

BOOK SYMPOSIUM ON KENNETH R. WESTPHAL'S
HOW HUME AND KANT RECONSTRUCT NATURAL LAW

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Kenneth R. Westphal

Introduction

Thank you each and all for coming and for your interest! I hope what we do today isn't disappointing; I'm grateful for your patience with my speaking yet another language, this one English. Please do interrupt me if I don't speak clearly enough or if I speak too quickly. I'm sorry I have not yet had an opportunity to learn Serbian, so my warm thanks to you for attending!¹

Let me try to say a few things briefly about what I've tried to do in this book; it results from, well, let me put it this way: I tried to pursue the kinds of studies and research required to write this book on issues that have been with me really from childhood. I was first exposed to Hume's theory of justice in an undergraduate course in political philosophy at University of Illinois taught by B.J. Diggs. Diggs was one of the few people who paid attention to Hume's theory of justice at that time, which turned out to be an extremely fruitful beginning for me in part because already I was concerned about whether it may be possible to recover at least the core content of a defensible, tenable natural law theory without getting involved in issues about moral realism – that is, the notion that there are somehow human-mind-independent moral facts of the matter that we need properly to take into account – because debates about those kinds of facts have for millennia been enormously controversial, especially among philosophers, though not only among philosophers, and at times not merely controversial, but controversies as you are painfully aware which too easily break out into open armed conflict and worse. So I've been trying to figure out whether or how it might be possible to identify some very

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basic moral norms without having to invoke issues about moral realism *or* anti-realism and also without getting sidetracked by issues about moral motivation and its purported relations to moral justification. Hence I have found myself quite at odds with most everything that's happened in ethical theory in the Anglophone 20th century. It turns out that right up to the end of the 19th century and into the very early 20th, everyone regarded moral philosophy as the genus with two proper species – ethics and justice, and those interested in moral philosophy were equally interested in issues about philosophy of law and philosophy of education. This is also true of none other than Henry Sidgwick, who mostly now by Anglophones is remembered only for his *Methods of Ethics*, to the utter neglect of his own *Principles of Political Economy*, of the fact that he was the head of the Statistical Section of the Royal Society when that section was responsible for economics, prior to economics becoming its own discipline. Sidgwick had written a really quite wonderful book on the *History of European Polity* and he understood political economy and wrote on it as a moral science, not only in the sense that it investigates human phenomena, but that political economy is also a *normative* art, as Sidgwick says. All of that is set aside in short order at the beginning of the 20th century among Anglophones with the sudden advent of moral intuitionism among Moore and Ross, and also C. D. Broad's *Five Types of Ethical Theory*. Now, much better attention to Sidgwick's work was given by Jerry Schneewind (1997) in his really quite astonishing study of Sedgwick's thought and philosophy, but Anglophone philosophy remains mostly very compartmentalized because this makes life (appear) simpler. So I have been trying to reestablish what I still regard as the proper genre of moral philosophy as containing the two equal species – ethics *and* justice – and trying to point out that issues about justice are not just corollaries to ethics, which is how they have been largely regarded, which is why in the Anglophone tradition Rawls's *Theory of Justice* (1971) was taken to be such a breakthrough, declaring, in effect: "I'm just going to do political philosophy; I'm not going to try to deduce it out of ethics or as corollaries to ethics." I'm not persuaded that Rawls's methods were sufficiently fundamental. We can discuss why so later, if you wish.

So, my aim has been to devise a certain kind of moral constructivism which can, I think, identify and justify fundamental moral norms, including juridical norms of justice, without appeal to the kinds of subjective factors or states of awareness that have been prominent in Hume's own ethical theory and also in most varieties of contemporary moral constructivism, because they all face exactly the kind of problem that can be found within Hume's sentiment-based ethics. If we base the identification and justification moral principles upon subjective states of awareness, we wind up with an account of those principles that cannot address anyone who simply lacks those states of awareness, or less honorably: those who deny having them. So I think all these contemporary varieties of moral constructivism that do take alleged states of awareness as basic have given in to moral relativism and pretty nearly to conventionalism before they get started. So, I've looked to how Hume identified a different way

