁹ Here I mean to suggest that both the introduction of the state has the effect of closing the normative gap *and* that Kant introduced the state with closing the normative gap in mind. The latter claim is obvious given that the civil condition is introduced in the direct context of the normative problem as shown above. This does not mean that Kant had the whole picture of the rejection of Achenwall to the state in mind in the *Feyerabend Lectures*, nor that the necessity of the state was adopted *solely* or even primarily as a result of Kant’s interaction with Achenwall.

²⁰ In the *Metaphysics of Morals*, Kant similarly says “The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it *cannot* do anyone wrong by its law. Now when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*).’ Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.” (*DR*, AA 6:314).

²¹ Messina (2020) argues that Kant’s view in the 1780’s is to ground moral duties by a combination of self-legislated categorical imperatives and pathological incentives, like hope and fear. However, Kant clearly contrasts his view with both Achenwall’s and Baumgarten’s view: “But to oblige someone through *poenae* [punishment] and *praemia* [rewards] is *contradicto in adjecto* [a contradiction in terms] because in this case I move him to action which he does not out of obligation but out of fear and inclination” (*V-NR/Feyerabend*, AA 27:1326). To say the least, it would be odd for Kant to then reintroduce pathological motivations *to create* external obligations pages later. Furthermore, as shown above, Kant seems to understand the problem with the state of nature as more than merely a problem of motivation, but a problem of the normative status of external laws themselves.

NR/Feyerabend, AA 27:1382). The will of society gives laws only to itself, and so subjects the people only to their own laws, “for the will of all is the law. They are all legislators” (*V-NR/Feyerabend*, AA 27:1382). Of course, the *exercise* of the legislative power has many forms (*democratie, monarcha, aristocratie*) but the power of the legislator comes from the people. Thus, subjects are only subjected to laws of their own, and the will of society in the civil condition is therefore autonomous in form.²²

Thus, the state has a legitimate form and authoritative scope.

In this way, the state replaces the will of God in Achenwall's system as the guarantor and validator of our subjective rights by justifying them under objective laws through a legitimate and authoritative will. Kant's insistence on the necessity of the state can be traced back to a response to problems that arise from Kant's rejection of key elements in Achenwall's system.

Conclusion

I have shown that Achenwall's system of natural law included an immediate relationship between objective law and subjective right grounded in the will of God and natural ends. Achenwall's ability to immediately justify subjective rights in light of objective laws allowed him to mitigate the role of the state to a contingent, though important role in his system. Kant, through his critique of Achenwall's foundations, opened up a gap between objective laws and subjective rights that problematized the state of nature in new ways. Kant could not, with Achenwall, immediately justify subjective rights in light of objective laws. In the last section, I argued that Kant, in order to close the gap and make concrete rights objectively necessary, made the state a necessary rather than contingent component to his theory of rights, effectively replacing Achenwall's authoritative divine will with the will of society as expressed in the state. This reading of Kant's relationship to Achenwall accounts for the specific justificatory problems that rights face in Kant's system.

²² In the *Naturrecht Feyerabend* Kant still maintains that a legislator can will in a way that the people *ought* to have willed. This picture of the enlightened monarch is abandoned for a more republican model in *Toward Perpetual Peace* (*PP*, AA 8:350ff). See Kleingeld (2019).

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Joel T. Klein

Kant on Legal Positivism and the Juridical State

Abstract: In this paper I argue that Kant’s political and juridical philosophy justifies a type of normative legal positivism that implies specific notions of law and legal freedom which determine and restrict the sphere of action of judges and jurists. Finally, I defend that, according to Kant’s practical philosophy, the normative connection between justice and law is not supposed to be carried out at the juridical level, as a meta-juridical theory, but at the political one, making it a meta-political theory.

Introduction

This paper is divided into three sections with a short conclusion. In the first part, I present the quarrel between legal positivism and non-positivism concerning Kant’s juridical philosophy. In the second section, I argue that Kant’s political and juridical philosophy assumes a legal positivist view of positive law and the juridical state.¹ The third segment deals with the issue of how Kant under-

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¹ Instead of ‘rule of law’ I adopt ‘juridical state’ as the English equivalent to ‘*Rechtstaat*’. For many authors the ideal of ‘rule of law’ already implies some moral and political assumptions, as complying with human rights and limited government. Since the whole thesis of this paper is to argue that Kant’s notion of *Rechtstaat* does not need to meet those criteria, I adopt here the less demanding notion of ‘juridical state’. In this aspect I follow Pogge, who states that Kant “can appropriately use the adjectives *rechtlich* and *gesetzlich* in German, so long as these are understood as ‘instantiating Recht’ and ‘governed by laws’, respectively. Translations as ‘right-

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stands the relationship between justice and law or that between the metaphysical principles of right and positive law. The paper concludes with some brief final remarks concerning the whole proposal.

1 Kant's Legal Philosophy in the Debate About Legal Positivism and Non-Positivism

According to Kelsen, legal positivism is defined by two intimately related claims. The first is the separation thesis, which concerns the independency of the validity of positive law from any norm of justice. The second is the monist thesis, which sustains that positive law has only one source, in the sense that the only authority to create law is established by the political-juridical system in question and can be systematized by the concept of the fundamental norm.² Thus, the validity of a law is not determined by its relationship to justice, but because it has been created according to appropriate procedures in a juridical-political system.³ Neither a particular law, nor the whole political-juridical system need to be evaluated by a norm of justice in order to be considered valid. From this perspective, Kelsen sees Kant's juridical philosophy as opposed to legal positivism, since he understands Kant's categorical imperative of right to have been derived from the categorical imperative of morality and as a moral cri-

ful', 'lawful', or 'legal' are mistaken, because a juridical state may well be unjust (in reference to natural law) and, as constitutive of legality, cannot itself be legal, or lawful, in reference to positive law. (Cf. how *rechtlich* contrasts with *rechtmässig* PP, AA 8:373, n. 30–31.)" (Pogge 2002, 139n.). Although I agree with Pogge about the translation and the framing of *Rechtstaat* as "juridical state", I do not follow him in his thesis that Kant's *Rechtslehre* can be understood as a type of comprehensive liberalism.

2 "Therefore any kind of content might be law. There is no human behavior which, as such, is excluded from being the content of a legal norm. The validity of a legal norm may not be denied for being (in its content) in conflict with that of another norm which does not belong to the legal order whose basic norm is the reason for the validity of the norm in question." (Kelsen 2005, 198). According to Alexy: "All positivistic theories defend the *separation thesis*, which says that the concept of Law is to be defined such that no moral elements are included. The separation thesis presupposes that there is no conceptually necessary connection between law and morality." (Alexy 2002, 3).

3 According to Gardner, legal positivism can be expressed by the following formula: "In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits." (Gardner 2012, 45).

terion for defining positive law (cf. Kelsen 2017).⁴ This interpretation finds strong support in passages like the following: “Like the wooden head in Phaedrus’s fable, a merely empirical doctrine of right is a head that may be beautiful but unfortunately it has no brain” (*DR*, AA 6:229); or, “if justice goes, there is no longer any value in human beings’ living on the Earth” (*DR*, AA 6:332).

This non-positivist interpretation was challenged by Waldron (cf. Waldron 1996),⁵ who argued that Kant’s juridical philosophy should be understood as a normative legal positivism⁶ of a sort which ascribes a particular moral and political worth to the legislative creation of law and to the separation of powers. It starts from the premise that independently of the existence of some shared moral values in society, there is still disagreement on how to interpret and implement said values so as to create specific norms. It is up to positive law, then, to establish a pacific and rational way to deal with potential disagreements by creating and ensuring order and security. In a nutshell, normative legal positivism is a philosophical position about positive law that advocates the juridical state at the same time that it acknowledges the existence of disagreement on how to define or how to apply moral values such as justice.⁷ One of its important consequences is the limitation of the judiciary’s political power by restricting its scope for discretionary interpretation of laws and constitutional review at the same time that it confers to the legislative power the sovereign authority of law-making.⁸

4 Bobbio (1995, 139f.), Höffe (1995, 72), and Byrd/Hruschka (2010, 35f.) also interpret Kant’s philosophy of law in this way.

5 The view that Kant’s juridical philosophy implies juridical positivism was previously argued by Hopton (1982), who defends Kant’s position from that of Austin. Even if Maus (2018, 241ff.) does not use the term ‘legal positivism’, it seems to me that she interprets Kant in the same fashion.

6 Bobbio (1996, 229) uses the category of ethical juridical positivism, which might have both an extreme variant (used more as a caricature by juridical moralists) and a moderate one.

7 See also Waldron (1999; 2001). One of legal positivism’s most central objections to non-positivism concerns morality’s cognitive indeterminacy (as per Kelsen (2017), Hart (1994, 164), and Raz (2010, 326)).

8 The main sources of this kind of positivism are found in Hobbes and Bentham. Normative positivism is distinct from the descriptive legal one developed in the 20th century by the analytical philosophers. The latter posits that it would be possible to analyze the concept of law, i. e., a description of its logical and practical implications without any compromise concerning a normative or political position to give support. Waldron (2002, 352) harshly criticizes this line of legal positivism because it has a cycloptic view of the meaning of legal positivism and fails to recognize the intrinsic link between law and politics. Surprisingly, the descriptive legal positivism of Hart, Raz and Gardner grants more legal and political preeminence to the judiciary

On the other hand, aligned with Kelsen, Alexy has restated a non-positivist interpretation of Kant's juridical philosophy. He argues that Kant established a necessary connection between the validity of law and its moral correctness (cf. Alexy 2019, 501), which can be considered a type of inclusive non-positivism.⁹ This type of non-positivism neither claims that moral defects always undermine the validity of law, nor that they never do so. In narrow conceptual proximity to Radbruch's formula,¹⁰ inclusive non-positivism claims that "moral defects undermine legal validity if and only if the threshold of extreme injustice is transgressed. Injustice below this threshold is included in the concept of law as defective but valid law." (Alexy 2019, 503).

Alexy presents two textual arguments. The first he calls the exception-clause argument and it is found in the following passage of *Doctrine of Right*: "Obey the authority that has power over you (in whatever does not conflict with inner morality)" (DR, AA 6:371). The exception-clause expressed in brackets is a restriction based on a moral principle that could be understood as "very extreme injustice is no law" (Alexy 2019, 505).¹¹ The second is the nullity argument supported by passages from *Enlightenment* where Kant states that a contract that tries to keep humankind in a perpetual minority must be considered 'null and void' (E, AA 8:39), or from *Doctrine of Right* when he claims that "a contract by

power in the sense that they are afforded more space for interpreting as well as for creating the law (cf. Dyzenhaus 2004).

9 Alexy speaks of three kinds of non-positivisms. The exclusive sort states that "every injustice, every moral defect of a norm, precludes its being legally valid, its being law. A classical version of this view is expressed by Augustine's statement that 'a law that is not just would not seem to me to be a law.'" (Alexy 2019, 502). Kant clearly does not defend this radical position. A second kind is the super-inclusive non-positivism. At first sight, this position looks like positivism because it states that the validity of law is not affected by moral defects but that they are distinct because non-positivism still stresses that moral flaws create degrees of defectiveness in the law (I do not believe, however, that this is a good category, because is difficult to see what could mean degrees of defectiveness if this has nothing to do with the validity of law. From the point of view of positive law this does not mean anything). Alexy had previously attributed this position to Kant (Alexy 2008), but in his last paper he redefines the stance to one of an inclusive non-positivism, although he still seems to attribute the category of super-inclusive non-positivism to Kant at the end of his paper (Alexy 2019, 508ff.).

10 The formula is the following: "The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice." (Radbruch 2006, 7).

11 This view searches out support in Ripstein, according to whom, the Nazi law should not be considered law, since there was no juridical state at the time nor even a despotic one, rather only a barbaric state (cf. Ripstein 2009, 348).

which one party would completely renounce its freedom for the other's advantage would be self-contradictory, that is, null and void, since by it the one party would cease to be a person and so would have no duty to keep the contract but would recognize only force." (DR, AA 6:283)

Attempts have been made to carve out a middle path between positivist and non-positivist interpretations. Stone, for example, agrees partially with Waldron, but insists that while "Kantian Right might be consistent with positivism" (Stone 2017, 174),¹² it also distances itself insofar as, for Kant, "law expresses a part of morality" (Stone 2017, 179). In order to avoid this issue degenerating into a dispute about words or definitions,¹³ a better strategy might be to determine how Kant's juridical and political philosophy responds to some specific issues concerning the understanding of positive law, more specifically its creation and administration. Particularly relevant questions are the following: is an immoral law still valid? Is an extremely unjust system of law still a juridical state? What is the role of judges and jurists concerning both the requirements of law and those of justice? In the end, answering those questions leads us naturally to take a stand and choose between a positivistic or a non-positivistic conception of positive law. In the next section I gather and interpret multiple aspects of Kant's practical philosophy that are spread out among a series of works and which give us a broad picture of what could be called Kantian critical legal positivism.

2 Kant's Legal Positivism

Kant's legal positivism is defined and defended in this section on the basis of nine differing yet interconnected elements concerning the meaning, the creation and administration of positive law. Each is related to the criteria presented by Bobbio (1995) for defining legal positivism, although he himself does not consider Kant a proponent of this tradition. Before going into the arguments, it must be stressed that I am not challenging that the main intention of Kant's *Metaphysical Principles of the Doctrine of Right* was to present a theory of just law. To that end, however, he needed to distinguish it from the concept of positive law in general

¹² Stone argues that Kant would agree with those that defend a kind of "modest legal positivism" (Stone 2017, 178). Bird/Hruschka (2010, 35f.) speak of strong positivist elements in Kant's philosophy of right.

¹³ There is no consensus regarding the different definitions present in both categories. We find, for example, distinctions between normative and descriptive positivism, between that which is inclusive and exclusive, and between the positive and negative forms. These challenges are beyond the scope of this paper and are, therefore, merely being pointed out.

and, particularly, from the concept of non-law. So, I am not claiming that Kant's main objective was to determine the conditions for positive law in general, but that, in his search for the criteria for just law, he also had to formulate a theory of positive law and how it might relate to justice. Therefore, we can find Kant's theory of law intermingled with that of just law, even though the former can be defined independent from the concept of justice. The general guideline of my interpretation is that Kant understands positive law as a necessary (in a logical and historical sense) but not as a sufficient condition for just law.

2.1 The Unconditionality of Positive law

It is precisely in this regard that Hopton (1982) and Waldron (1996) consider Kant to be a legal positivist.¹⁴ The argument runs as follows. According to Kant, there is a moral duty to leave the state of nature, because, although provisory rights do exist, they are undetermined both in respect to quality and quantity (cf. *DR*, AA 6:266).¹⁵ Distinct from Hobbes, the "*ex eudum est e statu naturali*" is not justified on the basis of the risk of death, but on a categorical imperative. Even if agents have consciousness and the clarity of moral law, it is clearly possible and probable that they might disagree in good faith about how to apply it in *empirical practice*, which, in turn, risks leading them to war (which need not always be an actual one). It is for this reason that Kant claims that positive law is necessary even for "well-disposed and law-abiding human beings" (*DR*, AA 6:312), which makes it even more pressing for sensible beings who act mostly on the principle of self-satisfaction. In other words, the existence of disagreements in good faith, even among moral beings, makes it necessary to have a rational way to resolve them with little individual discretion.¹⁶

14 The argument in 2.1 follows Bobbio's classification of the criteria of legal positivism, this aspect matches those of the theory of obedience. In his words, "it is not easy to make generalizations about this point. But there is a set of positions in the field of legal positivism that defends the theory of absolute obedience to the law as such, which might be translated in the aphorism 'Gesetz ist Gesetz'" (Bobbio 1995, 133, own translation).

15 According to Waldron, what is valid in the state of nature (even a logical-ideal one) is in a very generous way nothing more than an "idea of some individual's best effort to figure out – unilaterally – what he is entitled to." (Waldron 1996, 1565s).

16 See: "No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him. No one, therefore, need wait until he has learned by bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over oth-

The moral demand concerning the departure from the state of nature and the creation of the civil state implies the moral necessity to have clear and determined laws and a distributive system, so it can apply those laws in an impartial manner (cf. Kersting 1992, 352). The only law that should be recognized is public law and, therefore, all rights in the state of nature should be translated and reinterpreted by civil law. Leaving the state of nature implies a moral obligation to renounce the right to interpret and enforce what justice means. Therefore, the civil state is, by definition, one in which each subject lacks the right to disobey the laws created by the sovereign and applied by the courts.

This is a kind of normative legal positivism, because there is a normative requirement superior to positive law that establishes a moral obligation to comply with whatever positive law a state might put into place. In Kant's words, an external legislation "can therefore contain only positive laws; but then a natural law would still have to precede it, which would establish the authority of the lawgiver (i. e., his authorization to bind others by his mere *choice*)." (DR, AA 6:224)¹⁷ This means that, whatever a positive law might contain, it is still justified on the base of an *a priori* law of reason that the lawgiver has the authority to create and enforce the law. The counterpart of the moral authority of the lawgiver is the moral submission by the subject to the positive law.¹⁸ This already calls attention to the preeminence of the lawgiver and the legislative power over that of the judge and the judiciary power concerning the establishment of positive law.

ers as their master (not to respect the superiority of the rights of others when they feel superior to them in strength or cunning)? And it is not necessary to wait for actual hostility; one is authorized to use coercion against someone who already, by his nature, threatens him with coercion." (DR, AA 06:307).

17 Alexy (2002, 116) sees this formulation as the Kantian counterpart to Kelsen's fundamental norm, the difference being that the latter concept is a strictly epistemological presupposition, while Kant's norm carries the normativity of a natural law, an *a priori* one that arises from pure practical reason.

18 See: "A law that is so holy (inviolable) that it is already a crime even to call it in doubt in a practical way, and so to suspend its effect for a moment, is thought as if it must have arisen not from human beings but from some highest, flawless lawgiver; and that is what the saying 'All authority is from God' means. This saying is not an assertion about the historical basis of the civil constitution; it instead sets forth an idea as a practical principle of reason: the principle that the presently existing legislative authority ought to be obeyed, whatever its origin. Now, from this principle follows the proposition; the sovereign has only rights against his subjects and no duties (that he can be coerced to fulfill)." (DR, AA 6:319).

2.2 Separation Between Justice in Itself and Legal Justice

The question at hand is not about the connection between ethics and right or that between the categorical imperative and the categorical imperative of right.^{19, 20} At issue is whether Kant considers that positive laws and legal justice are valid apart and independent from that which is just in itself, namely, precisely as required by the categorical imperative of right.²¹ Kant does not take this issue up in detail, but the analysis of several passages prompts me to argue that Kant embraces both legal positivism as well as a profound institutional separation between positive law and justice.

First case – A contract to make a gift (*pactum donationis*). In the state of nature, people need not comply with the promise of a donation, because they have the right to change their mind. In the civil state, on the other hand, such a pact of donation must be carried out even if donors change their minds, unless there is an explicit waiver clause. “The court adopts this principle because otherwise its verdict on rights would be made infinitely more difficult or even impossible.” (*DR*, AA 6:298). So, what has been publicly and officially recorded takes precedence over what might be considered just between the two parties.

Second case – A contract to lend a thing (*commodatum*). If John lends something to Peter and this object gets broken, reason dictates that Peter must compensate John, at least if we are in the state of nature. In the civil state and in what concerns positive law, however, Peter should compensate John only if it was expressly agreed and properly recorded. “This verdict will indeed be given on different grounds from the decree of sound reason alone, since a public judge cannot get involved in presumptions as to what the one party or the other may have thought.” Kant adds: “the difference between the judgment that a court must make and that which each is justified in making for himself by his

19 The argument in 2.2 follows the formal criteria of law pointed out by Bobbio (1995, 131), in which law should be considered a fact rather than something that is good or bad, just or unjust. In other words, even if something is thought to be unjust, positive law is still valid, because it is defined by its formal structure and not according to particular moral values.

20 In this sense, Maus’s argument (2018, 242) regarding the delimitation of judges’ power of action seems to be poorly framed because she would still justify the legitimacy of judges to insert a non-ethical concept of justice but that is still determined by the categorical imperative of right.

21 As Kant frames it: “So the question here is not merely what is *right in itself*, that is, how every human being has to judge about it on his own, but what is right before a court, that is, what is laid down as right. And here there *are four* cases in which two different and opposing judgments can result and persist side by side, because they are made from two different points of view, both of which are true: one in accordance with private right, the other in accordance with the idea of public right.” (*DR*, AA 6:297).

private reason is a point that is by no means to be overlooked in amending judgments about rights.” (DR, AA 6:300).

Third case – Recovering something (*vindicatio*). In the state of nature, in the absence of positive law, if a horse is stolen from John and sold in a public market to Peter, then according to the principles of practical reason, John has the right to reclaim the horse. In this case, Peter has the right to the horse only until John reclaims it. On the other hand, in the civil state and under positive laws, Peter should be considered the legitimate horse owner if he had bought the horse in a public market according to the rules established by the authorities.²² “On this principle various statutory laws (ordinances) are subsequently based, the primary purpose of which is to set up conditions under which alone a way of acquiring is to have rightful force, conditions such that a judge can assign to each what is his most readily and with least hesitation.” (DR, AA 6:303).

Fourth case – Taking an oath (*iuramentum*). On the one hand, “a judge who requires swearing to a belief from a party in order to find out something relevant to his purpose, even if this purpose is the common good, commits a grave offense against the conscientiousness of the person taking the oath.” (DR, AA 6:305) On the other hand, in the context of positive law and “in the civil condition, if one admits that there is no other means than an oath for getting at the truth in certain cases, one must assume that everyone has a religion, so that it can be used as an expedient (*in casu necessitatis*) for the purpose of proceedings about rights *before a court*” (DR, AA:305). So Kant concludes that the court is still “authorized to use it”. (DR, AA 6:304). The separation between just law and positive law become clearer still when Kant states that it is unjust for the lawgiver to authorize the judiciary take an oath by coercion, even though the law may still be valid.