of constructively identifying and justifying fundamental principles, by taking into account quite basic and pervasive facts about our very finite form of human agency and our manifold dependencies, interdependencies and vulnerabilities, by which we are subject to extortion, injury, deception and other such unwelcome actions. Without any regard to motives or to sentiments, in his theory of justice in the *Treatise* (Book III), Hume argues strictly on grounds of utility that for human life to be possible at all, we require very basic principles providing for acquisition and justifiable use and also transfer of goods, including principles governing fidelity to promise and contract – and in conditions of even modest population growth, we further require some version of more or less formal institutions of government to identify and adjudicate disputes about rightful use or unrightful misuse of goods or about sufficient fidelity or infidelity regarding promise or contract, and to determine proper redress for violations or failures of performance. Thus we get quite straightforwardly on Hume's account at least the rudiments of civil and perhaps even criminal justice. He also argues that we then confront coordination problems, namely: We all benefit enormously from various kinds of public works, and it is an entirely suitable function of government to organize and commission such works, such as highways or harbors, or also the common defense.

In these ways, on grounds of utility alone, Hume identifies and justifies these basic, central principles of justice. They may be elementary, but they are not at all trivial. We don't get from Hume's account of justice much attention to issues about political legitimacy, because Hume's own project in the *Treatise* is largely explanatory. That's no surprise, yet there are some traces of his concerns with issues of legitimacy and with legitimate distributions of power and wealth; in some of his later essays he certainly is aware of how often and how easily powerful men have dominated women, slaves and other groups over whom they can wield power. So, he is not insensitive to those issues, but he doesn't have a philosophical response to them. Annette Baier (2010) has drawn attention to the great expansion of Hume's concept of justice in his *History of England*. I think that she's right about that, but she says nothing about whether or how he justified his expanded concept of justice. I don't think that he did justify it; certainly she doesn't show that he did.

However, these are precisely the issues directly posed by Rousseau, famously so, and I think quite rightly so. Central to Rousseau's requirement for legitimate law, legislation and government is what can be called the Independence Requirement: Within a legitimate society no one is to be allowed to acquire or to wield any kind or extent of influence, prestige, wealth or any other form of social power, by which he or she can unilaterally dictate what someone else does. This insures that cooperation is always on the basis of voluntary agreement for good reasons; this insures moral freedom of each and everyone, according to Rousseau. It's no surprise that this is exactly what Kant takes up.

Also no wonder is that Kant's sole innate right to freedom further spells out Rousseau's Independence Requirement. Yet running through this entire approach to legitimacy is the old Roman law adage, from the 2nd century C.E.

Phonetician jurist Ulpian: to live honorably, injure no one, and render unto each what is his (or her!) due. Now there are pressing issues what counts juridically as in-jurious, and I think Kant's principles can help quite a lot with these. The fundamental point of Kant's universalization tests is that rational justification in all non-formal domains, including ethics and justice, of claims, principles, judgments or also those maxims that guide actions, requires that sufficient justifying reasons for the claim or action or maxim are such that they *can* be addressed to all others, such that any and all others *can* identify and assess those grounds and likewise find them sufficiently justificatory, and *can* adopt and follow them in thought or in action, consistent with one's own judgment or prospective action. That's the universalizability built into Kant's universalization tests; Kant is already working with exactly that kind of communicability requirement in the "Doctrine of Method" in the first *Critique*. It's not new to the *Groundwork*, it's not new to the *Metaphysics of Morals*, it's fundamental to the entire Critical philosophy.² This is exactly what Hegel learns from Kant; these are the core conclusions to Hegel's analysis of mutual recognition in the *Phenomenology of Spirit*, but I'll leave Hegel aside,³ except to mention this point, that Hegel seizes upon what Kant had identified about this communicability requirement for justification, namely: a direct counterpart to Hobbes's problems in the state of nature where, again, too much of the Anglophone tradition has been obsessed with Hobbes's alleged egoism, though in fact he is not an egoist about human motivation; instead, the more fundamental issues Hobbes raises concern coordination – intersubjective coordination in our use of goods: simple innocent *ignorance* of what belongs to whom and what she or he rightfully may do with his or her belongings; simple ignorance of those relations suffices to generate the kind of total mutual interference that characterizes Hobbes's state of nature. *That's* the fundamental point in Hobbes's reconstruction of what turns out to be Epicurean natural law theory. I don't make that case; that's been done by Bernd Ludwig (1989).