Fifth case – Lying to save an innocent’s life. This might be the most famous case, although there are only few scholars that read this issue as an expression of Kant’s legal positivism.²³ Even if a lie can be seen as well intentioned and, therefore, as moral, insofar as it is only intended to save the life of an innocent, this act could still be judged illegal in the case of a terrible faith, for example, when the untruth is precisely what makes the murder possible. In other words, a well-intentioned liar could be judged as an accomplice to murder (cf.

²² This, of course, would not undermine John’s right to sue the seller, who was only an alleged owner of the horse.

²³ Mertens (2016, 46) is an exception. He argues that it is exactly because Kant has in view the guarantee of the social contract that he denies Constant’s allegation of a supposed right to lie from philanthropy. In other words, in his intent to preserve the positive law Kant can accept the condemnation of someone who has committed a juridical lie in the hope of saving an innocent.

RLP, AA 8:427). Truthfulness is, then, a formal principle that lies at the base of positive law. Namely, in civil law a person can neither be punished for telling the truth nor be forced to lie. It is a formal principle valid only for positive law and not for natural law in the state of nature.²⁴

There are other cases that could be interpreted along the same lines, namely as illustrating something that might be required or allowed only in the civil state and in the context of particular historical circumstances but which might be considered unjust. Examples include the privileges that a state might grant to the clergy (cf. *DR*, AA 6:324 ff.), the establishment of a hereditary nobility (cf. *DR*, AA 6:329), the absolution of the crime of murder in a duel or even infanticide (cf. *DR*, AA 6:336 f.). In each of these cases, there is a difference between what is just in itself and what might be legal. By speaking of what is required by the inherent logic of positive law, we have yet to define the conditions of justice. This will be analyzed below.

2.3 The Concept of Positive Law and Its Validity

According to Alexy (2008, 290), the “debate within non-positivism as well as the debate between non-positivism and the different forms of positivism is a debate over the concept and the nature of law”.²⁵ He defines as non-positivist those who accept the dual nature of positive law. On the one hand, there is the factual or real dimension that deals with the correct procedures for creating law and ensuring its effectiveness (either with the agents that operate the law, or with regard to its subjects, the people in general). On the other hand, there is the ideal criterion concerning the moral character and the concepts of human rights and justice. In this section, I argue that Kant’s concept of positive law involves only what Alexy considers the real aspect, which means that it need not entail the moral one. However, I also argue that, for Kant, there is another type of formality or ideality which does not yet involve moral aspects. In this sense, what Alexy calls the dual perspective of law becomes a triadic perspective in Kant’s juridical philosophy. I will now look at the concepts of positive law and the state of law and obligation (even in relation to an unjust law).

Kant defines practical law as “a proposition that contains a categorical imperative (a command). One who commands (*imperans*) through a law is the *law-*

²⁴ I discuss this topic in more detail in Klein (2018a; 2018b).

²⁵ The argument in 2.3 follows both the formal criteria of law (in the same sense presented above) and that of coercion: “legal positivism defines law by way of its element of coercion, whence comes the coactivity theory of law.” (Bobbio 1995, 131, own translation).

giver (legislator). He is the author (*autor*) of the obligation in accordance with the law, but not always the author of the law. In the latter case the law would be a positive (contingent) and chosen law” (*DR*, AA 6:227) I propose the following interpretation of this difficult passage. Firstly, it should be noted that, in previous lines Kant had restated the difference between the concept of freedom of will and freedom of choice using the distinction between noumena and phenomena. Thus, when he claims that, in positive legislation, the author of the obligation is not the author of the law, he means that the author of the obligation to obey positive laws is still the *homo noumenon*, even though they cannot be represented as the empirical (actual) or even as the hypothetical (in a mind experiment) author of the law. In other words, Kant is stating the obligation to respect positive law, even when it cannot be understood as coming from practical reason, in the sense that the agent would rationally agree with it. Positive law implies exactly the situation in which we are under an obligation to obey a law that we, as rational beings, are not able to consent to. Thus, unjust law is still law, and we are obliged to obey it. There is a kind of supra-positive obligation to the system of positive laws as a whole.²⁶

This also shows up in Kant’s definition of positive right: “The sum of those laws for which an external lawgiving is possible is called the *Doctrine of Right (Ius)*. If there has actually been such lawgiving, it is the doctrine of *positive right [...]*” (*DR*, AA 6:229). Kant, in the following lines, focuses on the doctrine of natural right, by which he means a systematic body of knowledge that can be used for evaluating positive laws. However, the fact is that he still defines positive laws as the actual legislation. This notion reappears when Kant defines right. From the point of view of a jurist, the question of ‘what is right’ is the same as the query ‘what is truth’ for the logician. In order to avoid tautology, the jurist has to refer to what the “laws in some country at some time prescribe. He can indeed state what is laid down as right (*quid sit iuris*), that is, what the laws in a certain place and at a certain time say or have said.” (*DR*, AA 6:229). Even as Kant raises the question of the universal concept of right related to the notion of justice, he also recognizes a definition of positive law as the legislation that is valid in and of itself.²⁷ This quote also provides another important

²⁶ This supra-positive normativity is precisely what makes Kant a normative positivist. In Kant’s words, an external legislation “can therefore contain only positive laws; but then a natural law would still have to precede it, which would establish the authority of the lawgiver (i.e., his authorization to bind others by his mere *choice*).” (*DR*, AA 6:224).

²⁷ Villey offers a similar interpretation: “Kant had defined the strict limits of the science of law: the study of the general external laws, equal to all and sanctioned by the state; [...] the jurist should restrict himself only to the texts, because only therein might solutions be found; to

clue, namely, an analogy between the meaning and the role of positive law and general logic.

General logic is also a normative discipline, since it does not lay down rules by which we think, but those according to which we should think in order to have valid reasoning (cf. *Log.*, AA 09:14). However, even if we respect the logical form of valid thinking, it does not mean that our thinking is correct. Formal validity does not ensure truth. This was one of Kant's main critiques to dogmatical metaphysics, which created complex metaphysical systems abiding only to the non-contradiction principle but without solving any real metaphysical issue. I am suggesting that, *mutatis mutandis*, the rules for considering positive law are to general logic in the same way that those for establishing just law are to the rules of transcendental logic. Transcendental logic does not abstract from all content, therefore it deals with a concept of form that is related to a specific content given *a priori* by reason (cf. *CPR*, B 80). There are, then, two concepts of 'form' and two of 'normativity'. The form and the normativity of general logic are necessary and sufficient conditions for the validity of knowledge, but insufficient for its correctness, its truthfulness. In analogy, one might say that positive law is a necessary and sufficient condition for establishing the concept of a state of law, but it does not suffice for the concept of the just state of law.

Keeping this in mind, a famous passage from *Anthropology* turns out to be even more pertinent:

Freedom and law (by which freedom is limited) are two pivots around which civil legislation turns. – But in order for law to be effective and not empty recommendation, a middle term must be added; namely, *force*, which, when connected with freedom, secures success for these principles. – Now one can conceive of four combinations of force with freedom and law: A. Law and freedom without force (anarchy). B. Law and force without freedom (despotism). C. Force without freedom and law (barbarism). D. Force with freedom and law (republic) (*Anth.*, AA 7:330 f.).

If we relate this quote to another formulation from *Doctrine of Right* that “right is connected to the authorization to use coercion” (*DR*, AA 6:231) according to the principle of non-contradiction, i.e., according to an analytical bond, then one

him only the letter of the positive law mattered [...]. This marked the beginning of the era of legal positivism (1804 in France and later in Germany)” (Villey 1976, p.145, own translation). Hruschka (2015, 42ff.) goes in an opposite direction. He assumes that in those passages Kant is criticizing the perspective of a mere formal jurisprudence. I, on the other hand, do not believe that Kant is making this kind of criticism. Kant criticism to jurists is compared to his criticism to the logicians, who want to transform a mere formal science, that can work only as a *canon*, into an *organon* (cf. *CPR*, B 85).

might infer that the concept of the juridical state is defined by two aspects, the law on the one hand, and the power to coerce on the other²⁸. For this reason, there is no juridical state in *anarchy* since the laws do not have power to coerce, just as there is no law in *barbarism* since there is merely the power to coerce. In anarchy there is savage freedom, and in barbarism there is savage power.²⁹

However, a state of law does exist in both republics and despotic states. Kant defines despotism as “the high-handed management of the state by laws the regent has himself given, inasmuch as he handles the public will as his private will.” (*PP*, AA 8:352). So, what distinguishes despotic states from barbaric ones is the existence of law and, therefore, the existence of positive law, even if said laws are the mere expression of the regent’s private will. In other words, even if a despotic regent disregards the ideas of general will and freedom as the moral content of positive laws, a juridical state still exists.

Kant thinks that we should always respect the law, even in despotic states, since “reason allow[s] a situation of public right afflicted with injustice to continue until everything has either of itself become ripe for a complete overthrow or has been made almost ripe by peaceful means”. This is the case because “some *rightful* constitution or other, even if it is only to a small degree in conformity with right, is better than none at all, which latter fate (anarchy) a *premat-ure* reform would meet with.” (*PP*, AA 8:373n). Some aspects of this position must be explained. Firstly, the sentence “conformity with right” means here the *a priori* right as given by purely practical reason. In this sense, even if the “rightful constitution” is only to a small degree in conformity with the pure doctrine of right, it is still a rightful constitution, which means that positive law and

28 In this sense also Pogge: “A complete and effective legal order, even without equality under the law, instantiates *Recht* or a juridical condition. All that is required for such a condition is that there be an effective body of public standing laws that constrains each person’s freedom in predictable ways and thereby predictably delimits and secures each person’s constrained external freedom*.” (*) If this explication of Kant’s definition is correct, then *Recht* as used in this definition is not equivalent to either ‘law’ or ‘(social) justice’. When law is incomplete or ineffective, there is law without *Recht*. And when law is complete and effective, there may be *Recht* without justice, for example, *Recht* that imposes very different constraints on different persons. This is not to deny, of course, that Kant also uses the word *Recht* in its common meaning, as denoting a society’s body of law, as well as of course in its even more common meaning of ‘(a) right (to)’.” (Pogge 2002, 139 f.n.).

29 Concerning the concepts of barbarism and barbaric, Kant uses them in his whole philosophy as a counterpart to civilization and education (*Bildung*) and an action according to law [*Gesetz*]. He talks about barbarism not only in politics (as in *DR*, AA 6: 337, 351; *PP*, AA 8:358; *Refl.*, AA 15:649), but also in philosophy (*CPR*, A 8), and the relation between sciences and politics and culture (*IUH*, AA 8:25 f; *Anth.*, AA 7:326; *Log.*, AA 9:31; *G*, AA 5:388). I am grateful to Giam-piero Basile for calling my attention to this broader use of the concept.

the juridical state both exist and we should respect them. Secondly, the mention of a “small degree” indicates that there still must be some common ground with a republic, otherwise, there would be no difference between a despotic state and a barbaric one. Thirdly, this small degree of conformity does not apply to the moral concept of freedom, but the formal criteria for a norm being considered law.

Now, which formal criteria are necessary for a law to be considered positive law? In the analogy with general logic, formal criteria are *necessary*, but not *sufficient* conditions for a given norm to be considered a just law. I suggest that Kant’s formal concept of positive law in general may be derived from his theory of action, which focuses strictly on the freedom of choice, while the concept of just law relates to his theory of *moral* action, which concentrates on the relation of freedom of choice to the notions of humanity and the innate right to freedom.

Because the concept of positive law in general is defined only in relation to the regulation of the freedom of choice, then the normative notion of positive law must satisfy the formal limits concerning how that faculty works. In this sense, for example, positive law is not allowed to discipline either religious belief (since faith is not something that we can chose, according to Kant), or actions that surpass the human faculty of choice as in, for example, the will to undo something in the past, or even having some natural characteristics, such as being white, black, short, tall, man, or woman, etc. None of those features or actions are consistent with the possibility of regulating the freedom of choice. Therefore, even in a despotic and unjust state, laws cannot exist that punish people for their religious beliefs or for having some natural features or history.³⁰ Any state with these kinds of regulations is a barbaric one. Concerning the internal formal criteria, positive law must have generality, publicity³¹, prospectivity, intelligibility, consistency, practicability, stability, etc. Those formal criteria might be present, for example, even in despotic states where no clear separation of powers exists and laws are unjust, i.e., in states with legal slavery and servitude, at least if

30 In this sense Arendt’s (1976) definition of totalitarianism can be understood to refer to those states that consider some group of people to be objective enemies, i.e., people are punished not because they have committed a crime but because they are simply part of a specific group, whether ethical or political.

31 Publicity here has to be understood as the fact that laws are public and that everyone is able to know them. In this sense, publicity here is different from the transcendental principle of publicity, which is an *a priori* principle that regulate the way as said laws are made and, which is a moral principle for creating just laws. I am grateful to Günter Zöllner for suggesting clearing out this difference.

those conditions are considered punishments for acts committed by the subjects and which might have been avoided by them (cf. *DR*, AA 6:283).

The difference between a despotic state and a republic concerning positive law is the relationship to freedom and justice. In republics, positive laws are evaluated by the categorical imperative of right, and they must respect the innate right to freedom. This means that positive laws still regulate the faculty of choice and must comply with all the necessary conditions implied in the formal concept of law. Now, however, the faculty of choice is also regarded in relation to will or practical reason. Therefore, positive laws have also to comply with moral requirements which imply a form that is not abstracted from all content, a form that is determined by an *a priori* law of reason. Only with the fulfillment of this requirement may positive laws be considered just and may a state be considered a republic. Thus, in a republic, the juridical system must work according to the principle of innocence, and contracts are valid only if they respect the dignity of human beings (which excludes contracts of servitude and slavery).

Distinct from Alexy's position (2008), Kant's concept of law does not have a dual but a three-part nature. The first aspect, the real aspect of the law, involves the political procedures for creating a valid law in a specific political system (these procedures can be considered material, because they might be completely contingent). The second facet, the formal and logical aspect of law, involves those criteria that even a despotic state can satisfy. The third condition is the metaphysical and moral aspect of law that turns a state into a republic and positive laws into just ones. In a barbaric state, only the first aspect pertains, so that said laws cannot even be called such. Only the first two facets exist in a despotic state, while only in a republic do all three characteristics of laws pertain. So Kant's idealism enlarges the scope of analysis.

Even though Kant clearly defends the moral concept of a republic, he can still be considered a legal positivist, because 'positive laws' are defined only by the first two aspects and without moral content. So, while both the barbaric state and the despotic one are unjust, only in the latter can law be found, which means that Kant's definition of positive law is independent of the concept of justice. His juridical philosophy implies two kinds of normativity. *Formal normativity* is morally neutral and is sufficient condition for the 'state of law', while *moral normativity* involves *a priori* moral content and is sufficient condition for the 'just law' or a 'republic'. This difference is indicated in the conceptual distinction between *formaliter* justice and the *materialiter* one (cf. *DR*, AA 6:307n.).

Kant's legal positivism is normative and not descriptive for the following reasons: 1. It involves a formal normativity that must be respected in order for a statutory norm to be considered law, i.e., Kant would not consider as law whatever set of statutory norms that people might call positive law, in the same way that

he *rejects* that empirical and psychological rules of thought might be considered logical laws (cf. *CPR*, B 77f.). 2. It involves a moral normativity that implies a moral obligation concerning positive law, even when it is unjust.³² This obligation, however, is external to positive law and is irrelevant to the definition of the concept of a state of law. 3. It involves a moral obligation to correct the unjust law and transform the despotic state into a republic. In other words, Kant's legal positivism is defined by a formal normative theory concerning law but is also framed by a moral theory of republic that requires freedom. These moral requirements do not compromise his legal positivism, because the relation between those aspects occurs in a political sphere and not inside the system of positive law, as will be detailed in the third section below.

If the Kantian criteria are compared with Radbruch's formula (2006, 07), it can be deduced that Kant would agree only partially with how the problem was framed. Kant's theory establishes a border between a barbaric state and a state of law. This threshold, however, is not determined by moral criteria, but by what one might call *logical-practical* ones. In this sense, it is still legal positivism because it does not need a moral criterion to determine the existence of the state of law. In order to look into the justice requirements of positive law and what turns a despotic state into a republic, another threshold must be met. This moral threshold implies *moral-practical criteria*, such as the presumption of innocence and the embodiment of the laws by the moral principles of freedom, equality,³³ and independence (in the sense determined by pure practical reason and not by some particular historical culture).

32 It is important to call attention to the fact that, despite all the importance that Kant attributes to justice and freedom, he still gives lexical priority to the order established by law. It is also for this reason that he rejects any attempt to a right of revolution, even under an unjust constitution (cf. *DR*, AA 6:320). For Kant, the order and security established even by unjust laws are more important than freedom and justice, due to the need to avoid the risk of anarchy. This is also one of the reasons that leads Kant to deny the authority of judges to 'correct' laws when they consider them morally flawed. This will be discussed in detail below.

33 Concerning equality, Kant gives an example. From the legal perspective, an aristocratic state with hereditary nobility might still be considered a state of law, even if an unjust one (cf. *DR*, AA 6:329). In other words, equality is a moral-practical criterion for the *just* law and not a formal-practical criterion for the concept of the state of law.

2.4 Theory of the Separation of Powers and the Refusal of Judicial Legislation

The idea of state involves, on the one hand, the universal authority (*allgemeinen Oberhaupt*) (which “can be none other than the united people itself” (*DR*, AA 6:315)) and, on the other, the multitude of subjects (who are the same people considered as subjects).³⁴ The state comprises three powers or three distinct dignities (*Würden*): “The *sovereign authority* (sovereignty) in the person of the legislator; the *executive authority* in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge (*potestas legislatoria, rectoria et iudici*.” (*DR*, AA 6:313). In Kant’s theory, these three powers represent the people in different ways, and each has a specific function. They are coordinated in the sense that they complement each other, and they are subordinated in that “one of them, in assisting another, cannot also usurp its function; instead, each has its own principle, that is, it indeed commands in its capacity as a particular person, but still under the condition of the will of a superior.” (*DR*, AA 6:316).

One of the main distinguishing characteristics of a despotic state versus a republic is the separation of powers. In the latter, the legislators are accorded the power to make laws, while the executive is only allowed to administer the state by means of decrees, which “are directed to decisions in particular cases and are given as subject to being changed” (*DR*, AA 6:316). The judiciary power, in turn, is granted the legitimacy to pass judgement according to the law produced by the legislative branch. “For a verdict (a sentence) is an individual act of public justice (*iustitiae distributivae*) performed by an administrator of the state (a judge or court) upon a subject, that is, upon someone belonging to the people” (*DR*, AA 6:317). In this sense, the authority to make laws through court decisions or by jurisprudence goes against Kant’s theory of the separation of powers and would constitute judiciary despotism.³⁵

³⁴ The argument in 2.4 follows Bobbio’s criterion of the source of law. Legal positivism claims that “the theory of legislation is the preeminent source of the law” (Bobbio 1995, 132 own translation).

³⁵ Kant’s juridical positivism avoids what Condorcet calls the despotism of courts. He states, “The despotism of courts is one of the most odious of all because, in order to maintain and exercise it, courts use the law, the most respected weapon of all.” This despotism “is still more inevitable if these courts have some role [to play] in the legislature, if they form a small group, if its members are tried by other members of that same small group.” (Condorcet 2012, 168). When looking at how to avoid this kind of despotism Condorcet argues that “If judges are elected for a finite period; if civil courts are separate from criminal courts; if judges are obliged to follow the strict letter of the law; if higher courts, also elected, are set up to penalize the prevarications of

Despotism is not the only negative consequence that arises when judges usurp legislative power. Barbarism is a true risk in this case. In despotism, the law is made and applied according to the formal criteria, such as generality, predictability, and the absence of retroactivity. All these are compromised, however, when judges hold not only the power to pass sentence according to the law but also have the ability to make law in the same act.

In this sense, Kant's legal positivism affords courts and judges neither the power to create laws nor that of strong constitutional review. It departs, then, from the descriptive and analytical legal positivism defended in the Anglo-Saxon tradition,³⁶ and also from Kelsen neo-Kantianism, which allocates those powers to the judiciary. It also departs from legal non-positivism because the latter gives less importance to formal criteria than to the particular result. For a non-positivist, it is more important to see just laws applied in a specific situation than to have law laid down by the legislative branch. In analogy with general logic, it can be said that for non-positivism the truthfulness of the conclusion is more important than the validity of the argument. For Kant's legal positivism, the truthfulness of this conclusion cannot be argued without complying with the formal criteria responsible for the validity of the argument. In other words, both formal and logical criteria are necessary conditions for the juridical state and for a just law

2.5 The Illegality of the Judgment of a Sovereign

"A dethroned monarch (who survives the upheaval) cannot be held to account, still less be punished, for what he previously carried out" (*DR*, AA 6:323).³⁷ This is a highly controversial issue related to Kant's denial of the right to revolution. I see it neither as a simple matter of statutory fidelity (cf. Horn 2014, 35) nor as an expression of a conservative mind. Rather it is one more aspect of his legal posi-

judges; [...] then we would have no further reason to fear the despotism of courts." (Condorcet 2012, 169). In this sense Montesquieu also asserts (1989, 76): "In despotic states there is no law, the judge himself is the rule".

³⁶ Gardner (2012, 43) distinguishes "the separation of *legislative* powers of law-making (i.e. powers to make legally unprecedented laws) *from judicial* powers of law-making (i.e. powers to develop the law gradually using existing legal resources).".

³⁷ The argument in 2.5 follows the principle "nullum crimen, nullum poena sine lege", which, in turn, relates to two characteristics of legal positivism pointed by Bobbio (1995) namely, the normative theory of law, i.e., that law is a command and also the theory of the juridical systematic order, which claims that the system of law is complete and coherent, i.e., what the law does not forbid is allowed and that contradictory laws must not exist.

tivism. According to Kant, the “reason a people has a duty to put up with even what is held to be an unbearable abuse of supreme authority is that its resistance to the highest legislation can never be regarded as other than contrary to law, and indeed as abolishing the entire legal constitution.” (*DR*, AA 6:320). The alleged right to resist “is self-contradictory, and the contradiction is evident as soon as one asks who is to be the judge in this dispute between people and sovereign (for, considered in terms of rights, these are always two distinct moral persons). For it is then apparent that the people wants to be the judge in its own suit.” (*DR*, AA 6:320). Since the sovereign power is the source of the positive law valid in the state, no law can be allowed to question that source. This is a matter of principle. In this quote Kant uses again the language of general logic when he mentions an auto-contradictory principle and a contradiction in the alleged law. In this sense, one might say that it is a necessary condition for the state of law that the sovereign power should not be invalidated in its decision. For this reason, the alleged right to revolution is a contradiction to the idea of law.

Along the same lines, Kant also rejects the right to prosecute a former ruler on the basis of allegedly unjust laws and administration. The assassination of kings after a revolution is thus a crime committed by the people, a crime that could be *explained* by an alleged right to preservation, but which cannot justify any judgment of the former ruler. Therefore, for Kant, the worst crime is not the assassination *per se*, but the attempt to give to this act the appearance of a juridical process, because “it involves a principle that would have to make it impossible to generate again a state that has been overthrown.” (*DR*, AA 6:322n.). The attempt to judge a former ruler goes against two formal criteria of the concept of law, namely, that the law comes from the ruler as a command, and second that no one should be judged by a retroactive law. Therefore, the intention to present the assassination of a King as the execution of a juridical sentence is a legal absurdity, a typical act of barbaric states.³⁸

38 With this limitation in mind, Ripstein (2009, 349ff.) presents what would be a Kantian solution to the Nazi regime. He argues that the Nazi state was a barbaric one and, therefore, the criminals that destroyed the German state could be judged by the reinstated sovereign. This solution respects the formal and legal concerns in Kant’s juridical philosophy. However, in order to ensure that the Nuremberg trial, for example, took place according to this premise and not a non-positivist theory of natural right, the following question must be answered: according to which laws were those criminals judged, the laws of the former Weimar Republic or those of an alleged natural right?

2.6 The Illegality of a War Court

War courts may be justifiable from the non-positivist perspective, as judgment could be reached according to laws considered just (laws that follow on from the idea of human rights or the natural law), even if those laws were not made positive by a superior political authority.³⁹ For legal positivism, on the other hand, this type of court is impossible, because there are no supra-state positive laws that allow this kind of juridical judgment, however odious the acts may have been.

According to Kant, since there is a state of nature among the states, it is possible to speak of a right to war, a right in war, and a right after the war. But upon probing those concepts, it can be discerned that those rights have the same juridical statute of private rights in the state of nature, namely, they have to be understood more as claims of rights than legal rights properly speaking. In this sense, speaking of right in this context is nothing more than making a claim on a title but without any superior instance to validate, evaluate, or to enforce it. So, those rights in the state of nature are actually moral claims rather than strict laws that could be used in court. The possibility of a war court would imply that one state has right, and the other has not, which is not the case in the state of nature. “It is *pleonastic*, however, to speak of an unjust enemy in a state of nature; for a state of nature is itself a condition of injustice. A just enemy would be one that I would be doing wrong by resisting; but then he would also not be my enemy.” (*DR*, AA 6:349f.). Because a court is only possible where is law, the solution would be to overcome the state of nature among states. Only when the states freely agree to enter into a federation with positive laws is it possible to legitimize a tribunal to decide upon their conflicts.

2.7 The Refusal of the Principle of Equity

Equity is described in *Doctrine of Right* as a kind of ambiguous right. “One who demands something on this basis stands instead upon his *right*, except that he does not have the conditions that a judge needs in order to determine by how much or in what way his claim could be satisfied.” (*DR*, AA 6:334).⁴⁰ Kant is

³⁹ The argument in 2.6 follows the topic pointed out by Bobbio concerning the relation between law and coercion. Therefore, for many positivists, international law is considered only a law in fieri (cf. Bobbio 1995, 155).

⁴⁰ The argument in 2.7 follows Bobbio’s criterion of the method of juridical science: “legal positivism embraces a mechanical theory of interpretation, which, in the practice of judges, stresses

not denying all legitimacy to the claims of equity, yet he calls attention to the fact that a judge “would have no definite particulars (*data*) to enable him to decide how much is due by the contract”, and that the “judge cannot pronounce in accordance with indefinite conditions” (*DR*, AA 6:334). His point is that the “ill cannot be remedied by way of what is laid down as right, even though it concerns a claim to a right; for this claim belongs only to the *court of conscience* (*forum poli*) whereas every question of what is laid down as right must be brought before *civil right* (*forum soli*).” (*DR*, AA 6:335). In other words, to solve the issue of equity by giving discretionary power to judges is a juridical mistake⁴¹, as it would incur even more injustice, not only to one of the parties but even more so to the entire structure of positive law that has to guarantee accuracy in the application of law and juridical security for the contracting parties. Stability, certainty, and predictability are formal criteria of law that supersede any claims of equity.

Kant’s position is that judges have simply to subsume a particular case under the general rule. This procedure always implies a certain degree of interpretation, due to the nature of concepts as discursive representations, and it is therefore applicable to all spheres of human knowledge and not exclusively to juridical activity. This interpretation, however, is completely different from the liberty to create, modify, or even challenge laws, which becomes customary when judges are accorded the right to pass sentence according to the principle of equity. For Kant, in the absence of a law, judges lack the legitimacy to create one and then pass sentence.⁴² So, the process of pronouncing a sentence should be guided by a mechanical procedure of judgment instead of a reflexive sort of one.⁴³

the declarative over the productive or creative element.” (Bobbio 1995, 133). In this sense, “based on the principles of legal positivism adopted by the juridical order of modern states, judges are not allowed to abrogate the law in the active of passing judgement, in the same sense that customs are prevented from doing so. The judiciary power is, therefore, not the primary source (the source for qualifying) of law.” (Bobbio 1995, 171, own translation).

41 Kant’s practical philosophy would have no problem, however, in considering the claims of equity in the sphere of *the legislative power*, which could improve previous laws or institute more precise ones in response to the demands of society.

42 There is only one exception: “Only where the judge’s own rights are concerned, and he can dispose of the case for his own person, may and should he listen to equity, as, for example, when the crown itself bears the damages that others have incurred in its service and for which they petition it to indemnify them, even though it could reject their claim by strict right on the pretext that they undertook this service at their own risk.” (*DR*, AA 6:235).

43 See: “*mechanismus* der Civilverfassung. Richter sollen mechanisch urtheilen” (*Refl.* 1509, AA 15:825). Concerning the concept of reflexive judgment see *CJ* (AA 5:179).

This position could be challenged insofar it goes against the notion that “with another pressing professional obligation of judges, namely their obligation not to refuse to decide any case that is brought before them and that lies within their jurisdiction.” (Gardner 2012, 34).⁴⁴ In other words, if judges were to refuse to hand down sentence, to judge a case, then they would be disobeying an obligation intrinsic to the juridical power, which would imply that the state itself is not complying with its responsibility to resolve conflicts. The critique goes on to state that this kind of position is unsustainable in the complex context of contemporary states.

In answer to this challenge, it could be argued that, rather than transferring the power to make laws to the judiciary power, the legislative process could be speeded up and made more efficient.⁴⁵ Moreover, for Kant, it seems much worse to allocate legislative functions to judges than to face the problems that might come with excluding the juridical claim of equity. In the latter situation, a contingent *harm* might come about for someone, while in the former situation a structural *wrong* is done to the freedom of all subjects.⁴⁶

44 It is worth pointing out that this assumption was introduced in the fourth article of the Napoleonic code by Portalis, one of the first French critics of Kant (cf. Bobbio 1995, 73 ff.). The article establishes that judges who refuse to hand down a sentence under the pretext of the silence, the obscurity and insufficiency of the law might be accused and punished as denying justice. Some have interpreted this possibility as a dogma of the omnipotence of the legislator, but, actually, it can be gleaned from a speech by Portalis that the true intent of the article was to give more space to the “educated men, to the discretion of the judges” (Portalis 1855, 3). In this sense, this principle goes against the enlightenment and rationalist philosophy that was trying to do exactly the opposite, to restrict the discretionary power of judges. In a sense, it was a kind of return to a common procedure used before the French revolution, when judges had great leeway to interpret and create laws. They were allowed to refer to natural morality or the rule of tradition in order to solve conflicts (Bobbio, 73 ff.). So, it is not surprising that Portalis defends the importance of the principle of equity in judges’ practice.

45 Along the same line, Montesquieu states (1989, 163): “It could happen that the law, which is simultaneously clairvoyant and blind, might be too rigorous in certain cases. But the judges of the nation are, as we have said, only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor. Therefore, the part of the legislative body, which we have just said is a necessary tribunal on another occasion, is also one on this occasion; it is for its supreme authority to moderate the law in favor of the law itself by pronouncing less rigorously than the law.”

46 Similar to the case of lying, see *RPL* (AA 8:429). Maus (2018, 240 f.) argues that, when judges have the power to create laws, the state’s ability to interfere is considerably enlarged without any regulation within the sphere of individual freedom, i. e., the sphere of individual freedom is considerably diminished without any guarantees of how this interference might be avoided or regulated. This would be inevitable when judges have the power to make judgments of equity.

2.8 Denying the legitimacy of the Ideal of the King-philosopher and the Judge-philosopher

It is particularly pertinent to understand that the character of Kant's legal positivism is associated with his rejection of the platonic ideal of the 'king-philosopher'.⁴⁷ "That kings should philosophize or philosophers become kings is not to be expected, but it is also not to be wished for, since possession of power unavoidably corrupts the free judgment of reason." (cf. *PP*, AA 8:369). This refusal is related to the idea that the ruler or some judges lack any privileged access to the idea of justice, and that they have to respect the respective *formal procedures and adopt the gradual perspective of reform* (a quite different path from that defended by Plato, for example, who argues that the realization of his ideal of polity requires that all adults should be expelled from it (cf. Plato 2000, 251/VII,541a)). This means that the guarantee of the state of law and the process of its moral improvement should not be carried out by giving discretionary power to purported saviors with some allegedly privileged capacity to understand justice. This holds, firstly, because knowledge of the moral law is not limited to a few while others lack it, nor is it a gift only of scholars (cf. *G*, AA 4:403f.). Secondly, even knowing the moral law, it can still be extremely difficult to determine how said law might be used to make positive laws in concrete situations. So, for example, even with the categorical imperative of right, drawing up and evaluating various positive laws cannot be approached as a mathematical equation. For this reason, the entire process of creating and sustaining a state of law should be mediated by institutional and political processes that have to engage with the historical particularities of different communities. So, neither a King-philosopher, nor a Judge-philosopher is a practical ideal for the goal of improving positive law and coming up with and implementing a republican state.⁴⁸

47 The argument in 2.8 follows the criteria of how the law should be viewed, i.e., legal positivists see it from its formal perspective, as well the issue concerning the source of law, namely, that it must be created by the legislative power and evaluated according to the formal procedures of its production (cf. Bobbio 1995, 131f.).

48 Maus calls attention to the fact that, during the clearly anti-positivist and anti-formalist Nazi regime in Germany, the similar expression of 'sovereign judge' was used: "In der rechtswissenschaftlichen Literatur der NS-Zeit heisst es denn auch lapidar – und wiederum sehr vertraut: Der 'königliche Richter [...] im Volke Adolf Hitlers muss heraus aus der Buchstabensklaverei des positivistischen Rechtes'. Auch die *Richterbriefe* mahnen die anvisierte Richterelite, 'sich nicht sklavisch der Krücken des Gesetzes' zu bedienen, sie befinden freilich auch, der so herausgehobene Richter sei der 'unmittelbare Gehilfe der Staatsführung'. In der Tat wir hier der logische Zusammenhang zwischen Gesetzesbindung und Unabhängigkeit der Justiz gerade in seiner völ-

Therefore, in Kant's words, "examples of good governments prove nothing about kinds of government. Who governed better than a Titus or a Marcus Aurelius, and yet one left a Domitian as his successor and the other a Commodus." (*PP*, AA 8:353n.). *Mutatis mutandis*, examples of good sentences by judges prove nothing about the moral and institutional adequacy of the judiciary power making laws in a republican state.⁴⁹ In this sense, his normative legal positivism requires the existence of institutions designed not to rely on judges' moral intuition. The jurist, "as an authority on the text, does not look to his reason for the laws that secure the *Mine* and *Thine*, but to the code of laws that has been publicly promulgated and sanctioned by the highest authority (if, as he should, he acts as a civil servant)." (*SF*, AA 7:24f.). Kant goes further and states that it would be unfair to require from judges to prove the truth of this laws against reason's objection, since the "decrees first determine what is right, and the jurist must straightaway dismiss as nonsense the further question of whether the decrees themselves are right. To refuse to obey an external and supreme will on the grounds that it allegedly does not conform with reason would be absurd" (*SF*, AA 7:25). Therefore, it is through the decrees of the legislative power that the government determines what is right and wrong. It is clear then, that Kant's juridical and political philosophy refuses models like the ideal judge Hercules, as defended by the legal non-positivism of Dworkin (1986)⁵⁰. Instead, judges must respect the formal procedures and powers of the judiciary while renouncing any legislative or executive powers so as to avoid the appearance of having privileged access to moral principles and the idea of justice.

ligen Zerstörung verdeutlich. Erst eine Justiz, die die Legitimation ihrer Entscheidungen nicht mehr aus stehendem Gesetzesrecht ableiten kann, wird von situativen politischen Bedürfnissen schlechterdings abhängig und degeneriert zum Anhängsel der Verwaltungsapparate. Dieser Vorgang ist über eine problematische Moralisierung der Rechtsbegriffe gesteuert worden. So fällt auch 1942 während der schlimmsten Perversion deutscher Justiz der schöne Satz: 'Der Richter ist die Verkörperung des lebendigen Gewissens der Nation.'" (Maus 2018, 38).

49 In the same sense, Waldron criticizes Dworkin's claim that "The United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions." (Dworkin 1986, 356). He argues that evaluating examples is not sufficient to sustain the thesis that juridical review, in a strong sense, is the most apt means to assure justice, because plentiful examples exist of clearly unjust court decisions (cf. Waldron 1999, 288). He defines juridical review in a strong sense as the situation by which: 1) courts have the authority to stop applying a statute in a particular case or modifying its application in order to improve the fit with individual rights; and 2) courts have the authority to partially or totally dismiss laws (cf. Waldron 2006, 1354).

50 In the same vein see also Dworkin (1996; 2006, 53ff.; 2011, 400–423, specially 414). I am grateful to Cristina F. Consani, who helped me with Dworkin's point.

2.9 Judges' Limitation of the Freedom of the Private Use of Reason

The denial of the ideal of the king-philosopher also suggests a departure from a monarchical conception of philosophy and an approximation to a republican model (cf. *CPR*, B 766 f.).⁵¹ This is also related to the rejection of the possibility of an intellectual intuition or a supernatural inspiration as the foundation of philosophy (cf. *WDO*, AA 8: 144 f.). Kings might practice philosophy, but not in the role of king, because being a king gives one no privilege in the realm of philosophy. Thus, the difference between a King-philosopher and a King who might engage in philosophy is based on the distinction between the public and private use of reason in the essay *Enlightenment*. It is argued that the free private use of reason not only can but should be regulated, otherwise it would be impossible to create any kind of public institution. If everyone had the power to interpret the law in their own way or to choose when or which laws apply to themselves, it would be impossible to establish any kind of regulation and the juridical state. This would be anarchy.

On the other hand, the freedom of the public use of reason is defined as the “use which someone makes of it *as a scholar* before the entire public of the *world of reader*” (*E*, AA 8:37). This kind of freedom does not limit to scholars the right to engage in debate, but it maintains that everyone who takes part in it must behave as a scholar. This use must also follow the appropriate procedures, such as the correct time and place. The moment at which a law should be obeyed or applied is not the right time to require the freedom of the public use of reason. Therefore, it is not at the moment of pronouncing a sentence that a law should be questioned or changed. The sentence in a trial is only the result of the private use of reason, and, so, judges lack the right to vindicate the freedom of the public use of reason.⁵² This does not mean that judges or other citizens should not

51 The argument in 2.9 follows legal positivism in two ways. Firstly, “the jurist has to study the law in the same way that a scientist studies natural reality, i.e., by restraining himself from formulating judgments of value” (Bobbio 1995, 131 own translation). It is also related to the theory of law as a command, i.e., the law is a command to the judge, and the law is always the law.

52 When one assumes the role of a judge, her freedom of the private use of reason must be restricted, otherwise, the rules and statutes of that institution could not be coherently and systematically be implemented. This was also very clear and central to Hobbes and Montesquieu. According to Hobbes (1985, 317/XXVI,7): “In all Courts of Justice, the Sovereign (which is the Person of the Common-wealth,) is he that Judgeth: The subordinate Judge, ought to have regard to the reason, which moved his Sovereign to make such Law, that his Sentence may be according thereunto; which then is his Sovereigns Sentence; otherwise it is his own, and an unjust one.” In the words of Montesquieu, (1989, 158): “But though tribunals should not be fixed, judgments

have the right to criticize the convenience and the justice of the law, but this is attributed to the public use of reason and implies another set of rules with specific times and locations.

The conceptual distinction between the freedom of private and public use of reason provides an excellent tool for evaluating the conduct of judges and the application of law. It also provides a conceptual framework for understanding Kant's legal positivism and its relationship to enlightenment. That Kant applies this distinction to understanding the practice of judges can be clearly seen in his thoughts on their education. The faculty of law should "base the teachings which the government entrusts to them on *writings* [...], since otherwise there would be no fixed and universally accessible norm for their guidance. It is self-evident that such a text (or book) must comprise *statutes* [...]" (SF, AA 7:22). The authority of law comes from what the legislative power has sanctioned and is not directly derived from reason. This "holds true of the entire code of laws, even those of its teachings, to be expounded to the public, which could also be derived from *reason*: the code takes no notice of their rational ground, but bases itself on the command of an external legislator" (SF, AA 7:22). Therefore, the professor of law gets his authority "not from natural law, but from the *law of the land*" and is a misalliance "to mix with its teachings something it treats as derived from reason, it offends against the authority of the government that issues orders through it" (SF, AA 7:23). The issue of justice is a topic for the faculty of philosophy, which is capable of dealing appropriately with the "free play of reason" (SF, AA 7:23). So, while judges are considered "tools of the government", they "are not free to make public use of their learning as they see fit" (SF, AA 7:18). In case they want to make use of the freedom of public use of reason, they would not be allowed to do so as judges, but would have to adapt to the rules of public and scholarly debate. They would have to take part in other forums which follow other rules.

3 Synthesis Between Positive Law and Justice by Way of Politics

Assuming that the previous arguments are convincing, one inevitably faces the issue of how Kant's legal positivism relates, then, to the metaphysical principles

should be fixed to such a degree that they are never anything but a precise text of the law. If judgments were the individual opinion of a judge, one would live in this society without knowing precisely what engagements one has contracted."

of right laid out in *Metaphysics of Morals*. I defend here that the metaphysical principles of right are not those of positive law, rather principles to laws in just states or republics and that they actually function as meta-political guidelines. They are normative principles for the creation of laws and political institutions and, even more importantly, their normativity focuses on the political moment and not at the level of the administration of positive laws. In this sense, the metaphysical principles of right are moral ones whose main focus is the constitutional and ordinary legislative power.

This interpretation finds support in *three aspects* of Kant's political and juridical philosophy. *The first* concerns his own definition of politics, namely, as an "exercised doctrine of right [*ausübender Rechtslehre*]" (*PP*, AA 8:370).⁵³ In this sense, politics should be viewed neither as the art of prudence, nor as the application of ethical principles of benevolence (cf. *PP*, AA 8:386), but, instead, as the moment to create institutions according to the categorical imperative of right. This means that "[r]ight must never be accommodated to politics, but politics must always be accommodated to right" (*RPL*, AA 8:429), or in more colorful words, that politics should bend the knee to right (cf. *PP*, AA 8:386). Even the unilateral use of force in the state of nature is allowed only in view of the act of creating the state and its political institutions. Therefore, the metaphysical principles of right are not those of a theory of positive law to be applied by judges and jurists, but metaphysical ones for a political theory of state.

This position is also supported by another systematical reason from the field of politics. From the point of view of the scholar of positive law and also the jurist, the law should be seen as part of the realm of nature. So, when one asks jurists 'what is law?', they have to answer "what the laws in some country at some time prescribe." (*DR*, AA 6:229). This definition does not mean to criticize the jurists' position, but only to describe what is proper to their activity, something that leads them very close to Kelsen's pure theory of right. The *a priori* principles of the doctrine of right belong to the realm of freedom, to the realm of what has to be done. Now, for Kant, the mediation between freedom and nature may be thought only through the faculty of reflexive judgment, which takes place by way of the faculty of teleological judgment. Politics is precisely the appropriate context where teleological judgments enable the mediation between freedom and nature, i.e., a teleological mediation between positive law and just law.⁵⁴

⁵³ See also: "[...] in order to progress from a *metaphysics* of right (which abstracts from all conditions of experience) to a principle of *politics* (which applies these concepts to cases of experience) [...]" (*RPL*, AA 8:429).