Now, concerning issues about justification, Kant points out two *distinct* issues of coordination concerning our judgments about what are (or are not)

2 In his review of my book, (McCarty 2016) simply re-asserts his belief that any maxim of this form, 'You exploit me in this way this time; I exploit you in this way the next time', passes Kant's universalization test, entirely ignoring three fundamental points: The care with which I have explicated the relevant kind of universalization; O'Neill's (1989, 138–9) observation that 'The false promisor, the deceiver, the coercer, the rapist – all of them *guarantee* that their victims cannot act on the maxims they act on. (If erst-while victims adopt the maxims of those who victimized them, they have regained some agency and become collaborators and colluders, not victims, and the initiator's maxim must be reconstructed)'; and that when the subservient partner is in the control of the dominant one, the latter can do whatever s/he will with or to the submissive partner, regardless of their prior agreement; this is a fact about power and its possible abuses, it is not a moral permission so to do. (All *Notre Dame Reviews OnLine* are commissioned; McCarty's blunder indicates what has become of today's 'scholarship'). For a much more accurate review, see Šljukić (2017).

3 I examine, reconstruct and defend Hegel's Critical philosophy in Westphal (2018a).

sufficient justificatory grounds regarding which claims, judgments, maxims or actions *are* sufficiently, rationally justified; namely, that either we identify grounds, and hence also on their basis actions, which *can* be omnilaterally justified for sufficient reasons, *or* within the domain of rational justification we're stuck with a direct counterpart to Hobbes's state of nature. Kant *names* Hobbes in this connection in the "Doctrine of Method" of the first *Critique*, and Hegel noticed that: Consider that marvelous section, "The Animal Kingdom of the Spirit" (*Der geistige Tierreich*); it is the direct literary counterpart to a Hobbesian state of nature, and not at all incidentally. Hegel, it turns out, was an extraordinarily subtle reader of Kant's Critical methodology. So Hobbes's point about coordinating intersubjectively publicly identifiable principles and practices, and by these also specific titles regarding who is entitled to do what with which things, when and how, so that these fundamentals of justice must be *public* principles, procedures and titles in order to relieve us of our natural ignorance of who is entitled do what with what, when and how. Hence justice must be public. When Hobbes says that justice pertains to men in society, not in isolation (*Leviathan*, 1.13.13), is not espousing conventionalism. His point rather is that fundamental moral problems start with problems of coordination, and those problems are exactly the problems Hume addresses in his theory of justice in the way that I mentioned about basic rights of acquisition possession, use, transfer, promise, contract and the rudiments of civil and criminal justice.

The interesting point about Hume's theory of justice in these regards is that in identifying and justifying these fundamental principles, even in terms solely of utility, at no point does Hume appeal to anyone's sentiments or motives. Indeed, Hume *rejects* act utilitarianism and adopts rule utilitarianism with a quite direct and I think also decisive example, his own example of restoring a fortune, a vast sum of money, to a seditious bigot – that's his own phrase – or to a miser. If you do so, plainly the public is not the benefactor because that money is either taken out of public use altogether, or it will be used for seditious or bigoted purposes, so plainly the public will not benefit by that restoration. However, the rules of justice require the restoration of a fortune to its rightful owner and that's a much more fundamental point of public justice and utility than the further consequences. When Hume makes this case, nothing about anyone's character, or motives, or sentiments – not of the agent, not of the miser, nor the bigot, and not of any ideal spectator – plays any role at all, zero, none – they just disappear, because they're not necessary and indeed irrelevant to this fundamental principle and practice of justice.

Hume himself shows us how to identify and to justify a fundamental moral principle without any appeal to his own sentiment-based ethical theory; *brilliant!* This was really quite common procedure in modern natural law theory, which then got lost because too much of it was done within a more or less theological worldview and the authors tended to get carried away with that aspect of the view rather than looking at juridical fundamentals. Yet Hume is not doing anything radically different; he's paying much more careful attention to these basic principles than most of his predecessors, that's not nothing. Yet

it's exactly that same kind of analysis Kant gives us about fundamental rights of acquisition, possession and use at the beginning of his "Doctrine of Justice" (essentially §§1–9), but amplified by Kant's use of Rousseau's Independence Requirement and a much more sophisticated account of rational justification, including the condition on the communicability of sufficient justifying reasons I mentioned before. This distinctive and incisive method for identifying and justifying basic moral norms has been altogether neglected, to our detriment (*cf.* Westphal 2018b). Thank you.

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As for the problem of how Hume and Kant reconstruct natural law, I've found some interesting points that I would like to address and call our attention to them. As a student of law I may not have been able to understand entirely some other points in the book and I would like to get a clarification.

1) One of the things I find interesting is the definition of moral realism. It is very important to make a difference between the thesis that there is a definite answer to question whether one is morally obligated and the thesis that there are some human mind independent truths. Because obviously a moral constructivism can endorse the first thesis, but moral realism is limited to the second thesis.