⁵⁴ It is not possible to fully develop all the consequences of this assumption here. See Klein (2021).

Therefore, it is not in the context of jurisprudence, but in the sphere of politics, that the mediation between what is and what has to be finds its proper systematic context.

The second aspect concerns the issue of the addressee of the metaphysical principles of right. First of all, is important to recognize that nowhere does Kant say his theory is directed toward jurists. On the contrary, he reinforces the meta-political thesis. On the one hand, everyone who lives in society, every citizen, is a potential recipient of his theory. That is why “it is itself a *duty to have* such a metaphysics, and every human being also has it within himself, though as a rule only in an obscure way.” (*DR*, AA 6: 216). On the other hand, there are also more specific addressees, those who assume the political function of people’s legislative representatives. What stands out here is the reformist perspective according to which states created by violence (cf. *DR*, AA 6:339) should approximate the ideal of a republic. Those reforms are thought to be planned and carried out from above (cf. *DR*, AA 6:340). Therefore, the metaphysical principles of the doctrine of right are normative, political ones that justify and contextualize a kind of *normative legal positivism*. This moral requirement of making political and institutional reforms to which the people might give their consent (cf. *DR*, AA 6:327 f.; *TP*, AA 8:304) is a duty of the sovereign. This, in turn, has as its counterpart the right of subjects to be treated in a certain way. Those duties and rights are actually moral requirements and claims that apply at the level of political justice, a context that is logically prior and external to the actual juridical institutions of the state. In this sense, those criteria of justice are not internal principles of the positive law and should not be implemented according to the discretionary decision of a judge. In sum, the metaphysical principles of right are criteria of justice that establish a set of moral requirements for the political public sphere and have as their addressees members of the legislative power, in the first place, and all citizens, in the second. The former have to plan and to gradually make institutional reforms towards a republican constitution, while the latter have to support them.

Finally, the third aspect deals with the relationship between justice and positive law in history. Legal positivism is closely related to the ideals of enlightenment and reform.⁵⁵ So, it is particularly relevant that the conflict between the faculty of philosophy and the faculty of law is summarized in the philosophical

⁵⁵ Hopton (1982, 71 ff.) believes that the link between natural and positive law is restricted only to this third element, a mediation in the philosophy of history. He thinks that the “social contract” has the statue of an “as if”, that is, an element both of natural and positive law. I am not, however, in agreement with this view, because, in this event, the social contract would be limited to a regulative statue, which is not the case.

issue of the possibility of moral progress in history. Kant recognizes the tendency of the faculty of law to not respect its inherent limits, namely, to present and organize the laws given by the state, more precisely by the legislative power. The faculty of law also tries to determine what those laws have to be. In this sense, the faculty of law seems intent on taking over not only the role of the keeper of the state statutes, but also of the guardian and the ruler by defining how and in which direction the state should develop its laws.⁵⁶ The faculty of philosophy, on the other hand, advocates that the state should gradually approximate the requirements of justice by legislative reforms. In this sense, through its representatives, the people must give laws to itself. When the judiciary takes over the function of the supreme interpreter and guardian of law, when the power to rule is given to judges and courts, then they became tutors of the people and the process of enlightenment is blocked. Therefore, the argument that the people might be incapable of making good choices of their representatives, or that said representatives might lack the ability to make good laws is a political and philosophical position that implies an aristocratic and technocratic perspective which contradicts enlightenment ideals and argues in favor of the tutorial model of society.⁵⁷

The issue of the moral progress of humankind in history is also, in the end, the question of whether human beings can increasingly expand their sphere of freedom both in the sense of not suffering undue interference in legal freedoms and in that of increasing their political freedom. Only by limiting the judiciary to

56 “We must, they say, take human beings as they are, not as pedants ignorant of the world or good-natured visionaries fancy they ought to be. But in place of that *as they are* it would be better to say what they *have made* them – stubborn and inclined to revolt – through unjust constraint, through perfidious plots placed in the hands of the government; obviously then, if the government allows the reins to relax a little, sad consequences ensue which verify the prophecy of those supposedly sagacious statesmen.” (SF, AA 7:80). Kant is talking here about politicians, but, as he is dealing with the conflict between the faculty of philosophy and that of law, which seems to indicate a debate about the political role that jurists intend to assume.

57 Maus (2018) strongly criticizes the activist posture of the judiciary that wants to become society’s super ego. Bobbio has also pointed out the importance of the relation between legal positivism and the Enlightenment: “Considering legislation to be the main source of law is a position related to humans’ aim to change society. In the same way that people can control nature using the knowledge of its laws, they might transform society by changing the laws that rule it. In order to do so, however, the law must be made in a conscious way, according to a rational finality; it is crucial that the law be made by legislation. Customary law does not serve that finality, because it is not conscious, it is unreflective, it is a law that expresses and represents the actual structure of society and, therefore, cannot help to change it. Legislative law, on the other hand, embodies a structure that people want the society to assume. Custom is a passive source of law, while legislative law is an active one.” (Bobbio 1995, 120 own translation).

the strictest application of the law, which is one of the central tenets of Kant's legal positivism, is this possible. Therefore, institutional reforms and the improvement of positive law should be carried out through political rather than judicial channels.

Now, one can ask how Kant's theory might deal with some crucial issues about the debate between legal positivists and legal non-positivists, namely: what should judges do in case of a clear contradiction between positive law and what is considered justice? Should they stay silent and only apply the law? How to interpret Kant's restriction clause that one should obey the authority who has power over you, unless it "does not conflict with inner morality" (*DR*, AA 6:371)?

Following the arguments above, one might be inclined to answer that judges are restricted to the application of law, even if they clearly consider it unjust. This does not mean, however, that judges, as scholars, might not take the freedom of their public use of reason to argue that a law should be changed or invalidated. They are not allowed to do so, however, while they are exercising their function as members of the judiciary, otherwise they would be encroaching upon the legislative power.⁵⁸ In the event that the issue concerns not only one law but the whole system of positive law, the answer would remain the same. Judges still have a solution similar to that of a member of the clergy who comes across a contradiction between inner religion and the precepts of his congregation, "he could not in conscience hold his office; he would have to resign from it." (*E*, AA 8:38). So, however critical the opinion of judges concerning the law, it should not be resolved while they hold judicial responsibilities but only when acting as citizens. This answer only works when we are still living in a state with a system of laws, even if a despotic one. When the threshold from a despotic state to a barbaric one is passed, then it fails to make sense to think that the action of judges could make any difference. In barbaric states, there is no law. "But this desperate leap (*salto mortale*) is of such a kind that, once the issue is not that of right but only of force, the people may also try out its own force and thus make every lawful constitution insecure." (*TP*, AA 8:306). In this sense, if Hobbes's sovereign answers only to god, Kant's sovereign might be evaluated in the public sphere and, in the last instance, by history, even if there is no means to coerce him by juridical means. In this way, we can understand the apparently paradoxical relation

58 Kant seems to accept that courts have the power to enact a weak constitutional review, but in more serious cases, legislators themselves have the last word: "In one respect, however, the faculty of law is better off in practice than the theology faculty: it has a visible interpreter of the law – namely, a judge or, if his decision is appealed, a legal commission, and (as the highest appeal) the legislator himself." (*SF*, AA 7:25).

that Kant has with the French revolution, namely, on the one hand, a revolution cannot be juridical and morally justified while, on the other, it can be seen as a morally positive event in the history of human progress. This is so because revolutions might happen when sovereigns in despotic states do not make the required reforms or when people decide to leave the condition of barbaric states. In a certain way, the dethroned monarch might be considered to be an enemy in the state of nature that “instead of honorably carrying out his surrender agreement with the garrison of a besieged fortress, mistreats them as they march out or otherwise breaks the agreement”, therefore he “cannot complain of being wronged if his opponent plays the same trick on him when he can.” (*DR*, AA 6:308n.).

Final Remarks

At the same time that Kant defends a universal concept of justice grounded in the metaphysical principles of right, he also develops a theory of legal positivism concerning the way one has to deal with positive law in a juridical system. This is possible since he approaches the issue of law from different perspectives. First of all, law is seen from the perspective of an *a priori* foundation in the pure practical reason; secondly it is approached from its effectivity, which implies its phenomenal and historical context. Thirdly those two perspectives have to be brought together in the realm of politics. The synthesis between the *a priori* right and the legal positivism doctrine of law is associated, on the one hand, with a formal conception of the structure of the state, its laws, and institutions and, on the other hand, with the *a priori* principles of justice linked to the notion of moral progress and enlightenment. In the same way that transcendental logic is subsumed under the criteria of general logic, just law is also encompassed within the formal criteria of law and the juridical state. Therefore, the concept of a juridical state has, as its necessary condition, the legal positivist perspective of positive law. So, for Kant’s critical legal positivism, the responsibility for improving law according to the criteria of justice does not fall to the judiciary but is the responsibility of the legislative power. In other words, it does not follow the path of juridical legislation but that of politics and legislative legislation. It is up to the judiciary to look after the strict application of the law as it is intended by the legislative power, otherwise some of the central formal criteria of law and the juridical state would be disregarded.⁵⁹

⁵⁹ Kant can be said to open up a path here toward what is called the democratic rule of law and

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Becoming Pluralists: Kant on the Normative Features of Pluralistic Thinking

Abstract: Kant's essays in the philosophy of history, such as *Universal History* and *Conjectural Beginning*, offer a speculative account of the gradual development of reason in our species and of the way the mature use of reason can be attained. Such mature use of reason, as Kant explains a few years later in the published *Anthropology*, is characterized by abandoning the standpoint of "practical egoism" and learning how to exercise the psychological disposition to "pluralism". To be a pluralist, he claims, means to be capable of seeing things from other people's standpoints, of giving deliberative weight to the needs of others, and of taking part in universally valid judgments. But Kant is never explicit about what is required in order to become a pluralist, nor does he explain what it means to be a pluralist beyond a brief remark in the *Anthropology*. My paper takes a detailed look at this under-studied notion and offers a novel account of this notion. I explicate the features of pluralistic thinking and I connect this notion to the public use of reason, the three maxims of common human understanding, and the role played by interpersonal communication in advancing the progress of our rational capacities. I also explain the key role of education in reason's development and the conceptual relationship between the enlightenment of an individual and the enlightenment of the human species.

Introduction

Kant's essays *Universal History with a Cosmopolitan Aim* and *Conjectural Beginning of Human History* from the 1780's offer a conjectural account of the way our species have been gradually learning to make a mature or enlightened use of practical reason. Such mature use of reason, as Kant explains a few years later in the published version of his anthropology lectures, is characterized by abandoning the standpoint of "practical egoism", which amounts to giving deliberative weight only to one's own happiness (*Anth.*, AA 7:130), and learning how to exercise the psychological disposition to "pluralism": endorsing "the way of thinking in which one is not concerned with oneself as the whole world, but rather regards and conducts oneself as a mere citizen of the world"

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(*Anth.*, AA 7:130). On this picture, the pluralist is capable of seeing things from other people's standpoints, of giving deliberative weight to the needs of others, and of taking part in universally valid judgments. This is because the pluralist regards himself as a citizen of the world (i.e., as a member of the community of all human beings) in which every member is subject to the same universal law.

Kant is never explicit about what is required in order to become a pluralist, nor does he explain what it means to be a pluralist beyond the brief remark in the *Anthropology* (cited above). My paper takes a detailed look at this understudied notion of pluralism and explicates the features of pluralistic thinking. My aim is to offer a novel account of Kant's pluralism and to connect it to the notions of public use of reason, the three maxims of common human understanding, and the role played by interpersonal communication in advancing the progress of our rational capacities.

The paper consists of three sections. In §1 I set Kant's notion of the psychological disposition to pluralism against the background of his ethics and his anthropological account of the development of practical rationality. I also argue that Kant's pluralism is not only a political notion, but primarily an ethical one: it denotes not only a certain way of acting (response to 'heteronomous' incentives), but also a certain way of structuring one's motivational psychology.

In §2 I seek better to understand what being a pluralist amounts to – what the specific features of the pluralistic standpoint of reason are. This section addresses the question: How can I be a pluralist in the right way? I claim that being a pluralist involves the following necessary conditions: abiding by the maxim *think for oneself* (thinking freely), abiding by the maxim *think from the standpoint of others* or making public use of reason, and abiding by the maxim *think consistently*.

In §3 I point out that Kant is interested in the process of reason's maturing or enlightenment in *both* every individual human being and in the human species as a whole. Drawing primarily on the *Lectures on Pedagogy*, I raise several questions about the relationship between an individual's maturing and humankind's maturing, I answer them on Kant's behalf, and I point to several shortcomings in his account of reason's maturing.

1 Kant's Ethical Notion of Pluralism

As Kant suggests in the *Conjectural Beginning*, the disposition to practical egoism (giving deliberative weight only to one's own happiness), which characterized the first humans who started using reason, led to the emergence of an unjust juridical order which was motivated by individual self-interest and competitive-

ness. In the same way, the gradual improvement of our juridical order seems to be coupled with a psychological disposition that opposes practical egoism – namely, the disposition to pluralism. Kant’s essays from the 1780’s and his published *Anthropology* show that a necessary condition for the existence of a truly just juridical order is that it consists of members who are pluralists in the Kantian sense: who assume and accept their coexistence in a *community* with others (as citizens of the world) and hence regard themselves as governed by the universal law which regulates the pursuit of their various conceptions of happiness.

An important aspect of Kant’s pluralism is that it is not only a political notion, but primarily an ethical one. In other words, it denotes not only a certain way of acting (response to ‘heteronomous’ incentives), but also a certain way of structuring one’s motivational psychology. When defining pluralism in the *Anthropology*, Kant uses the terms “community” and “world” in the normative way (*Anth.*, AA 7:130). To be part of a world-wide community of human beings has an important practical implication for one’s actions: that of restricting which actions furthering one’s happiness are *permissible* given their potential impact on other members of the community. The idea underlining such a restriction is that all members of the rational community have an equal claim to freedom.¹

Furthermore, Kantian pluralism depicts not only a concern for other people’s desires and goals which may differ from mine (a position commonly referred to as ‘altruism’), but also an understanding that, since people have different conceptions of happiness and their preferences are contingent, pursuing happiness as such cannot be a universal law. Hence pluralism encompasses not only altruism, but also a regard for oneself as governed by the universally valid moral principle which regulates the pursuit of everybody’s happiness. To be a pluralist means not only to be able to see things from other people’s perspectives, but also actually to interact with those unlike oneself in order collectively to settle on ways of discharging the duties that stem from the requirements of morality, which bind all of us. Importantly, it does not suffice to conduct oneself in a way that takes into account the potential impact one’s actions could have on other members of the community; the pluralist must also *believe* that other members of the world-wide human community to which he belongs have an equal claim to freedom, and hence that their happiness needs to be given deliberative weight.

¹ Despite the fact that Kant’s pluralism is an ethical as well as a political notion, it bears close resemblance to Rousseau’s social contract – a strictly political notion. Arguably, Kant intended his kingdom of ends (comprised of pluralistically minded members) to be an ethical counterpart of Rousseau’s social contract.

2 Normative Features of Pluralistic Thinking

So far, I have argued that Kant's notion of pluralism is not only political, but also ethical in scope. I am now going to consider what is required in order to be a pluralist – to reflect on the normative features or components of the pluralistic standpoint of reason. To do so, I will present what I take to be the necessary conditions of being a pluralist²:

- (1) abiding by the maxim *think for oneself* (thinking freely);
- (2) abiding by the maxim *think from the standpoint of others* (making public use of one's reason);
- (3) abiding by the maxim *think consistently*.

While these three maxims of common human understanding have been widely discussed in Kant scholarship, no attempts have been made to conceptually connect them with Kant's conception of pluralism and the related idea of a pluralistic standpoint of reason from his *Anthropology*³. This section will show how Kant's pluralism and his three maxims of common human understanding relate to one another.

2.1 Abiding By the Maxim *Think for Oneself* (Thinking Freely)

There are textual grounds to believe that, for Kant, one of the necessary conditions of being a pluralist is being able to think freely, which for Kant is synonymous with abiding by first maxim of common human understanding: the maxim *think for oneself*⁴. Kant describes this maxim in most detail in his *Enlightenment* and *Orientation* essays as well as in several other texts⁵.

This maxim is arguably the most foundational maxim enabling rational autonomy. A person who thinks freely or thinks for herself is able critically to reflect on her beliefs and desires instead of blindly following the prescriptions of others.

² By 'being a pluralist' I mean actually making use of the disposition to pluralism, not just being disposed to do so.

³ See, for example, O'Neill (1989; 1992); Velkley (1989); Neiman (1994); Weinstock (1996); Munzel (1999); Deligiorgi (2002; 2005); Patrone (2008).

⁴ Free thinking is discussed by Kant in the *Enlightenment* and *Orientation* essays. The three maxims of common human understanding appear in slightly different formulations in three places: *CJ* (AA 5:294–295); *Anth.* (AA 7:200); *Log.* (AA 9:57).

⁵ See also *CJ* (AA 5:294–295); *Anth.* (AA 7:200); *Log.* (AA 9:57).

The maxim *think for oneself* or the requirement to think freely is described in the *Enlightenment* and *Orientation* essays, the third *Critique*, and *Anthropology* as a negative principle: one must not rely (unquestioningly) on the authoritative claims of others – a kind of behavior which characterizes private uses of reason (cf. *E*, AA: 8:37) – but rather on the authority of one’s *own* rational and critical capacities. In third *Critique*, Kant describes this maxim as “the maxim of the *unprejudiced* way of thinking” (*CJ*, AA 5:294) adopted by people who do not rely on the opinions of others (heteronomy of reason). Adopting this maxim therefore requires that we think of ourselves in a certain way: as deliberative agents capable of making sound judgments independently of others (cf. *E*, AA 8:35; *OT*, AA 8:146 f.; *Anth*. AA 7:228 f.). As Deligiorgi aptly puts it, “The change from submission to external authority to submission to the authority of one’s own reason is a condition for undertaking what is required to make good this claim to authority, namely, the commitment to autonomous reasoning” (Deligiorgi 2005, 93). Only then, O’Neill suggests, will we be able to hear and debate a plurality of viewpoints expressed by people whose thinking is independent (O’Neill 1989, 46).

Being able to think freely or for oneself is linked to the next condition of being a pluralist – thinking from the standpoint of others or making public use of reason – which describes the right way of structuring our rational deliberation and the right way of communicating with other people. But the condition of free thinking or thinking for oneself specifically tells us that, in addition to having to reason in a public way (on which I will elaborate shortly), I must do so specifically because *I myself* arrived at the conclusion that this is the right way for me to reason, and not because someone convinced or pushed me to do so. My motivation to reason in a public way and subsequently to engage in interpersonal communication in the right way must be the result of a process of autonomous deliberation (of free thinking). My way of reasoning, in other words, must be free from intellectual constraints imposed on me by others.

As a child, I “let others think for [me] and merely imitated others or allowed them to guide [me] by leading-strings” (*Anth.*, AA 7:229), Kant writes in the *Anthropology*. But, at some point, I must exit such immaturity and adopt the maxim of thinking for myself. When an adult willingly stays within the condition of immaturity beyond her childhood years, thus staying within it despite having the capacity to exit it, her immaturity becomes “self-incurred” (*E*, AA 8:41; *Anth.*, AA 7:229) and blameworthy, unlike the inevitable and natural immaturity of a child.

Of course, exiting immaturity has a social and cooperative dimension to it. This is clear from Kant’s emphasis on the fact that any such human development can only happen in a social setting. Thus, in some sense other people may – and indeed must – play a role in my decision to exit intellectual immaturity and to

endorse the maxim *think for oneself*. But the very agent whose reasoning is to be developed plays a crucial, first-personal role in this development – a role which cannot be fulfilled by any other agent. Thus, even though others provide the agent with various educational and social opportunities to develop her reasoning skills and influence her motivations toward endorsing the maxim of thinking for oneself, it is still the case that she herself must decide to make use of these opportunities and to develop certain skills and cultivate certain motivations. In this way, abandoning immaturity is the first autonomous decision in one's life and the first step toward one's enlightenment. This is why in the *Anthropology* Kant describes one's decision to exit the state of immaturity as “the most important revolution from within the human being” (*Anth.*, AA 7:229).

The capacity for autonomous reasoning, which we gradually improve over the course of our life, is the hallmark of being human. It is the ability to make one's own reason the author of the rules and maxims that guide our thoughts and actions. This responsibility is connected to the fact that we are free not only in the negative sense of being independent from alien causes (such as the laws of nature) and being able to cause something on our own. We are also free in the positive sense: the structure of our will is such that we are driven to arrive at the principle of acting only on maxims that could be endorsed by all other rational beings (*G*, AA 4:446–449). This is what Kant calls in the *Groundwork* “the will's property of being a law to itself” (*G*, AA 4:447).

In the *Orientation* essay Kant elaborates on the possibility of free or autonomous thinking and thus of achieving enlightenment. He connects it with free communication with others, claiming that the freedom to communicate with rational interlocutors is crucial to maintain our capacity to think freely. Kant writes: “the same external constraint which deprives people of the freedom to communicate their thoughts in public also removes their freedom of thought” (*OT*, AA 8:144). Similarly, in *Theory and Practice* Kant connects freedom of expression with the public use of reason: “a citizen must have, with the approval of the ruler himself, the authorization to make known publicly his opinions about what it is in the ruler's arrangements that seems to him to be a wrong against the commonwealth. For, to assume that the head of state could never err or be ignorant of something would be to represent him as favored with divine inspiration and raised above humanity. Thus *freedom of the pen* [...] is the sole palladium of the people's rights” (*CS*, AA 8:304, original emphasis). Freedom of expression, Kant claims here, is important during any communication with the sovereign and for improving any issues within a commonwealth. The last sentence of the quoted passage might also be read as cautionary: having freedom of expression does not mean that one can also engage in whatever behavior or (political) movement one wants to; the freedom concerning one's reasons for

deliberations is not simultaneously the freedom concerning one's reasons for actions.