2) The second interesting point are five social coordination problems of Hume. They are reminiscent of Herbert Hart's legal anthropology in his famous book *The Concept of Law*. Hart speaks about five truisms which are contingent facts, but nonetheless universal about human nature: human beings are vulnerable, more or less equal, they have limited resources at disposal, their sympathy towards each other is limited (neither angels nor devils) and they have limited understanding and strength of will (limited contemplation and determination). All of those truisms justify certain rules (Hart makes a difference between primary and secondary rules). For example, the vulnerability of human beings justifies the rules that demand protection of persons. The equality enables coercion, because if there were greater inequalities among humans so that some were greater and stronger and smarter it wouldn't be possible for the less strong and less smart to exercise coercion and impose sanctions on the superior ones. The limited sympathy makes the coercion necessary. The limited resources are enough to justify both static and dynamic rules, in the sense that static rules regulate property (Hart doesn't use the term possession) and the dynamic rules that regulate promise and contract. In contrast to Hart's account Hume requires some further premises, further social coordination problems in order to make a complete system of those static and dynamic rules regulating possession or property and promise and contract. The limited contemplation and determination justify the secondary rules which give legitimate power to government to organize the society to issue further authoritative rules. That is actually the fifth

social coordination problem that Hume also discusses and uses as a justificatory point for government rules as rules protected with sanction, i.e. legal rules.

3) The third point I find very interesting is your remark that issues we confront today, primarily legal philosophers and moral philosophers, are far too complex to afford a dismissive attitude towards our philosophical predecessors. In regard to that I had an impression that maybe too much is written about what other authors have already written. We are discussing what someone said, we are having a meta-debate forgetting about the core issues, just discussing only about sentences or even words which are in some works of renowned authors. My concern is that if we disregard the core issues, then the meta-debate would be in vain.

The points that I found problematic are the following:

1) The contention that moral philosophy entails ethics and justice is contestable. I regard justice as a moral value or a moral virtue, not a philosophical discipline in practical matters. Therefore it is hard for me to conceive ethics and justice on the same level as two coordinate types of moral philosophy as a generic discipline. Ethics is like a synonym to moral philosophy, while justice represents an object of legal philosophy, even maybe of political philosophy. From that viewpoint it would be plausible to talk about ethics and legal philosophy as types of the moral philosophy, on the one side, and about good and justice as their objects, on the other. That was on p. 2 of the book. Now I would like to refer to p. 25, where we come to read about basic moral principles of ethics and jurisprudence. Somewhat different terminology is used which calls our attention to the possibility to reformulate those elements of moral philosophy. On p. 181 we may read that for the Anglophone analytical ethics in contrast to moral philosophy the ethics is primary, while social-political philosophy i.e. justice is secondary. Therefore, in three different places of the book, three different terminologies are employed to address the problem of justice. That is how I reach the conclusion, and please correct me if I am wrong, that the moral philosophy can be divided in an individually oriented and a collectively oriented part. The division may well not be precisely stated. But the formulation suffices to point out that the individual problems constitute the object of ethics as moral philosophy in the narrow sense, while legal and political philosophy deal with the collective issues.

2) Proceeding from the previous question, I would like to ask whether to comply with the dictates of justice represents an ethical or a moral duty?

3) According to the Optionality premise the fact that the principles of justice are artificial does not necessarily mean that they are either relative, conventional or arbitrary. But, does it mean that relative and conventional moral standards and principles are not arbitrary and to what extent? I see a relative moral principle as based on an individual decision or individual will, while conventional as based on a collective will or agreement. But, is the difference made with regard to arbitrariness? Aren't they both already arbitrary? We may even take into consideration different types of moral relativism: descriptive, normative, meta-ethical. I would appreciate if you could clarify the matter.

4) I now turn to the difference between identification, explanation and justification of moral principles as primarily explained on p. 40 and 41. A difference is asserted between an identification of moral principles, explanation of our knowledge of them and justification of both moral principles and our knowledge of them. Hume's project was purportedly explanatory. Supposedly in his moral theory he remained focused only on the explanation, not on the justification. I'm afraid I was not able to catch the fine difference between these two. Each definition of three tasks entails a normative element, because we are not simply to identify principles, but to *correctly* identify principles, to *properly* explain and to *tenably* justify them. While reading the book I regarded identification of principles as a completely cognitive task meaning that principles are somehow given in advance, and we have to identify them, to state them, to describe them, not prescribe them, and only afterwards justify them as they are. It seems as opposed to the whole project of moral constructivism the talk about a correct, proper identification. It seems to me as if the correct identification overlaps with the justification of the principles. How otherwise are we supposed to correctly identify them? That is also something I had a problem with, having doubts whether I understood it properly.

5) Referring to p. 55 and contention that some acts of injustice arouse the sense of injustice because they are unjust. My question is whether some or all acts do arouse the sense of injustice in Hume's opinion?

6) Referring to p. 58 and the figure of impartial spectator, I would like to ask whether there is a difference between being just and being non-arbitrary? As complex social relations the principles of justice (as principles solving social coordination problems) are artificial. Nonetheless they are indispensable to human life both individual and collective. That's why they represent laws of nature, i.e. they are non-arbitrary. But, moreover those principles are said to be just. Why? For reasons Hume provides in his resolution to five social coordination problems. I am referring to p. 36, where the discussion about the social coordination problems concludes. On p. 58 the principles "of justice" (as principles solving soc. co. problems) are laws of nature, i.e. non-arbitrary, because they are solution to those problems. But on p. 36 the principles "of justice" (as principles solving soc. co. problems) are just because of the same reason, that is, because they are solution to those problems. In that light my question is whether justice consists in non-arbitrariness, and if not, why are laws of nature just beside the fact that they are non-arbitrary?

Kenneth R. Westphal

Thank you very much; I think these are very interesting questions! Obviously I regret having left some of them apparently open, but let me try to clarify some of them. Let me start with a remark regarding moral anthropology or practical anthropology (as Kant calls it) and Hume's observation about our limited generosity and benevolence. This feature of what Hume takes to be human psychology – our limited generosity and benevolence – at most explains why we

need to pay particular attention to duties of virtue or duties of justice regarding others, and when we ought to be and how we ought to be more benevolent or more generous. So, the fact of limited generosity only *explains* why we face particular issues about when assisting others is morally a duty; it doesn't *justify* these acts morally *as dutiful*. *These* are the moral issues, while limited generosity does nothing to identify which acts *are* appropriate or morally obligatory acts of assistance. This is part of where Hume is engaged in a psychological, anthropological form of inquiry about moral beliefs, which by design cannot address issues about which actions are in fact just or virtuous or for that matter supererogatory (*i.e.*, above and beyond the call of duty). In the Hume chapter (of my 2016 book) where you wonder what counts as explanation, and what counts as justification, there's very little normative justification of Hume's basic rules of justice, because Hume's account is so much an explanatory account, mainly seeking to explain why certain actions are *called* just or unjust, and at times he wants the mere designation of acts as either just or unjust or the mere designation of acts as virtuous or unvirtuous, vicious, to constitute those acts *as* (morally) just or unjust, virtuous or vicious. That's the strongest nominalist part of Hume's anti-rationalist explanation of moral language and moral beliefs. That project of Hume's has nothing to do with justifying those beliefs (morally or otherwise); it only seeks to explain how we ever come to associate any moral sentiment of approval or disapproval of various acts which we happen to designate 'just' or 'unjust', 'virtuous' or 'vicious'. So, you're right, in that chapter there's very very little about normative justification, yet the issue about non-arbitrariness comes up this way: These basic rules of justice Hume *does* identify, and he identifies in many regards why these are absolutely *necessary* for human life. This *is* an important contribution to their identification and their justification, except that Hume doesn't make it out to be a normative justification. He does say they promote general utility, but does not offer this observation there as a normative justification of those principles. All the normative justification awaits my discussion of Kant's views (in the subsequent chapters).

So, the issues you query regarding non-arbitrariness are emphasized by the way I try to get philosophers to stop automatically equating conventional norms with arbitrary or optional norms, which has been rampant in the Anglophone discussion for the past 80 years. I think it really is an insight on Hume's part that there *are* some norms which may well be conventions, they may well be our artifacts, but nevertheless they are *entirely* non-optional: either we identify these and abide by them, or resolve all our problems by quickly going extinct. So, there's at least a strong prudential reason to behave ourselves rather better than we often do, but this is not a normative, moral justification of so acting (on Hume's part) because it is the right way to behave in our dealings with one another. So, yes, and I tried at several points (perhaps not clearly enough) to indicate, that of course there are many principles we must establish conventionally; this is called legislation and custom, but these will all specify and augment the very basic principles of justice that Hume has identified in his rules of justice and some further such rules that I think Kant identified. As