Chronologically speaking, *Orientation* is the first place (1786) where Kant presents all three maxims of common human understanding as a coherent set of maxims. Prior to 1786, there is no mention of the three maxims as such. Of course, in *What is Enlightenment?* (published two years earlier) Kant talks about a principle which he will later label the first maxim, calling it “the propensity or calling to think freely” (*E*, AA 8:41) or “the calling of each individual to think for himself” (*E*, AA 8:36). But this principle is discussed in isolation from the other two and it is not explicitly called a maxim. On these grounds, one may suspect that Kant did not come to terms with the three maxims of common human understanding until 1786, even though they (especially the first one) were implicitly in the background of his theorizing about rational development and interpersonal communication.

Some critics, such as G. Felicitas Munzel (1999), have taken the fact that *What is Enlightenment?* centers around the prescription to think freely as the key principle of achieving enlightenment to mean that abiding by this principle is sufficient for becoming enlightened (Munzel 1999, 223–236). Moreover, in arguing that learning to think freely means becoming enlightened, Munzel uses the term ‘the first maxim’ as a synonym for the principle of thinking freely that Kant postulates in *What is Enlightenment?* even though Kant does not use this term in this essay. I believe it is incorrect to equate learning to think freely with becoming enlightened, and I think that Munzel’s anachronistic use of the term ‘the first maxim’ to refer to the principle of thinking freely in the context of *What is Enlightenment?* illuminates this mistake. I have at least three reasons for this. First, when we look at the intellectual history of Kant’s terminology, it becomes clear that a plausible reason why Kant does not explicitly mention the second and third maxims in *What is Enlightenment?* is because he has not yet started calling them this way. (He does, in fact, refer in this essay to the principle of making public use of one’s own reason, which – as I will argue shortly – is closer to the second maxim.) Second, as I have already said, Kant does not explicitly talk about *the first maxim* or any other maxims in this essay. Third, there are independent exegetical and philosophical reasons for believing that, for Kant, becoming enlightened (or becoming a pluralist) requires adopting more principles than just the principle of thinking freely – and I will argue for this in the remainder of this section.

2.2 Abiding By the Maxim *Think From the Standpoint of Others* (Making Public Use of One's Reason)

As Kant writes at the end of the *Orientation*, the criterion for abiding by the first maxim *think for oneself* is that one thinks according to grounds that could be valid for all rational beings: “*Thinking for oneself* means [...] no more than to ask oneself, whenever one is supposed to assume something, whether one could find it feasible to make the ground or the rule on which one assumes it into a universal principle for the use of reason” (*OT*, AA 8:146n). This formulation of the first maxim shows how it leads to the second maxim *think from the standpoint of others*. As formulated in the *Critique of Judgment*, the second maxim consists in one’s capacity to “set [one]self apart from the subjective private conditions of the judgement, within which so many others are as if bracketed, and [to] reflect on his own judgement from a *universal standpoint* (which he can only determined by putting himself into the standpoint of others)” (*CJ*, AA 5:295). This maxim (also called the maxim of liberal, enlarged, or broad-minded thinking (cf. *Anth.*, AA 7:228; *CJ*, AA 5:294)) focuses on the challenge of using one’s reason correctly once one has learned to rely only on the authority of one’s own reason instead of the authority of others. Abiding by this maxim is the second necessary condition of being a pluralist: a person is a pluralist if she thinks from the standpoint of others.

The maxim of thinking from the standpoint of others or of making public use of one’s reason governs the following aspects of being a pluralist: (i) thinking as though one was about to address the entire “society of citizens in the world” (*E*, AA 8:37), (ii) actually addressing the world at large, and (iii) in so doing regarding oneself as a member of the community of all human beings. To show why this is the case, I will draw primarily on Kant’s discussion of the function of making public use of reason from the *Enlightenment* essay. This maxim, moreover, describes more precisely the contrast between reason’s egoism and reason’s pluralism, which Kant draws in the *Anthropology*: a person who does not abide by this maxim is a “practical egoist” who thinks he is cognitively self-sufficient; one who abides by it is a “pluralist” who takes other people’s needs into account when engaging in practical deliberation, thereby enlarging his thinking by the perspectives and reasons of others.

In the *Enlightenment* essay, Kant defines the public use of one’s reason in the following way: “The public use of one’s reason must always be free [...]. [B]y the public use of one’s own reason I understand that use which someone makes of it as a scholar before the entire public of the world of readers [...] insofar as [...] [one] regards [one]self as a member of a whole commonwealth, even of the society of citizens in the world” (*E*, AA 8:37). This definition already presupposes the

intellectual independence or autonomy of the person who makes the public use of her *own* reason – that is, it presupposes the first maxim *think for oneself*. A person who makes public use of her *own* reason is someone who is already able critically to reflect on her beliefs and desires instead of blindly following a number of intellectual, political, or religious authorities (“guardians” in Kant’s own terminology (*E*, AA 8:36)).

Kant’s definition of the public use of reason suggests that to make a public use of reason means to address the entire world at large (“the society of citizens in the world”, “a whole commonwealth” (*E*, AA 8:37)) instead of a specific group of individuals. For example, public intellectuals wishing to influence the public opinion on a particular issue by expressing themselves in popular media should exercise reason in a public way. Kant himself wrote numerous pieces of this kind, including his *Essays regarding the Philantropinum*. As O’Neill emphasizes, “[t]he notion of a *public* use of reason is [...] defined in terms of the *audience* whom an act of communication may reach” (O’Neill 1989, 32). This means that Kant poses certain constraints about the way one can communicate to the entire community of human beings: one should only say things that could be understood by, or rendered intelligible to, the world community. This is because “[o]nly if we can communicate in ways that are generally interpretable is there any point in seeking an unrestricted audience. [...] A genuine debate needs some mutual comprehension, not just hostile talking past one another or a reliance on some external authority” (O’Neill 1989, 34, 41). By contrast, when people make a private use of their reason, they address merely an audience that has been restricted or delineated by an authority.

In this regard, Kant’s public/private distinction does not neatly map onto contemporary uses of these terms. Usually, the sphere of thinking that free from external constraint is labelled *private*, while the *public* sphere at least may be regulated by law. For Kant, though, individuals holding public offices and representing a particular institution must, in their capacity as public officers, make only a private use of reason: private (or deprived) because constrained by an authority external to reason itself, and thus ungrounded by principles of reason universal to all humankind. By contrast, for reason to be used publicly means for it to be, first, free from non-lawlike, non-shareable principles imposed by a contingent authority; second, to be free from lawlessness and arbitrariness⁶. Guiding one’s thinking by the maxim *think from the standpoint of others* or making a public use of reason therefore involves focusing on the formal and necessary features of human rationality instead of on the material and contingent fea-

6 See also Bittner (1974, 194–196); O’Neill (1992, 297–299); Höffe (1997).

tures of one's specific situation in the world, and hence that it involves focusing on the merely possible judgments that others could make instead of their actual (contingent) judgments. Since there is no external authority accepted by all rational deliberators, the only kind of authority that can characterize public uses of reason is internal to human reason itself (cf. *OT*, AA 8:145–146; *CPR*, A 747/B 775). The only thing public reason is constrained only by are its own, autonomous principles – those shareable among all humans – which, being fundamental to human reasoning, are not guided by some local authority, nor by lawless arbitrariness.

The requirement to address the entire world at large is thus the requirement to structure our reflection in a way that takes into account whether our reasons can be considered as universally valid. This requirement connects the public use of reason with the ethical requirement to treat all human beings as autonomous rational agents with equal claims to freedom. In the *Orientation* essay Kant re-describes this aspect of making public use of reason in a way that suggests a 'universalizability' criterion: "To make use of one's own reason [in a public way] means no more than to ask oneself, whenever one is supposed to assume something, whether one could find it feasible to make the ground or the rule on which one assumes it into a universal principle for the use of reason. [...] [W]ith this examination he will see superstition and enthusiasm disappear, even if he falls far short of having the information to refute them on objective grounds" (*OT*, AA 8:146f.). For Kant, then, regularly making public use of reason means (among other things) to structure our rational deliberation so that our deliberative processes could be understood and accepted by the entire world of rational deliberators. This is how other rational deliberators are 'taken into account' in the right way.

Furthermore, regularly making public use of reason describes a certain way of thinking as well as a certain way of speaking or communicating. These two are tightly related because, as Wood puts it, "Thinking itself is a *social* activity because it must be critical, testing what is thought from a plurality of standpoints in order to achieve unity" (Wood 1999, 302, original emphasis). It describes a certain way of thinking because it needs to pass the *hypothetical* test of being understandable and intelligible to the entire world of rational deliberators. And it describes a certain way of speaking because pluralism requires a specific way of communicating with others – it poses limits on the way interpersonal communication happens. Specifically, it must presuppose that others are also autonomous rational agents with equal claims to freedom which I must respect because of our common membership in the human community. If a deliberative agent regularly makes public use of her reason and thereby examines whether her beliefs and claims could be accepted by others (considered as universally valid),

then she is ready to *actually* (instead of merely hypothetically) engage in the right kind of interpersonal communication. Actually communicating in such a way is crucial to the project of collectively clarifying, and learning about, moral principles that ought to guide us all. This is because exchanging opinions is necessary for testing and comparing them in order collectively to arrive at better practical norms. Kant frequently emphasizes that our human capacities can develop and improve only in a social setting. As we read in the *Anthropology*, “with all other animals left to themselves, each individual reaches its complete destiny [*Bestimmung*]; however with the human being only the species, at best, reaches it” (*Anth.* AA 7:324; cf. *IUH*, AA 8:18–19). This is why we need not only freedom of thought or conscience, but freedom of expression as well.

Unlike contemporary accounts of public reason and pluralism such as Rawls’s or Gaus’s, Kant’s public use of reason is not meant to regulate our political participation, or be confined to strictly political matters or to the decision-making processes of governments. Rather, the meaning that Kant applied to the notion of making public use of one’s reason is the ability to reason in a way that could be in principle understood and debated by a community of public intellectuals interested in the topic, even if their opinions are not popular in such a community. The ability to make public use of one’s own reason therefore regulates public discussions even if they are not about fundamentally political issues. This ability also requires freedom of consciousness and freedom of expression. For Rawls, Gaus, and other contemporary public reason theorists, pluralism is a problem for democratic theory: that people have different reasonable conceptions of the good and that they face reasonable disagreement about their beliefs are facts about our society, and we need a system that enables all people to engage in political participation despite this pluralism. For Rawls, public reason is a solution to the challenge of pluralism: it is a standard for decision-making in the political sphere and for political legitimacy that is acceptable to all reasonable members of the community (Rawls 1993). Gaus’s conception of justificatory liberalism takes this standard to be the epistemic criterion of reasonability that applies to individual beliefs, not to comprehensive doctrines or sets of beliefs endorsed by reasonable individuals (Gaus 1999, 273–282) (As Gaus has argued, even reasonable people often hold some unreasonable beliefs (Gaus 1995)). Kant’s pluralism is a notion that acknowledges that there are many different conceptions of happiness and thus the only way we can construct a moral universe to which we all equally belong is by distinguishing happiness (which is contingent) from morality (which is universally valid). When Kant talks about making public use of reason, he is not talking about full and equal political participation or political decision-making, but about the fact that we can, and should be able to, write down our opinions and debate them. Kant’s views are therefore closer to

Gaus's conception of justificatory liberalism than to Rawls's political liberalism: first, both frameworks apply to a wider set of beliefs than political beliefs; second, both of them center on the way particular opinions are formed instead of on the entire set of beliefs individuals have.

Moreover, Kant believes that one uses one's reason in a public way only when, in addressing the entire world, one regards oneself as a *member* of the community of all human beings. This component of thinking from the standpoint of others and using reason in the public way expands on the former component. When structuring my rational deliberation so that my reasons could be understood and accepted by all other human beings, I must *also* think of myself as being a member of (and a participant in) the human community. Structuring my rational deliberation in the public way involves regarding myself as a part of this community. This component of the public use of reason, just like Kant's notions of cosmopolitanism (from the *Universal History*) and of pluralism (from the *Anthropology*), presupposes the agent's regarding herself a citizen of the world. In all three definitions – of pluralism (in *Anthropology*), of cosmopolitanism (in *Universal History*), and of public use of reason (in *Enlightenment*) – Kant makes use of the same term: “citizen of the world” [*Weltbürger*] (*Anth.*, AA 7:130; *IUH*, AA 8:26; *E*, AA 8:37).

2.3 Abiding By the Maxim *Think Consistently*

Finally, the third necessary condition of being a pluralist is abiding by the third maxim, *think consistently*. A person is a pluralist if she thinks in a consistent manner. An alternative formulation of this maxim in the third *Critique* is “Always to think in accord with oneself” (*CJ*, AA 5:294). Unlike the previous two maxims of common human understanding, this maxim represents a more general commitment to rationality understood as means-end coherence and a way of thinking unified under common principles, which is required by reason. In other words, it represents a rejection of arbitrariness and lawlessness.

Deligiorgi has argued that the maxim *think consistently* represents only the need to apply the previous two maxims in a consistent and regular manner. She writes: “Consistency is here [in the third maxim] put to the task of joining together the negative moment of intellectual emancipation, the throwing off of the ‘yoke of immaturity’, with the positive moment of autonomy through which we seek to override the narrowly subjective conditions of our judgement. This emphasis on consistency suggests that autonomy is not just a matter of ad hoc instances of reasoning, but a life-shaping discipline” (Deligiorgi 2002, 151). In a similar vein, G. Felicitas Munzel has interpreted the maxim of consistent

thinking as “the union of the first two maxims” (Munzel 1999, 223) and “the consummation of the first two” (Munzel 1999, 224).

However, I think it is a mistake to interpret Kant’s third maxim of common human understanding solely as requiring a consistent and regular application of the maxim of thinking for oneself and the maxim of thinking from the standpoint of others. One reason for this is that the first two maxims already have built into them the requirement of being abided by regularly and as often as possible – after all, they are normative principles of good or correct thinking, meant to guide the development of human practical rationality and the intellectual flourishing of the agent who applies them. Another reason is that the third maxim of common human understanding, given that its place is on a par with the other two maxims, should have a distinct, novel meaning instead of merely guiding the application of the previous two maxims.

My reading of the maxim of consistent thinking is that it requires holding non-contradictory beliefs that are, moreover, unified under common principles of reason. In other words, the beliefs one holds have to be not only logically consistent, but also systematic in the sense described in the *Architectonic* of the first *Critique* (CPR, A 832–851/B 860–879). Since reason’s end is unity under principles⁷, thinking must be consistent if it is to count as the exercise of a skill and if it is to achieve reason’s end. Consistent thinking includes being accountable to oneself as a rational autonomous being as well as to others with whom one may enter into a discussion. In a certain sense, as the Kingdom of Ends formulation of the Categorical Imperative (cf. *G*, AA 4:433, 4:439) suggests, being rationally autonomous already involves accountability to one’s community.

Deligiorgi’s and Munzel’s interpretations of the third maxim as merely uniting the first two and representing the need to apply the previous two maxims in a consistent and regular manner is in my view mistaken. To be sure, such a reading might find some textual support in Kant’s discussion of this maxim from the third *Critique*, where he writes: “The third maxim, namely that of the consistent way of thinking, is the most difficult to achieve, and can only be achieved through the combination of the first two and after frequent observance of them has made them automatic” (*CJ*, AA 5:295). However, I do not think that

7 In the *Anthropology*, for example, Kant writes: “In the end, since the entire use of the cognitive faculty for its own advancement, even in theoretical cognition, surely requires reason, which gives the rule in accordance with which it alone can be advanced, we can summarize the demand that reason makes on the cognitive faculty in three questions, which are directed to the three cognitive faculties: What do I want? (asks understanding), What does it matter? (asks the power of judgment), What comes of it? (asks reason)” (*Anth.*, AA 7:227). See also *CJ* (AA 5:294–295).

this remark of Kant's actually supports Deligiorgi's and Munzel's interpretation. In this passage, Kant is only claiming that the third maxim, which is the most difficult regularly to abide by, can only be applied after one has learnt regularly to abide by the first two maxims. Perhaps, then, learning to regularly abide by the first two maxims is a necessary condition for learning the third. However, Kant is not claiming in this passage that (as Deligiorgi and Munzel suggest) all that the third maxim consists in is consistent and regular application of the first two maxims.

Taken together, the three maxims of common human understanding "are presented as exemplifying the requirements for preserving lawlikeness without assuming a lawgiver" (O'Neill 1992, 300). They are supposed to guide our use of reason in thinking and acting so that we can be fully-fledged, mature members of the human community. Tying it to the notion of "pluralism" from the published *Anthropology*, these members are pluralists who endorse "the way of thinking in which one is not concerned with oneself as the whole world, but rather regards and conducts oneself as a mere citizen of the world" (*Anth.*, AA 7:130). To regard and conduct oneself as a citizen of the world means to guide one's reason only by the principles that are common to all human beings.

3 Pluralism of an Individual and Pluralism of the Species

Kant's discussion of the lengthy and demanding process of developing practical reason (learning to adopt the pluralistic standpoint of practical reason) pertains both to the development of an individual human being over the course of his or her life and to the development of the entire human species across numerous generations. In a certain sense, both humanity as a whole *and* every individual human being must strive toward achieving the maturity of reason. In *What is Enlightenment?* and in the *Anthropology* Kant talks about the duty of extricating oneself from reason's immaturity or unfreedom that *every single* individual has. He states that "it is difficult for any single individual to extricate himself from the minority that has become nature to him" and that "there are only a few who have succeeded [...] in extricating themselves from minority" (*E*, AA 8:36). He also underlines the significance of the task of exiting immaturity of reason by calling it "the most important revolution from within the human being" (*Anth.*, AA 7:229). But it is also clear that Kant is interested in the rational maturing of the *humankind* as a whole (of the entire human community), which is clear

from his use of phrases such as “universal enlightenment”, “humankind’s emergence from its self-incurred immaturity”, or “an enlightened age” (*E*, AA 8:40).

Once we realize that Kant is concerned with both of these processes, it is natural to ask what the relationship between them is. Even though Kant does not explicitly discuss this question, it seems to be in the background when, toward the end of the *Anthropology*, he admits the puzzling and somewhat hopeless nature of humanity’s task of educating itself: “The human being must [...] be *educated* to the good; but he who is to educate him is on the other hand a human being who still lies in the crudity of nature and who is now supposed to bring about what he himself needs. Hence the continuous deviation from his vocation with the always-repeated returns to it” (*Anth.*, AA 7:325, original emphasis). In a similar vein, in the *Lectures on Pedagogy* he observes that humans can only be educated and perfected by other (imperfect) humans, which makes this process challenging, slow, and filled with failed attempts: “The human being can only become human through education. [...] It must be noted that the human being is educated only by human beings, human beings who likewise have been educated. That is also why the lack of discipline and instruction in some people makes them in turn bad educators of their pupils” (*LP*, AA 9:441–443).

Investigating the relationship between the maturing of an individual and of humanity as a whole can be broken down into several narrower questions, which I intend to address in this section. First, how many individuals in a given community (or in the entire world) must achieve maturity in order for humankind as a whole to be deemed mature? In particular, does humankind’s maturing depend on specific individuals in public roles, such as political leaders, religious leaders, or teachers? Moreover, how does the maturing of different groups of people (e.g. nations) bear on the maturing of the entire human species? In the remainder of this section I will sketch Kant’s views about the relationship between the maturing of an individual and of humanity as a whole, pointing to the shortcomings of Kant’s answers to the questions posed above and providing plausible answers on Kant’s behalf.

Kant claims both that humanity’s enlightenment depends on the enlightenment of the individuals, and that an individual person’s enlightenment in turn depends on that of humanity’s. The first observation is perhaps trivial (given that humanity is composed of individuals), but the latter is not. Kant firmly believes, as we saw before, that the development of human capacities can only happen in a social setting. In the *Lectures on Pedagogy* he claims that for a person to become gradually more mature or enlightened, he needs to receive adequate education from people appropriately trained to do so. He then divides the education of the human being into three chronological stages: care, discipline, and instruction (cf. *LP*, AA 9:441–444). As an infant or toddler, the

human being needs the *care* of his parents so that he does not make a harmful use of his powers. (By ‘harmful’ Kant does not mean an act that would be intelligibly evil, for toddlers cannot be morally blameworthy, but an act that could harm other people or this child’s own development.) The toddler does not take an active role in this stage of his own education, but passively receives help from others. Next, as a pupil, the human being requires being *disciplined* so that he does not deviate by means of his animal impulses from his human development (which, by definition, is contrasted with remaining an animal). For Kant, the stage of discipline amounts to a negative process of curtailing one’s tendency to animal behaviors. It is this process that imprints on a child’s mind the “precepts of reason” (*LP*, AA 9:442). Finally, as a young adult or an apprentice, the human being needs to receive *instruction* – the positive part of education – in order to cultivate his rational capacities and moral virtue, and hence to learn to participate not just in the social and technical, but also in the moral life of humanity.⁸

It seems that it is only the third stage of education – instruction – that begins the process of learning how to be a pluralist or an enlightened person. The first two stages, by contrast, are merely responsible for preparing one’s mind to be in a position to receive such instruction and act on it, but do not constitute parts of the process of becoming enlightened and do not require any active participation on the pupil’s behalf. All three stages of education cannot happen without the adequate participation of other human beings. This means not only that a child cannot become a human proper in isolation from others, but also that others’ failures to find out what the effective methods of education are will sabotage a child’s chances of reaching enlightenment and achieving the pluralistic standpoint of reason.

Since, Kant believes, we still have not managed to find the perfect and most efficient way of educating children, it is plausible – although he never says this explicitly – that no individual person has so far managed to achieve full enlightenment. However, any individual’s rational progress will, when put back into the community, constitute a small step in the direction of humanity’s enlightenment. This, in turn, will be beneficial for the rational progress of the individuals of the next generation. Kant eloquently conveys this idea of one generation educating the next in the *Lectures on Pedagogy*: “Education is an art, the practice of which must be perfected over the course of many generations. Each generation, provided with the knowledge of the preceding ones, is ever more able to bring about an

⁸ For a more detailed description of the phases of a child’s education, which goes beyond my purposes here, see Munzel (1999, 279 – 288).

education which develops all of the human being's natural predispositions proportionally and purposively, thus leading the whole human species toward its vocation" (*LP*, AA 9:446).

Kant discusses the stages of the child's education into a fully-fledged person in several other places, such as the *Universal History*, the *Anthropology*, and once again later in the *Lectures on Pedagogy*. Each time he refers to them as cultivation, civilization, and moralization.⁹ Cultivation is the process of learning skillfulness of carrying out an end by finding suitable means, but without yet being able to set an end for oneself. Civilization amounts to becoming prudent, learning manners and cultured behavior appropriate to the times one lives in. Finally, moralization is learning to choose from the multitude of possible ends only *good* ends – "those which are necessarily approved by everyone and which can be the simultaneous ends of everyone" (*LP*, AA 9:450).¹⁰

Each time Kant mentions the three stages of human development he hints at their close connection with humanity's large-scale rational progress toward fulfilling its vocation. In the *Universal History* he talks about cultivation, civilization, and moralization as something that "we", collectively, are involved in (*IUH*, AA 8:26). In the *Anthropology* he discusses this triad as something the human being is "destined" to achieve as his "vocation" by living "in a society with [other] human beings" (*Anth.*, AA 7:324). Likewise, in the *Lectures on Pedagogy* he notes that the development of the individuals through education must "reflect especially on the development of humanity", "try to bring posterity further than they themselves have gone", and must "see to it that humanity becomes not merely skillful but also moral" (*LP*, AA 9:449). In this text we also find a more explicit indication that these stages of a person's development are possibly stages of humanity's development, too: "We live in a time of disciplinary training, culture and civilization, but not by any means in a time of moralization" (*LP*, AA 9:451).¹¹ If it is possible for Kant describe his own times with the use of these stages, then it must be the case that these stages can describe not just phases in an individual's life, but *also* phases of humanity's overall progress. Surely, moreover, in any given period of time there exist individuals with differ-

⁹ In the *Lectures on Pedagogy* (AA 9:449–50), he actually mentions four stages, adding discipline to the beginning of the list.

¹⁰ I believe that these three stages correspond, respectively, to the exercise of the technical hypothetical imperative, the pragmatic hypothetical imperative, and the categorical imperative (cf. *G*, AA 4:414–417).

¹¹ In *What is Enlightenment?* we find a very similar observation: "If it is now asked whether we at present live in an enlightened age, the answer is: No, but we do live in an age of enlightenment" (*E*, AA 8:40).

ent levels of development and enlightenment. Perhaps there are, on average, more developed or enlightened people now than before, or perhaps the educated people who exist now are more enlightened, on average, than educated people from a century ago. Nonetheless, in the current time, as in the past, people who are alive have different levels of development and enlightenment, even within the same generation.

Kant frequently says that an individual cannot by himself reach the human destiny, perfection, or vocation; only the species as a whole can.¹² These observations make it particularly difficult to draw a sharp distinction between the process of reaching enlightenment for a single person and for humanity as a whole. A naïve reading of the idea that only the whole species can reach its vocation would be that, since it is the vocation to *humanity* that Kant is concerned about, it is obvious that any single individual cannot fulfill it, since no single individual is equal to the whole humanity. But this is surely not all that Kant means here.

Rather, for Kant the intellectual achievements of one generation are a baseline, as it were, for the education and development of the generation that is to follow. This is why “the correct concept of the manner of education can only arise if each generation transmits its experience and knowledge to the next, each in turn adding something before handing it over to the next” (*LP*, AA 9:446). If a critical number of generations succeeds in this regard, then “education will get better and better and each generation will move one step closer to the perfection of humanity” (*LP*, AA 9:444). For one generation collectively to take a step toward enlightenment, therefore, is a necessary condition of the enlightenment of individuals who will live in the future.

But how many individuals in a given community (or in the entire world) must achieve maturity in order for the individuals of the following generation to have the right circumstances for their own enlightenment? And does the maturing of future individuals depend on any particular people? Kant does not provide an answer to the former question, but he provides one to the latter. The maturing of people from the next generation, he says, depends on how enlightened

¹² In the *Anthropology*, for example, he says: “with all other animals left to themselves, each individual reaches its complete destiny; however with the human being only the species, at best, reaches it” (*Anth.*, AA 7:324). In the *Universal History* he similarly claims: “In the human being (as the only rational creature on earth), those predispositions whose goal is the use of his reason were to develop completely only in the species, but not in the individual” (*IUH*, AA 8:18–19, original emphasis). In the *Lectures on Pedagogy*, he claims: “It is also completely impossible for the individual to reach the [human] vocation” (*LP*, AA 9:445).

the individuals in public roles – especially teachers, political leaders, and religious leaders – currently are.

The role of the teachers is to design and execute the right plan of education for the schools – a plan whose aim is to improve the human condition. Kant writes: “the design for a plan of education must be made in a *cosmopolitan* manner. [...] Accordingly, the set-up for the schools should depend entirely on the judgment of *the most enlightened experts*. [...] It is only through the efforts of people [...] who take an *interest* in the best world and who are capable of conceiving the idea of a future improved condition, that the gradual approach of human nature to its purpose is possible” (*LP*, AA 9:448–449, my emphasis). Kant publicly expresses great admiration and contentment about one particular educational institution in Prussia – the Philanthropinum Institute in Dessau established by J. B. Basedow in 1774 – of which he wrote that it is the first institution that “[has] come about according to the perfect plan of education” and “the greatest phenomenon which has appeared in this century for the improvement of the perfection of humanity” (*V-Anth/Fried*, AA 25:722–723). By looking at Kant’s description of the teaching methods endorsed by the Dessau Institute and advocated more generally by the Philanthropinismus reform movement, we may perhaps be able to infer how an ideal cosmopolitan plan of education might look like¹³.

First, this school is supposed to give its pupils the opportunity “to form themselves into teachers according to the true educational method” (*Essays regarding the Philanthropinum*, AA 2:450) who can then spread this method around the whole country (perhaps eventually the whole globe) and foster the enlightenment of pupils from other cities (and even countries). This shows that improving the human condition is indeed one of the tasks of more enlightened people. In fact, one sense of being enlightened is simply to know *how* to improve the human condition by occupying a public post. As for the more specific educational methods, the Dessau Institute introduced reducing the emphasis on memorization in favor of critical thinking and enjoyable conversational learning, combining theoretical learning with handicrafts and physical activities, and studying foreign languages in conversational ways. Moreover, the Institute admitted children of all sexes, social classes, and religions, and promoted wearing simple clothing so that the wealthier children did not differentiate themselves (Munzel 1999. 271f.). These methods seem very much in line with Kant’s emphasis on the three maxims of common human understanding, on the development of a multitude of capacities and talents, and on equal treatment of others regard-

¹³ For a comprehensive account of Basedow’s progressive ideas on education, see Loudon (2020).

less of who they are. The role of the teachers, Kant explicitly notes in the *Lectures on Pedagogy*, is to promote not only technical skillfulness, but also to instill the ability to think in an enlightened way (i. e., freely, publicly, and consistently). The best teachers and other public figures try not only to develop the technical and prudential skills of the under their governance, but also their morality, thus “bring[ing] posterity further than they themselves have gone” (*LP*, AA 9:449–450).

In addition to teachers, political leaders and religious authorities also play a key role in the maturing of the generation that follows them. The role of the enlightened political leaders and the state in general is the protection of rightful freedom of its citizens. The state, for example, guards us against civil compulsion and compulsion over conscience. It also ensures the freedom, equality, and independence of each of its citizens.¹⁴ It thereby removes the obstacles to adopting the three maxims of common human understanding and encourages participation in the public domain and law-making. Here Kant’s idea of a “moral politician” – a leader whose political principles and decisions are compatible with morality (*PP*, AA 8:372) – can serve as an illustration of what kind of political leaders would be needed so that the country in question can progress toward enlightenment. The role of enlightened religious leaders, in turn, is to encourage their own and one another’s moral progress and the cultivation of moral virtue, so that our behavior can transform from merely empirically good to intelligibly good, i. e., stemming from moral motives.

The next question we might ask about the relationship between the maturing of an individual and the maturing of the whole humanity is: How does the maturing of different groups of people, such as specific nations, bear on the maturing of the entire human species? Unfortunately, Kant does not provide us with an explicit answer to this question. But its importance for his project is evident from his frequent discussion of the necessity for the educational techniques to be designed ‘in a cosmopolitan manner’ and from the fact that his ideal political state is the cosmopolitan condition (*Universal History*). The term *weltbürgerlicher* (‘cosmopolitan’) and its cognates such as *Weltbürger* (‘citizen of the world’) are technical terms in Kant’s philosophy. Crucially, as we have seen earlier in this paper, he uses them in the definition of a “pluralist” in the *Anthropology*. The widespread, normative use of this term is most evident, however, in the *Theory and Practice* essay where Kant defines the cosmopolitan perspective as “a view to the well-being of the human race as a whole and insofar as it is con-

¹⁴ See, for example, *CS* (AA 8:290–296); *OT* (AA 8:144–145).

ceived as progressing toward its well-being in the series of generations of all future times” (CS, AA 8:277–278).

Despite the importance Kant assigns to the cosmopolitan perspective and the cosmopolitan state of mind, it remains true that the actual focus of his historical, anthropological, religious, and pedagogical writings is specifically Europe (and in particular his own country). But we may perhaps speculate as to his views about the way in which the maturing of different nations bears on the maturing of the entire human species. It seems plausible that the nations which, in Kant’s view, are more enlightened or mature would be obliged to play the role of a guide and a teacher of the other nations. The relationship between the more and the less enlightened countries would, on this picture, be akin to the relationship between a well-trained teacher and the pupils at the Dessau Institute. It also seems likely that the principles of enlightened governance, education, and general thinking and acting would have to be passed on through international conventions and guidelines concerning political issues and educational curricula. Kant’s justification for such a view would plausibly be that a gradual progression of humanity as a whole cannot happen except when mature nations guide the less mature ones toward enlightenment¹⁵.

Conclusion

In this paper I have provided a detailed account of the necessary and collectively sufficient components of adopting a pluralistic standpoint of reason or, simply put, of being a pluralist. These three components are: thinking freely or abiding by the maxim *think for oneself*, making public use of reason or abiding by the maxim *think from the standpoint of others*, and abiding by the maxim *think consistently*. By doing so, I have provided evidence for the claim that Kant’s notion of pluralism is not only a political notion, but primarily an ethical one: it pertains both to acting and to structuring one’s motivational psychology. Each individual’s developing and maintaining a pluralistic standpoint of reason is therefore *necessary* for collectively developing moral principles that govern everyone’s actions. I have also shown that Kant is concerned with the process of reason’s maturing or enlightenment in both every individual human being and in the human species as a whole. I have raised questions about the relationship be-

¹⁵ I am merely reconstructing and filling in Kant’s views here, not endorsing them. I do recognize that this picture, unfortunately, has been used to justify colonialism and a multitude of harmful racist attitudes.

tween an individual's maturing and humankind's maturing and answered them on Kant's behalf.

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Howard Williams

Karl Vorlaender's Kantian Synthesis of Marx and Kant

Abstract: Karl Vorlaender made an excellent scholarly contribution to the detailed and accurate academic appreciation of Kant's work. Over several decades from the early 1890s to the late 1920s he researched and presented Kant's ideas in their German and European philosophical context in a manner which contributed to their accessibility and their reach into the culture and population at large. Vorlaender performed an important role in the transmission of Kant's ideas and the ideas of the neo-Kantian school in general to a younger generation of scholars and the German public as a whole. Vorlaender is by far the most focussed upon social and political issues amongst the neo-Kantians. Others may have completed deeper individual investigations of the import of Kant's work, particularly in epistemology and ethics, but none rise to Vorlaender's level in their analysis and discussion of the political significance of Kant's work. Much of this significance is attained by concentrating primarily upon Kant

Introduction

Karl Vorlaender made an excellent scholarly contribution to the detailed and accurate academic appreciation of Kant's work. Over several decades from the early 1890s to the late 1920s he researched and presented Kant's ideas in their German and European philosophical context in a manner which contributed to their accessibility and their reach into the culture and population at large. He was not the most ambitious and influential of the school of neo-Kantian scholars, being overshadowed in this respect by his mentor at Marburg, Hermann Cohen and his colleague Paul Natorp. However, Vorlaender performed an important role in the transmission and elucidation of Kant's ideas and the ideas of the neo-Kantian school in general to a younger generation of scholars and the German public as a whole.

Vorlaender is by far and away the most focussed upon social and political issues amongst the neo-Kantians. Others may have completed deeper individual investigations of the import of Kant's work, particularly in epistemology and ethics, but none rise to Vorlaender's level in their analysis and discussion of the political significance of Kant's work. Much of this significance is attained by concentrating primarily upon Kant's critical metaphysics and ethics but, as we shall

see, Vorlaender played a particularly praiseworthy role in drawing attention to the historical and political dimension to Kant's philosophy. His major achievements were to demonstrate the strong link that can be made between Kant's philosophy and socialism, particularly through a close analysis of the relationship between Kant and Marx, and to bring out the critical political implications of Kant's writings on history and politics for a sharper understanding of what a progressive political theory might entail. Above all, Vorlaender showed through his many publications that Kant's political and ethical ideas could be made accessible to a very wide audience in a manner that was true to the philosopher's intentions and demonstrated the relevance of those ideas to the pressing problems of the early twentieth century and beyond.

Vorlaender was always at pains to point out the radical reformist implications of Kant's political thought and he placed especially strong emphasis on the cosmopolitan dimension of Kant's political ideas. In keeping with Kant's legacy, Vorlaender rejected militant nationalism and embraced the cooperation of states based upon law. In the later phases of his life Vorlaender was quite naturally drawn to the radical socialist experiment being undertaken in the Soviet Union and shared an enthusiasm for Marx's thinking which almost rivalled his attachment to Kant. But Vorlaender never fully embraced the model of Soviet communism – whilst expressing the hope the experiment might meet with success – he nevertheless retained his conviction that the reformist, legal path of change advocated by Kant represented the path to follow.

Vorlaender began his philosophical career as a student of Kant's pure moral philosophy and throughout his academic life evaluated social and political problems from within the perspective of Kant's categorical imperative. Thus, in interpreting Marx, Vorlaender tended always to give Marx the benefit of the doubt: even where Marx may have appeared to be taking an ethical short cut in advocating revolutionary methods he always sought to interpret those methods as compatible with Kantian ethical ideals. And where clearly Marxist politicians advocated and adopted methods that ran contrary to those ideals Vorlaender rejected their policies. In interpreting Vorlaender's contribution we unavoidably encounter the question whether or not it is possible to be both a Marxist and a Kantian? Vorlaender saw himself as a Kantian socialist. This allowed him to accept a great deal of Marx's doctrines but ultimately led him to distinguish his views from most, if not all, of the leading Marxists of his day. Vorlaender's Kantian reading of Marx's critique of capitalism was rejected by the Soviet Communists (expressly so by Lenin) and by the leaders of German communism. The latter favoured the revolutionary path of the Bolsheviks. For decades since the debacle of National Socialism in 1930s Germany and with the rise and fall of Soviet Communism very little has been heard of Vorlaender's attempted synthesis

of Kant and Marx. In the new circumstances of the twentieth first century, almost precisely a hundred years since Vorlaender put forward his Kantian Marxist arguments, his position merits close re-examination (cf. McCarron 1996).

Karl Vorlaender is a highly interesting philosopher from the standpoint of post-Kantian political philosophy. Although he was not primarily concerned in his work with Kant's principal political writings – indeed, his initial interest was expressly in Kant's pure moral philosophy, writing his doctoral dissertation on *The Formalism of the Kantian Ethic* in Marburg under the guidance of Hermann Cohen (cf. Vorlaender 1893, Preface and Afterword) – he made the very appealing attempt to synthesize Kant's approach to morality, society and politics with Marxian socialism. In one respect Vorlaender was different from the neo-Kantian movement he saw himself as representing in philosophy, in that he engaged openly throughout his career as a publicist with the political issues of his day. Here he adhered more precisely to the model of the philosopher that Kant himself sought to uphold with his notion of publicity. Like Kant, Vorlaender was concerned to engage with the political trends of his day and to influence the views of legislators and leaders but without of course being engaged in direct political work. Vorlaender was particularly concerned to transmit to the educated public a full understanding of what he took to be the progressive import of Kant's work and so kept up a stream of publications from the beginning of the twentieth century to his death in 1928. A remarkable example of his commitment to communicating with the public as a professional philosopher is *Volkstuemliche Geschichte der Philosophie (Popular History of Philosophy)* which appeared in 1924, which represents an attempt to provide an accessible, simplified account of his own two volume *History of Philosophy* which was re-published five times by 1919. This was in addition to a large number of shorter pamphlets and books which related Kantian philosophical issues to important topics of the day.

1 The Lecture on Marx and Kant

In this first section we shall look at an early lecture of Vorlaender which shapes his understanding of the relationship between Kant and Marx. This Vienna lecture of 1904 provides an excellent introduction to his later treatment of the two thinkers and Vorlaender's mature thinking as a whole. According to Vorlaender, the materialist conception of history that Marx develops is “despite its name” wholly “compatible” with the critical idealism that the so called “neo-Kantians espouse” (Vorlaender 1904, 14). The materialist conception of history complements critical idealism, especially when two special additions to it are made. The first addition to be made would be to provide the conception with a “reliable

philosophical basis”, and the second would be to provide it with a “forward leading” systematically spelled out social or “if one wishes, socialist ethic” (Vorlaender 1904, 14). Thus, despite Marx and Engels assurances that their outlook had a strongly materialistic background, Vorlaender optimistically believes that the differences between their approach and Kant’s critical idealist system can be successfully reconciled.

Vorlaender quite wisely doesn’t hold that this connection between Kant and Marx is trouble -free. Some aspects of Kant’s critical system have to be set to one side. For instance Vorlaender believes we can overlook what he calls “Kant’s personal views” about God, the world and immortality which he puts forward as postulates admittedly “not as a basis, rather only as an addition, to his ethic” (Vorlaender 1904, 18). Vorlaender acknowledges also that Kant in “the political respect” is “essentially a liberal” whose main work on the “philosophy of the state places the so-called ‘*Rechtstaat*’ or the state based on law at the centre of his account” (Vorlaender 1904, 18). Vorlaender does not speak poorly of this liberal trend in Kant. He sees it as combined with a “radical attitude” which lead Kant to support many of the main aims of the French Revolution with an “undisguised sympathy” (Vorlaender 1904, 18). This radical point of view Kant, possibly “because of the influence of Prussianism,” connected with a “constitutional-monarchical attitude” (Vorlaender 1904, 18). It seems Vorlaender does not want to go out of his way to defend Kant’s views on the pragmatic value of a constitutional monarchy, although in many respects it does appear possible to provide quite a strong defence of Kant’s reforming account of the role of the monarch. Kant’s positive view of the monarchical form of constitution is, I think, not derived solely from his Prussian experience, indeed the virtue Kant seems most prominently to find in the monarchical form is that it is the most likely type of constitution to bring in the republican mode which he most favours (cf. *PP*, AA 8:353).

Vorlaender sees much to defend in Kant’s account of the ideal constitution provided in the *Critique of Pure Reason* as a constitution affording “the greatest human freedom according to laws that permit the freedom of each to exist together with that of others” (*CPR*, A 316/B 373). Vorlaender stresses that this ideal has not simply to be the characteristic of one state constitution but also the basis of “all laws” (Vorlaender 1904, 19). Vorlaender finds Kant’s principled adherence to the rule of law a marked contrast to the *Realpolitik* of the late nineteenth century of which he strongly disapproves. He feels Germany can do without such doctrines of devious political prudence. Vorlaender praises Kant’s emphasis on the adherence to principle in politics, and although Kant does not neglect the material well-being of subjects, Vorlaender believes he sets a good example in stressing that as important, if not more important, than this pursuit

of well-being is the means by which it is pursued. Freedom and right should not be abandoned for the sake of mere well-being. Vorlaender quotes with approval one of Kant's reflections (he finds in a collection of B. Erdmann) where Kant argues that we should treat as merely common decency the gifting to the poor an inheritance we have received from a wealthy person who acquired their wealth through the exploitation of others, and not as ordinary understanding would have it as a generous gesture (Vorlaender 1904, 19).

Vorlaender strongly supports the commitment he finds in Kant's *Religion within the Boundaries of mere Reason* to freedom for all social groups. Man was created for freedom – this was a divine gift which no one is entitled to take away from another in an irrevocable way (Vorlaender 1904, 20). Moreover, Vorlaender believes that Kant's *Doctrine of Right* is by no means as “individualistic and liberalist as is ordinarily assumed” (Vorlaender 1904, 20). The ideal of a perfectly just civil (buergerliche) constitution in which the freedom of each is guaranteed through the freedom and consent of all others reminds Vorlaender of Marx's formulation of the social ideal in his writings on socialism. For Vorlaender this Marxian ideal is guaranteed in no less a way than through Kant's principle of a legally authorized coercion (Vorlaender 1904, 20). This view of legally guaranteed improvement contrasts strongly, of course, with the interpretation of Marx's views Lenin was developing within the Bolshevik faction of the Russian Social and Democratic Labour Party at the time, which was wedded to a more authoritarian centralized view of the rise of the working class to power. Vorlaender is also impressed by the “original communism of the land and earth” which appears in the *Doctrine of Right* (Vorlaender 1904, 20). Although this original ownership cannot be historically established, the idea of such a communal ownership should be seen as a principle of right on the basis of which alone humans can use the place on the earth where they find themselves. Vorlaender clearly has in mind section 13 of the *Doctrine of Right* where Kant argues that “any piece or land can be acquired originally, and the possibility of such acquisition is based on the original community of land in general” (*DR*, AA 6:262). Vorlaender might also have quoted (with even greater justification) in support of his interpretation of Kant as a forerunner of socialism the concluding part of this section: “Original possession in common is, rather, a practical rational concept which contains a priori the principle in accordance with which alone people can use a place on the earth in accordance with principles of right” (*DR*, AA 6:262).

Vorlaender goes on to compliment Kant on his vision of a “cosmopolitan condition” as one in which one who no longer enjoys advantages “for whose sake others have to do without so much more” (Vorlaender 1904, 20). He discovers in Kant an egalitarian vision where the right of one person is similarly safe-

guarded for all others. Vorlaender senses correctly in Kant an acceptance of the equality of all peoples and the desire that no state should stand any higher than any other in the recognition of its rights. Rather in this cosmopolitan condition *all the natural capacities of humanity* can freely develop. In Vorlaender's view one cannot require of a "committed socialist" (Vorlaender 1904, 20), any more than this.

The seemingly less than progressive aspects of Kant's political theory Vorlaender attributes to Kant being "trapped in the ideas of his time and his class" (Vorlaender 1904, 20). A point of view that Vorlaender particularly regrets in this *Zeitgeist*-influenced political theory is that Kant does not place the responsibility for removing the obstacles to a more class free and equal society directly in the hands of citizens themselves, but rather in the hands of the head of state. Vorlaender believes Kant is betraying his own categorical imperative in not recognising the authority of the citizens to change their laws to bring about greater equality. Here Vorlaender fails to mention properly Kant's profound philosophical objection to the people as a whole changing the laws themselves and seeking to carry them out. For Kant it is only the people's *representatives* (separately chosen and elected so that no one person is both a member of the legislature and the executive) that should make and execute the laws. The difficulty with Vorlaender's recommendation of a more direct Marxian route to change is that this would violate the principle of the separation of powers. Vorlaender accommodates Marx's deviation from Kant's modern republicanism by regarding socialism as the natural heir of liberalism. "The path from liberalism (in the true sense of the word) leads not only historically, but also logically to socialism. The freedom of the individual is only a seeming one whilst the oppressive reign of private capital is in fact made the means of work in the hand of the owner" (Vorlaender 1904, 21). The freedom of the individual will only truly be realized through a condition where economically no one is any longer dependent upon another, where we work according to Marx's model in free association with others to meet both our individual and common needs. Vorlaender sees this Marxian 'free association' as a close approximation to Kant's 'realm of ends' where no individual is solely a means.

2 Socialism: Realizing the Categorical Imperative

Vorlaender sees the idea of the categorical imperative as central in seeking to demonstrate the incipient socialism to be found in Kant's critical system. Vorlaender speaks of drawing out the "socialist implications of the categorical imperative" (Vorlaender 1904, 21). Genuine individualism and genuine socialism

are, for him, no mere opposites, but rather they “complement” each other. The raising of a society into a “community” implies not the “limitation and damming in of one’s own self, but rather the widest development of its powers” (Vorlaender 1904, 21).

For Vorlaender “Marx signifies the historical economic grounding and Kant the ethical one” (Vorlaender 1904, 22) of socialism. Although he is aware that Marx, when asked about the relation of morality to his own system of thought, is supposed to have laughed, Vorlaender believes the link between socialism and morality cannot be wished away. He thinks there are two important reasons how this distance grew between Marx’s understanding of his doctrine and the ethical standpoint. First, he believes that the relation between ethics and justice had been taken to its extremes in “the speculative idealism of Fichte, Schelling and Hegel” (Vorlaender 1904, 22). These speculative doctrines were too esoteric to reflect the circumstances of the time. Marx and Engels had first developed philosophically in the atmosphere of this post-Kantian speculation and they wanted to put as much distance as possible between themselves and this world. Secondly, the socialist doctrines of their day also showed evidence of being carried away by similar exotic dreams where wise sounding slogans replaced the need for genuine understanding. They wanted to avoid the “moral preaching”, the “pious wishes” and the idealistic “proposals for improvement” (Vorlaender 1904, 22) which characterized much of their own contemporary socialism. Marx and Engels’ aim was to take the step from utopian thinking to systematic knowledge (cf. Vorlaender 1904, 22). They conceived of themselves as the “mid-wives of history” in seeking to give birth to new social forms which they saw as inherent in the social and economic relations of their time.

Paradoxically Vorlaender holds that within their mockery and disdain for the moral point of view there was none the less for Marx and Engels a “latent deep ethical intuition (*Anschaung*)” (Vorlaender 1904, 22). And here Vorlaender expresses his own profound conviction that “socialism will neither historically nor logically be free from ethics” (Vorlaender 1904, 23). He sees that as very evident in the writings of the young Engels and Marx. Both Marx and Engels were driven from their earlier standpoint of liberal radicalism to socialism by their ethical points of view. The *Communist Manifesto* operates, Vorlaender believes, with a series of ethical expressions such as the “oppressor and the oppressed” and “shameless exploitation” (Vorlaender 1904, 23). And in Marx’s *Capital* it is claimed that the bourgeoisie has dissolved its own worth into an “exchange value” (Vorlaender 1904, 23) or price. The wretched circumstances of modern capitalist society are emphasized, exploitation and “the furies of private interest” (Vorlaender 1904, 23) are bemoaned. In short Marx’s major book lays bare “the brutal, inhumane nature of the class struggle” (Vorlaender 1904, 23). The depic-

tion of the industrial development of Britain, the first country fully to go down the capitalist road, has its highly satirical moments which are given their bite by the moral standpoint which informs Marx's critique. Satire is effective only with reference to fundamental moral convictions which it bitingly brings to mind.

Modern socialists cannot then get away from the ethical ideal in their innermost soul. "No socialist can live without ethics i.e. without the pursuit of self-established consciously anti-egoistic goals no socialism can come into the world" (Vorlaender 1904, 24). Marxists themselves admit this. Vorlaender cites the view of the later biographer of Marx, Franz Mehring, who had acknowledged that the Marxian ethic is identical with the Kantian (cf. Vorlaender 1904, 24). Marxist should make no bones about this ethical dimension. Indeed as far as Vorlaender is concerned, the ethics of Marxism needs to be carefully developed if the movement is to become a political success. Otherwise Marxism will be deficient in its philosophical scholarship. Socialists should have absolutely nothing against "a scientific justification and treatment" (Vorlaender 1904, 24) of such an ethic. And he believes that such a treatment should be carried out in "accordance with a Kantian pattern, an ethic as an independent normative science, which proceeds on its own according to its own point of view" (Vorlaender 1904, 24). We might fairly reflect that the failure of many Marxist socialists (particularly in the sphere of Soviet Communism) to pay heed to Vorlaender's recommendation has cost them dearly.

Vorlaender is always torn between being true to his Kantian background and the later enthusiasm for his later reading of Marx. Vorlaender is a deep admirer of both thinkers, as is witnessed by the extensive intellectual and social biographies he published on both. The general pattern his thinking appears to follow is to try to integrate Marx's system, where possible, into Kant's thinking. The cornerstone of Vorlaender's own philosophy is provided by Kant's ethics, and by his general commitment to the neo-Kantian group of philosophers he likes to see himself as part of, however he is politically and socially attracted to Marx's radical socialism and also to the socialist movement which sprung from it. He seems highly aware of the difficulties of his position, but he always aims at a synthesis. He neither abandons Marx for Kant, nor Kant for Marx. This leads to an acute appreciation of Kantian philosophy and Marxian social theory in his own time.

3 Ethics

Vorlaender insists upon an ethical basis to the Marxian diagnosis of society and finds this absent in many of the writings of Marxian socialists in his day. For him

it is not “sufficient” (Vorlaender 1904, 24) for the treatment of ethics by Marxian’s to be based solely on an understanding of the ideological roots of morality. Not enough is said if one simply pronounces that “the highest ethical thoughts” (Vorlaender 1904, 24) are the product of the development of “economic and other moments” (Vorlaender 1904, 24). He quite accepts that the theory of ideology which casts morality as part of the ideological superstructure of any society¹ is “very fruitful and fully justified in its own sphere” (Vorlaender 1904, 24). However, we have to make clear to ourselves “that socialism cannot” arise wholly within the framework of a “natural scientific explanation of the past, present and future” (Vorlaender 1904, 24). We have at the same time to see that socialism requires “a scientific examination of the teleological idea or the idea of purpose – establishing the basis and goals of a unified ethical demand (*Wollen*)” (Vorlaender 1904, 24). Marx’s materialist conception of history cannot of itself say anything at all about the final aims of socialism. The Marxian historical approach recognises only “an endless development of social occurrences which consecutively and in favourable circumstances have the tendency to permit the possible or probable realisation of socialist ideals” (Vorlaender 1904, 24).

The crucial point for Vorlaender is, however, that those socialist ideals “cannot now or ever be distilled from the standpoint historical development alone” (Vorlaender 1904, 24). Here Vorlaender pinpoints a weakness of the Marxist method that places so much emphasis on the independent development of economic forces and relations alone. How can one specify which the developments to encourage are and the developments to avoid? Are we to be at the mercy of all – negative and positive? Vorlaender highlights the difficulty of going ahead simply on the basis of a deterministic historical materialism alone. There are also needs to be some assurance we are heading in the right direction. This requires a more profound understanding of teleological thought. This is more clearly to be found in Kant’s philosophy rather Marx’s. Socialists for Vorlaender must analyze carefully the whole of idea of purposeful development in history and through this give historical materialism a firmer ethical basis on which to advance the demands of socialism. It is mistaken to deploy the materialist view of history simply to obscure ethics. Rather the teleological view of history we advance should be brought into harmony with a sound ethics (Vorlaender 1904, 24).

This synthesis of the Marxian approach with Kantian ethics would not only benefit Marx’s philosophy it would also bring advantages to Kant’s thinking. “For that formal ethics of Kant would fully float in the air were it not brought

¹ Marx summarises the main ideas of his theory of historical materialism in his 1859 *Preface to a Contribution to a Critique of Political Economy* (cf. Marx and Engels 1968).

down to earth from the cloudy heights of abstract thought, in order to strive for its realization” (Vorlaender 1904, 25). Vorlaender thinks he is not alone in believing that Marx’s theory of history and Kant’s ethics have a great deal to offer each other. He regards it as a feature of the neo-Kantian school that many of its adherents had brought to light this fruitful connection. He speaks of there being a good number of “socialistic Kantians and Kantistic socialists” (Vorlaender 1904, 26) in his time and their ranks were increasing steadily. He mentions very warmly amongst the prominent neo-Kantians Paul Natorp, and draws attention also to the writings of the Austro-Marxist, Victor Adler. Vorlaender commendably persisted with this view of the mutual need of Kantian ethics and Marxian historical determinism for each other throughout his life. In his later biography of Marx where he discusses the relationship between Marxism and ethics he acknowledges the major theoretical contribution of Marx is indeed to demonstrate economic transformation which were already taking place within the capitalist economy, but on the other hand he argues that this has to be complemented by an overarching concern for ethical issues. He thinks this ethical dimension is particularly relevant where Marx speaks of the future social relations that are to be realised (Vorlaender 1929, 298). Ethics can complete Marxism, but cannot take its place. The critical social understanding must be present but it must be given its direction in politics and policy through an ethical underpinning. Politics and economics should be pursued through the prism of the categorical imperative.

4 *Kant and Marx* – a Scholarly Study

Undoubtedly Vorlaender’s major work from the standpoint of his relationship to his philosophical mentors is *Kant and Marx*, first published 1911. This book is also probably, along with his later historical work *From Machiavelli to Lenin*, his most significant publication in political thought. In many respects *Kant and Marx* is an entirely new work, but it draws noticeably from earlier essays Vorlaender had written. This is a point he acknowledges himself (cf. Vorlaender 1911). But it is a much longer work for he also engages with writers and ideas, individuals such as Lassalle and the French socialist leader Jaures only touched upon elsewhere. Here Vorlaender makes clear that he is engaging with Marx from the standpoint of the neo-Kantian school. He emphasizes the value of the neo-Kantian approach. He particularly stresses that the approach of the neo-Kantians to philosophy and Kant is far from being a scholastic one. For him this has important ethical and political implications. He sees the neo-Kant-

ian school as above all carrying on Kant's method (Vorlaender 1911, 118). He judges Hermann Cohen to be pre-eminent amongst the neo-Kantian group.

One key area in which Vorlaender regards Kant's philosophy and Marx's work as closely overlapping is in the understanding of history. For Vorlaender Kant's "critical ethics" embraces within itself a "strict causal conception of history which takes this world not as it ought to be", but "as it really is" (Vorlaender 1911, 18). For this reason Marxists ought not to be too taken aback by Kant's critical philosophy which can offer them important insights in their writings. Vorlaender particularly likes the sections in Kant's *Religion within the Boundaries of Mere Reason* (Vorlaender 1911, 20) where Kant outlines his views on freedom. Vorlaender is drawn to them on the grounds that they treat any kind of human servitude with complete scorn. He believes that Marx shares this contempt for dependence with Kant. He thinks Marx shares also with Kant a realism about social relations. Indeed, Vorlaender holds that Kant goes beyond Marx in his pessimism about the human species. Kant's view of the human character is dark (Vorlaender 1911, 21). Marx shows greater optimism about what the species can achieve in the short term.

Vorlaender has great respect for Kant's conception of political freedom with its deep connection to the rule of law and the independence of the individual. However, he is not drawn so strongly towards the apparent reverence that Kant shows from time to time towards the state. Vorlaender acknowledges regretfully that "Kant's feeling for freedom is connected to a quite extraordinary state mindedness so that many of his expressions sound wholly absolutist" (Vorlaender 1911, 22). It is difficult to decide who comes out best from this comparison between Kant's guarded approach to political improvement and Marx's great optimism. Here perhaps Vorlaender is drawn too strongly to Marx's hopes for betterment. In the light of history Vorlaender's pronouncements about Kant's reluctance to enthuse seem unwise. A great deal has occurred since 1911 to demonstrate the good sense of Kant's caution in his assessment of the human condition. Marx's revolutionary optimism seems now misplaced. Despite the undue reverence Kant shows, in Vorlaender's view, towards the state it is important to understand that Kant is not a monarchist. For Vorlaender Kant gives the greatest prominence to the rule of law which can best be realised through a republican form of government.

We can see Vorlaender adopt a different tone in his 1922 book *Immanuel Kant und sein Einfluss auf das deutsche Volk*. Here there is warm praise for Kant as a great German patriot. Vorlaender is careful to note that Kant is not a supporter of nationalist enthusiasm, however Kant does require an outlook of patriotic respect from the citizens of a state for their country. Vorlaender makes a great deal of the impact that he believes Kant's ideas had upon the Ger-

man military. Perhaps trying to counter the impact of the destructive militarism that he must have witnessed around him in the immediate aftermath of the First World War, Vorlaender argues that from very early on Kant enjoyed a positive reception amongst the military. He notes how Kant spoke with great interest about the members of the military who he met in Königsberg and he claims that all the well known “military reformers” of the time were “more or less filled with the ethical spirit of Kant” (Vorlaender 1922, 101). In this context Vorlaender also mentions the writings of Carl Clausewitz who was indeed known to have been influenced by both the Kantian and Hegelian philosophies (cf. Williams 1992, 106 ff.). Vorlaender notes the Kantian vocabulary that Clausewitz deploys in his strategic analyses: “aw, basic principle, maxims etc. (cf. Vorlaender, 1922, 102) and is convinced that Clausewitz follows in the “ethical tracks” (Vorlaender 1922, 102) of Kant. The tone of this book appears a good deal more defensive than the tone adopted in *Kant and Marx*, as though Vorlaender wants to establish both his own and Kant’s German credentials.

However, I would be creating the wrong impression if I implied that Vorlaender was departing in the later book on popular philosophy from the progressive and reforming project outlined in the 1911 book on *Kant and Marx*. The popular book ends with an engaging account of Kant’s relationship to socialism. For Vorlaender Kant was an inspiring spirit for contemporary socialism and this was primarily through the impact of his idea of the *categorical imperative*. Vorlaender quotes with great pride the words of his *Doktorsvater*, Hermann Cohen that “Kant is the true and real originator of socialism” (Vorlaender 1922, 104). Vorlaender sees Cohen as a leading spirit in the neo-Kantian school which was drawn towards socialism. Another student of Cohen’s, Paul Natorp is seen also as an important influence on socialist thought, particularly through his major philosophical work on education *Social Pedagogy* (Natorp 1920).

One of the themes of this 1922 book on Kant and the German people is that Kant should be seen as Germany’s “best hope” to provide the “absolutely necessary” uplift required for the German nation “which presently lays on the ground” (Vorlaender 1922, 105). Vorlaender clearly felt very deeply the humiliation that the “German fatherland” experienced in the years immediately following the First World War. And for him Kant’s spirit and philosophical ideas are the best answers to the predicament the German people are in. He is full of praise for Kant’s “drive for the truth”, his “honesty” and his capacity for “self-criticism” and his “sense of duty” (Vorlaender 1922, 105). The German people need to turn away from the path of despair and take responsibility for their situation. Vorlaender quotes a Latin saying which he thinks highly appropriate for the times and the German people which he translates as meaning: “don’t give in to misfortune, rather stand up to it, with even greater fortitude” (Vorlaender

1922, 105). Vorlaender wants to share with the German people the inspiration and support that he had gained from a life time's study of Kant's philosophy. The sincerity with which this is expressed (now in retrospect) makes a very sad ending to the book. The book was a philosophical manifesto for Germany in the 1920s whose message may no longer be applicable, but may serve as a warning to other nations (and later generations of Germans) always to safeguard what is best in their philosophical traditions.

In his numerous writings on socialism Vorlaender makes a great deal of the similarities between Kant's philosophy and Marx's critique of capitalism. Arguably, however, his pursuit of this synthesis has too romantic and optimistic a tinge. He emphasizes a lot less the differences between the outlooks of the two. And this is a line of enquiry that is equally as profitable as pointing out the similarities. Vorlaender stresses often the respect Kant shows for the rule of law and the arguments he presents for a separation of powers within the state. However, Vorlaender fails to look closely at Marx's views on the greater centralisation of state power and the arguments for a proletarian dictatorship in the immediate aftermath of a socialist revolution. This is certainly the case for the book on *Kant und Marx*. The book provides a very valuable report of how Marx's ideas relate to Kant and Kant scholarship. The section on Hermann Cohen carefully notes Cohen's differences with Kant on social issues to be found in Cohen's book *Kants Begründung der Ethik*. Kant is primarily blamed by Cohen for not looking beyond the circumstances of his time and being embedded in "the one-sidedness of the bourgeois outlook" (Vorlaender 1911, 129). There is a great difference in mood between this earlier book and the 1922 volume on the influence of Kant on German thinking with the former wedded to the ideal of an up-to-date discussion of the latest research on Kant and Marx, and the latter wedded to an uplifting (therapeutic) examination of Kant's writings. Whilst the earlier book is optimistic, ending with a discussion of articles in the socialist journal *Die Neue Zeit* which point to the important link between Kant and Marx, the former looks back in sadness to the fine philosophical example which Kant had set but no longer seems to be heeded.

Von Machiavelli bis Lenin sets a different tone again. Here Vorlaender speaks of the "socialistic core" of Kant's political doctrines (Vorlaender 1926, 159). He believes that the centre of this doctrine is Kant's idea of freedom. Here Vorlaender reads Kant in a modified Rousseauian fashion as holding that "the general will of the people without distinction must be established as the basis" (Vorlaender 1926, 160). He identifies himself closely with Kant's dislike for any distinctions of rank within society and with his love of freedom. Vorlaender particularly likes referring to quotations from Kant's *Nachlass* (the unpublished writings becoming widely available for the first time through the publication

of Kant's *Gesammelte Schriften*) which demonstrate his distaste for unnecessary restrictions on human freedom (Vorlaender 1926, 160). At the time of the French Revolution, it was apparent that Kant was pleased that the French were leaving behind the privileges of the feudal order. His distaste for serfdom and the servility the order institutionalized stands out. Vorlaender is also struck by Kant's aversion to unnecessary military exercises. Military parades were a particular cause of scorn. That another should be able to command what one does with one's body, how one should deploy it in a certain way at a certain time represent a lamentable restriction on a human individual's freedom and dignity (Vorlaender 1926, 106). He clearly read with remarkable care all of Kant's writings that were available to him to bring out the progressive liberalism of Kant's views on politics. Although he depicts Kant as a radical democrat (Vorlaender 1926, 162) he stresses that Kant prefers evolution to revolution and compares his views with those of the German socialist Eduard Bernstein who objected strongly to the revolutionary dimension of Marxist thought (Vorlaender 1926, 163). Vorlaender brings out, like Eduard Bernstein, the liberal heritage that Kant offers to socialism. "Summarizing briefly" Vorlaender says, Kant is a follower of the liberal *Rechtsstaat*, "with at the same time a strong emphasis on the idea of the state" (Vorlaender 1926, 165). This idea of the state was not one that would merely enable a powerful individual centred market order in the manner of Adam Smith but would equally emphasize our mutual dependence.

Vorlaender finds a strong socialist strain in Kant's idea of the state which he strikingly illustrates by a reference to Kant's treatment of the organism and organisation in the *Critique of the Power of Judgment* (Vorlaender 1926, 166). In a lengthy footnote in that work Kant refers to the French Revolution as providing an example of the development of an ideal form of political organisation. In this ideal form each individual takes on the status of both a means and an end for the organisation of the whole. Vorlaender likes the example because it brings into focus Kant's deployment of terms crucial to the categorical imperative within the sphere of right. Vorlaender envisages that it can only be possible to have a form of social organisation where each individual is both end and means within a socialist framework. "That the people becomes a state at all, rests according to Kant, on the simultaneous adoption of the concept of means and ends of the categorical imperative, and a political-social organisation that we would otherwise find first only in a romance" (Vorlaender 1926, 166). Kant does not rule out the adoption of apparently utopian ideas in the drive to improve society and the state. He requires only that they should be adopted cautiously and through the existing political authorities and not against them. In this, Vorlaender regards Kant not as a wild visionary who inhabits a "cloud cuckoo land" (Vorlaender 1926, 167) but as a realistic political commentator.

5 Politics and History

Vorlaender was an extraordinarily productive author and editor. He made an excellent contribution to Kant scholarship and German philosophical scholarship in general. An example of his fine editorial work is the selection of Kant's writings on the philosophy of history, ethics and politics that he first brought out in 1913. Its standing as a source for Kant scholars can be gauged by the fact that the publisher, Meiner Verlag, brought out the selection once again (after many previous reprints) in 1973. The selection illustrates the deep reading that Vorlaender had undertaken of Kant's work, with scarcely anything of significance left out. What is most noticeable in the introduction to this volume, apart from the breadth of Vorlaender's knowledge of the excerpts, is Vorlaender's choice of most significant text. He likes most the supplements and appendix from *Toward Perpetual Peace* because they are "of the most philosophical character" (Vorlaender 1973, xxxvii). And indeed Kant's discussion of the relationship between morality and politics and his subsequent treatment of the idea of publicity in the appendix (cf. *PP*, AA 8:370–386; *MM*, AA 6:338–361) merit the closest attention. In the discussion on morality and politics Kant stakes a great deal on the compatibility of the two, and makes the greatest effort to differentiate a moral politics from a *political morality* which pays lip service to ethical questions but does not incorporate moral principles in the process of deliberation. The further discussions on publicity have deeply influenced philosophical discourse since Kant's time and bring to the fore the relationship between openness and effectiveness in the determination of policies to this day. In the late twentieth century publicity was, for instance, a notable concern of both Juergen Habermas and John Rawls.

Vorlaender here also pays particular attention to the reception of Kant's book *Toward Perpetual Peace* and the article *On the Common Saying* at the times of their publication. The book was in very great demand and swiftly went through several publications and was translated into both French and English by 1797. Vorlaender is drawn above all in these responses to Kant's criticism by Friedrich von Gentz who was a student of Kant, but became a prominent critic of the French Revolution in German speaking countries. Vorlaender is much taken by the restraint that Kant shows in dealing with Gentz, clearly wishing that Kant had gone further in his criticisms of Gentz that he does. Vorlaender attributes this to Kant's reluctance to get drawn into polemics. For Vorlaender, Gentz is a clear opponent of Kant that required firm rejection (Vorlaender 1973, xxxviii). As Gentz had been not only a student of Kant, but had worked with him on the proofs of the *Critique of the Power of Judgment*, Vorlaender ap-

pears to expect from him a greater understanding of Kant's liberal ideas than he demonstrates. In his response to *On the Common Saying* Gentz questions, for example, the commitment to equality Kant demonstrates as possibly too dangerous (Vorlaender 1973, xxxii); finds that the royal prerogative has a good deal to be said for it; and holds more generally that what is true in theory – contrary to Kant – does not hold in practice. It is probable that Gentz criticisms of Kant were to have more far reaching effects in Germany than many of the criticisms of other contemporary philosophers owing to Gentz's association with Metternich and Hapsburg politics in the later part of the nineteenth century. Gentz came under the influence of Edmund Burke's conservative ideas in the period of the revolution, completing the first translation of *Reflections on the French Revolution* in 1794. Possibly the strong dislike that Vorlaender exhibits towards Gentz can be explained by the reputation that the author and diplomat later enjoyed as a defender of the monarchical order in Europe and close confidant of Metternich.

Vorlaender's *Volkstuemliche Geschichte der Philosophie* (Vorlaender 1921) was a popular introduction to philosophy and represents an attempt by Vorlaender to reach the widest audience possible in distilling what he regards as the principle insights of philosophy. As befits the time in which it was written, shortly after Germany's catastrophic defeat in the First World War and the creation of the Weimar Republic, Vorlaender strikes a very serious tone in presenting the work. Vorlaender is in a sombre mood. In a brief preface to the third impression in 1923, he speaks of his pleasure in preparing the edition and pride that the book had been translated already into Polish and Dutch. His hope is that "the philosophical sense of the men and women of our nation will strengthen and deepen" as a result of the book (Vorlaender 1921, viii). In the chapter devoted to Kant he emphasizes the realism of Kant's approach to politics, particularly as it is exemplified in *Toward Perpetual Peace*. For Kant perpetual peace entails not the realization of an imaginary condition. It is not a prophecy or an "ever developing" state of peace "soon to be reached" (Vorlaender 1921, 223). These ideas do not correspond to the sober aims that Kant has in mind. Rather for Vorlaender the book presents an "eternal task" that stands before us: a goal to which we have always to seek to approximate as a duty" (cf. Vorlaender 1921, 223).

6 A Thoroughgoing Kantian

The roots of Vorlaender's philosophical approach are to be seen in his early career as an academic at Marburg university. Vorlaender never truly left behind his point of origin as a scholar and a student of Hermann Cohen. As with Cohen,

philosophical scholarship was for him from necessarily attached to the study and thorough examination of Kant's philosophy. Vorlaender wrote his doctoral dissertation on the topic *Der Formalismus der Kantischen Ethik (The Formalism of the Kantian Ethics)* which was examined at Marburg University in 1893. The line of argument Vorlaender follows in the dissertation was naturally strongly influenced by Cohen's writings in the field, in particular *Kants Begründung der Ethik (Kant's grounding of ethics)* which was first published in 1877. In the brief outline of his curriculum vitae at the end of the dissertation is a short list of academics who influenced his own thinking, Vorlaender gives pride of place to Hermann Cohen.

In the dissertation Vorlaender sees it as a strength of Kant's system that the ethics relies on *form*. He acknowledges at the outset that it is a widespread criticism of Kant's thought (cf. Vorlaender 1893, 1). Vorlaender regards the criticism as emerging first with Fichte which is then "transferred to Schleiermacher, Herbart" (Vorlaender 1893, 1) up to more recent times. Vorlaender notes that one has only to open a book on the history of philosophy or leaf through a philosophy journal and the same complaint about Kant's formalism is heard. Vorlaender neatly turns this apparent notoriety to his own advantage by suggesting that it is important to look more closely at what *form* indicates to Kant. In doing this Vorlaender takes advantage of the work of Hermann Cohen on Kant's theory of knowledge. Vorlaender places particular emphasis on Kant's theory of experience where form is fundamental and makes possible the full richness of our world through identifying and giving shape to the material. Vorlaender connects the law shaping dimension of form in the construction of the natural world with the role that law plays in morality. Kant's commitment to form entails that the rules spelled out in the various formulations of the categorical imperative can be adapted to all human contexts.

As with the neo-Kantians in general Vorlaender's emphasis is on the compatibility of Kant's pure moral theory with socialist politics. In so far as politics in general is concerned Vorlaender readily acknowledges that Kant appears not to be a socialist (cf. Vorlaender 1893, 18). The main grounds for saying this is that Vorlaender takes Kant as being born too soon, that is, he was born well before the time modern capitalism had fully established itself. Königsberg in Kant's day was predominantly a merchant and shipping city that had in its time been the capital of East Prussia, and still formed an important administrative center. However, its hinterland was rural and agriculture was the predominant economic activity. Kant's father was a harness maker whose own existence depended heavily upon the interaction of city and countryside. Thus, Kant would have little or no direct experience of the modern working class. He was no doubt aware of the growth of large-scale manufacturing in Britain and

some other parts of Europe in his own time but wage-workers were not a group of people who commanded much of Kant's attention. Vorlaender devotes a short chapter to *Kant as a politician* in his two volume biography of 1924. As his opening remark Vorlaender notes that we ought not to "judge the political thinking" of eighteenth century individuals "according to today's conceptions" (Vorlaender 1924, 210). Passive citizenship was all to which members of that group could aspire (cf. Saage 1994, 119–128). Vorlaender holds the view, as we have seen, that Kant is essentially a "liberal" but detects within this liberalism a "somewhat radical attitude" (Vorlaender 1893, 18).

Although there is no direct indication that Marx took his cue from Kant in outlining his materialist theory of history, there is an indication that Kant believed that his own sketch of historical development that he presents in his essay on *Universal History from a Cosmopolitan Point of View* might benefit from further elaboration later. Indeed Kant emphasizes how his own sketch is modestly put forward as a starting point for a functional account of history. In the opening paragraphs of the essay he indicates that

here there is no other way out for the philosopher—who, regarding human beings and their play in the large, cannot at all presuppose any rational aim of theirs – than will to try whether he can discover an aim of nature in this nonsensical course of things human; from which aim a history in accordance with a determinate plan of nature might nevertheless be possible even of creatures who do not behave in accordance with their own plan. We want to see if we will succeed in finding a guideline for such a history, and want them to leave it to nature to produce the man who is in a position to compose that history accordingly. Thus did it produce a Kepler, who subjected the eccentric paths of the planets in an unexpected way to determinate laws, and a Newton, who explained these laws from a universal natural cause (*IUH*, AA 8:18, cf. *CBH*, AA 8:109).

One of the major aims of Marx in his systematic writings is to show that we may regard our history as having a strongly functional element: he claims that there are distinct epochs in human history which are heavily influenced by the mode of production that predominated in the society at the time. That mode of production led to definite class structures which brought about social divisions and conflicts that gradually moved the society forward. Arguably Marx takes the analogy with natural science to too great a length by suggesting that progressive social changes will inevitably come about.² There can be no absolute guarantee in human affairs that this development will follow a predictable course. The potential exercise of freedom by human individuals cannot be ruled out. Progressive developments may both be hampered as well as encouraged by our own

² For a discussion of Marx's views on science see Williams (1989), especially pp. 220–242.

choice. In this respect Vorlaender is correct to emphasize the role that ethics must play in human progress.

Thus, Vorlaender was neither a fully-fledged follower of Marx nor Kant. When Vorlaender speaks of his relationship to Kant and Marx in the Preface to his Marx biography he emphasizes that he *comes* philosophically from Kant and has studied Marx for more than 30 years from this standpoint (cf. Vorlaender 1923, iv). But he stresses that he has never been a Kantian in the “school sense”, as the Russian philosopher Bukharin tries “to have done with him”, nor was he a “Marxist” in the sense in which “Sombart dismisses him” (Vorlaender 1923, iv). Here Vorlaender is trying to convey his independence from both Kant and Marx as a scholar and philosopher. He regards himself as attempting a novel synthesis of the two standpoints. And it is on this attempted synthesis Vorlaender's contribution to political philosophy has ultimately to be judged.

Conclusion

What is most to regret in Vorlaender's considerable and significant studies of Kant's philosophy is the lack of a systematic engagement with Kant's philosophy of right. Commendably Vorlaender gives prominence to Kant's shorter political and historical writings, bringing out Kant's role as a public philosopher in Prussia and Europe during his time. Vorlaender plays an important part in establishing Kant as an important political theorist – independently of the major role played by the critical philosophy within philosophy itself. However, this is at the expense of downplaying the systematic part of Kant's political philosophy which is to be found in the *Doctrine of Right* in the first part of the *Metaphysics of Morals*. In this Vorlaender was no doubt only following the general tendency of Kant scholarship in his time – especially amongst the neo-Kantians – which focussed primarily on the three *Critiques*, especially the *Critique of Pure Reason* and as an addendum to the *Critiques*, the *Groundwork of the Metaphysics of Morals*. Vorlaender, like his mentor Hermann Cohen, drew conclusions from these writings as to what Kant's political position might be and generally drew conclusions which he thought compatible with Kant's categorical imperative. None the less Vorlaender, in an attempt to raise the status of Kant's *Doctrine of Right*, might have paid closer attention to the impact Kant's strictly legal and political thinking had on his immediate philosophical audience in the 1790s and beyond (cf. Maliks 2014, chap. 4–5). Fichte and Hegel took very seriously some of the main philosophical arguments of the *Doctrine of Right*, and there was considerable debate about *Toward Perpetual Peace* and the *Metaphysical First Principles of the Doctrine of Right*, when they first appeared in 1795 and 1796. Thus, there

was an earlier history of paying close attention to the systematic arguments of Kant's critical doctrine of right that Vorlaender might well have taken up. In the far less receptive context of British philosophy in the mid nineteenth century, several decades before Vorlaender began his studies, T.H. Green and Edward Caird had, after all, attempted to follow Kant's arguments about right in far greater detail (cf. Caird 1889; Green 1941).

Vorlaender notably excerpted Kant's writings for a progressive take on Kant's politics. He read Kant's philosophy assiduously – both his published work and the unpublished manuscripts. On the whole, however, Vorlaender fails to follow through the systematic import of the Kantian doctrine of right. Kant's political views were not seen as coherently connected to his philosophy of right, but rather as emanating from the general spirit of his critical philosophy. Of course, there was no clash between the system as a whole and the *Doctrine of Right*, but in the neo-Kantian interpretation the overall general connection was emphasised at the expense of the precise systematic scholarly connection. As a result, book length work on Kant's philosophy of right was left to the late twentieth century (Kersting 1984; Saage 1994; Shell 1980) and beyond.

We can take as an example of Vorlaender's somewhat narrow appreciation of Kant's doctrine of right the section in his biography of Kant where he speaks of Kant's *Rechtslehre* as a product of Kant's retirement years. Vorlaender remarks that the *Metaphysics of Morals* does not, in his view, "provide a complete system of the philosophy of right and ethics, only the philosophical introduction to such a system" (Vorlaender 1924, 277). In a literal sense this assertion is, of course, true – especially of the *Rechtslehre* – which Kant himself describes as the *Metaphysical First Principles of the Doctrine of Right*. But Vorlaender overstates his case about the standing of this work when he implies that there is a disconnect between it and the critical system. He expresses regret that not much is taken up in the *Rechtslehre* from the ideas that Kant presents in his earlier lectures on natural right and morals, suggesting that the lectures seem to have nothing in common with the later work, although Vorlaender acknowledges that many of the technical terms that are used by Achenwall in the textbook Kant used for the lectures on natural law are to be found in the later *Doctrine of Right*. Vorlaender regrets too that the discussion of private law in the *Rechtslehre* rests on the deployment of terms from Roman law which are distinctly of a "dry, abstract, nature" (Vorlaender 1924, 277). For Vorlaender the most interesting paragraphs in the work are devoted to the "ownership of land, money, the rights of parents and households" (Vorlaender 1924, 277). This is unfortunately a rather summary and partial judgment of the whole work which reflects the fact that the *Rechtslehre* was in Vorlaender's time read only as a supplement to Kant's main works, and not considered as an important part of the critical philosophy as a

whole. It seems therefore fair to conclude that Vorlaender underestimates the systematic importance of Kant's theory of right. In this respect Vorlaender was a representative of the neo-Kantian school as a whole which focussed primarily on the significance of Kant's system from the perspective of natural science, the theory of knowledge and individual morality.

In tune with his interest and support for socialism and his sympathy for the Marxian outlook Vorlaender at times shows himself to be impatient with Kant's gradualist and reformist approach to politics. This sympathy with Marx's politics may help to explain why Vorlaender does not fully endorse Kant's views on political change. Kant objects strongly to strategies of resistance and revolution in his *Doctrine of Right* (and in his writings on politics generally) and makes clear at all times his preference for change from the top down via reform. Marx clearly is not wholly averse to political change taking place through reform, however his general expectation appears to be that the most vital political changes can only take place through revolution. Revolution need not necessarily lead always to violent conflict and bloodshed, however they are not ruled out and often are a key part of developments within this radical outlook. Vorlaender wants always to avoid violent upheaval but, through his partial embrace of Marx's politics, he seems to contemplate its necessity as a last resort. Arguably Vorlaender is able to take this position because he does not fully comprehend the significance of Kant's representative, republican view of authentic politics. To act politically for Kant citizens have simultaneously to see themselves as both potential law makers and members of the executive. Politics has to be pursued by the people's representatives. Individuals cannot act directly for themselves in the political context. Policies have to be seen as the outcomes of structured public debates reflected upon in a disinterested way with the general well-being in mind. They cannot be decided upon as the whim of the moment by large scale political pressure.

In contrast with Vorlaender, Kant seems more aware of the precariousness of civil institutions and the authority of the rule of law. Such open civil institutions, which allow debate and the election of representatives, should be cherished and not be exposed to radical political upheaval. Vorlaender draws attention to Kant's preference for a *strong* state. For Vorlaender it is a striking, "decisive" element of Kant's political philosophy which goes hand in hand with Kant's "concern for the possible and the given" (Vorlaender 1924, 228). He appreciates the reasons for Kant's emphasis on these elements and understands that the concern for them may lie in Kant's own background in Frederick the Great's Prussia. However, Vorlaender himself is not fully convinced of the validity of such a state-oriented approach which we can see in a more marked form in Hegel's political philosophy. In speaking of Kant's desire to see a powerful and effective

state I think, however, it is important not to see this objective in Bonapartist or twentieth century totalitarian terms. Kant indeed wants there to be a flourishing state, with the complete monopoly of legitimate force, in order that society may progress; and also that there can be proper representative government and so individual freedom. What leads Kant to the view that state authority has to be fully assured is his concern about the vulnerability of civil society itself and the precariousness of individual freedom. Kant seeks to avoid a politics that is governed by mass emotion and the fashions of the day. Politics should be led by the respect for law and the considered reflections of reason (encouraged by the freedom of expression) and not by the passing whims of the time.

With the benefit of hindsight (enriched or, rather, *disillusioned* by the tumultuous history of the twentieth century) we can say that Vorlaender seems not to have fully thought through the contradictions in his own political theory – sandwiched as it is between the Kantian and Marxian heritages. Rather than moving forward with a workable synthesis of Marxian and Kantian ideas, Vorlaender was seemingly trapped by a too benign admiration of both thinkers. Understandable as this might be in the writings of historian of philosophy such as Vorlaender – who was always concerned to emphasize the contribution of the German speaking world both to philosophy and history – this approach appears to have prevented him from recognising the potential pitfalls that might lie ahead of a too generous amalgamation of the two thinkers approaches. No two political theorists of note entirely see the world and the ideal politics in precisely the same way. There were certain to be significant variations between Kant's approach and Marx's approach. As Vorlaender himself points out, we can even see such significant differences between the two key protagonists of socialist thinking, themselves, Marx and Engels. Vorlaender takes Marx to be the more creative, profound mind and Engels the more practical and receptive mind (cf. Vorlaender 1929, 247). They must therefore from time to time arrive at different conclusions. Thus, it can be no surprise that the sober reformism and progressivism of Kant's philosophy, and the revolutionary spirit of Marxism failed to gel in Germany and Europe in the 1920s and 30s. Instead of which they were driven apart by the revolutionary Bolshevism of the German Communist Party on the one side, and the fascist insurrectionists of the National Socialist Party on the other. Vorlaender's political theory reflected, but failed to overcome the stark conflicts of the Weimar Republic.

Arguably the authoritarian German legal philosopher Carl Schmitt took more seriously Kant's legal and political philosophy than some of the neo-Kantians.³

³ Cf. Schmitt (1988, 38, 41) where he alludes to Kant's influence on German political thought.

Of course Schmitt's object in his writings in the 1920s was wholly to oppose Kant's liberalism and reformism. But he may have sensed more than Vorlaender the progressive value of Kant's political philosophy. A general weakness of the neo-Kantian approach to Kant's practical philosophy was to confine it as much as possible to the personal sphere, and its systematic exposition to the academic sphere. Although Vorlaender was a stark exception to this with his clear and valuable expositions of Kant's liberal political ideas, he may though in the end have shared the general fault we see in the neo-Kantian approach of placing too much emphasis on the private sphere and scholastic enquiry in the examination of Kant's moral philosophy. The categorical imperative does not contain Kant's last word on politics. Creating a world where actions that accord with the categorical imperative find their place requires coming to terms with the separate but related field of right. Politics is the carrying out of the theory of right, taking advantage of the mechanisms of nature that work in favour of progress. Kant sought a politics which permitted the full experience of individual autonomy, whilst at the same time maintaining popular sovereignty; the separation of powers; and the rule of law. Achieving and maintaining the latter three may at times require a restraining of the former in a manner in which the autonomous individual may find difficult, if not necessarily impossible, to swallow. Maintaining the independence of equal, participatory citizens requires the presence of the possibility of a mutually reciprocal coercion.

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