particular societies become larger, they require more clearly stated laws governing property and its acquisition, its rightful use, transfer, and what counts as harmful or negligent misuse of our belongings. Many such principles and practices must be made more specific as our societies increase in size and also as our economies become more complicated and as we start putting so much more technology into economies and into common usage. I wanted to emphasize that there is a core group of principles by which we must abide, in one form or another, within any feasible, and within any tolerably just, human community. As for what is tolerably just, I only address in the part of book on Kant, but I think that Hume's insights about the rules of justice are a really good start, and in particular that he sees that artifice, literally making something, such as these most basic principles, may be conventions, and yet, nevertheless, there are simply no alternatives for us given our finitude and our mutual interdependence and our vulnerabilities.

Yes, nominally the terms 'ethics' and 'moral philosophy' could be swapped around, but I'm happy to go back to Plato's *Laws* and also to Aristotle – his *Ethics* and *Politics*, which are two parts of one project – and how consistently this topic was regarded as moral philosophy, also in England of the 19th century, e.g., Bentham and Mill. Bentham means his title: *Introduction to the Principles of Morals and Legislation* – and likewise Mill, in *Utilitarianism*, in the last chapter on justice, is quite clear that these rules are rules of justice for philosophers too, until they show us that we can do better in these regards. Sidgwick is quite plain about moral philosophy embracing both ethics and justice. So, yes, we could swap the English terms, 'morals' and 'ethics', but I think the tradition of usage, coming from literally the ancient Greeks to now, leaves us with more established usage according to which moral philosophy designates the genus, and within it we have ethics, justice, political philosophy, philosophy of law, philosophy of education, and of course everyone from Plato, indeed from Socrates, down to Sidgwick recognize that these are inseparable aspects of human life. Ethics just isn't individualist in the way that 'moral point of view' theories tried to make it in the 1950s. The individual questions about how each of us ought to behave are shot through with all kinds of social dimensions regarding our associates, our family, our friends, and of course all of our professional, or vocational, or academic involvements and how we make use of public, civic and private materials and resources.

So I agree with you that there isn't any clean, plausible distinction between individualist ethics and anything more social, but that's how too many Anglophones have thought about ethics in the 20th century, beginning with Moore, Ross and C. D. Broad. Broad first restricts attention to the ethical aspects of those writings of the figures he considers in his *Five Types of Ethical Theory*, where he praises Sidgwick to the heavens for all sorts of things, but never mentions that Sidgwick wrote on *Principles of Political Economy*, the *History of European Polity*, and that many of his ethical essays addressed quite pressing social and political issues. All of these are completely disregarded by Broad, and that neglect goes forward in the Anglophone tradition, particularly so in

the United States, but very much so also in England; *this* alleged primacy of individual(ist) ethics to justice I dispute; and yes, I expect this dispute to make much less sense in Europe, or anywhere else in the world, because in Europe there's been quite broadly, with one exception, a much more generous and responsible retention of the importance of issues about politics and justice and philosophy of law. The exception is France where the influence of the Communist Party squelched issues about philosophy of law, political philosophy and many issues about justice until really quite recently; I know French colleagues who now are doing all they can to regenerate political philosophy and theory of justice within practical philosophy. I hope that's some help; thanks for your questions and comments.

Igor Cvejić

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I have three questions or comments. The first two questions are concerned with some of my doubts about taking Kant's arguments, but trying to take them without general background of transcendental idealism and *a priori* foundations.

1) When we take a look at the first six paragraphs of *Private Rights* in *Metaphysics of Morals*, where Kant reveals his arguments about a possession, we could see that Kant's core intention is to abstract from intuition (*Anschauungen*, MS, AA 06: 255), explicitly, from world of phenomena, from the nature as the field of concepts of understanding (*Verstand*). Thus, the object of intelligible possession is, primarily, the purpose, as the object of the will, e.g. the object of purposive causality. It is important because it shows to us, that Kant explicitly leaves the questions about sensuous objects, and the nature, and speak about noumenal objects, and the realm of ends. The whole argument is, thus (at least before §7.), developed in the different field, in the world of noumena. It actually helps Kant to skip some problematic questions related to the physical conditions, because he strictly speak about noumenal objects, objects of the will. Therefore, I am skeptical about a claim that Kant had missed to mention some anthropological arguments, but I find that he rather wanted to make *a priori* foundations for his argument in the world of noumena – and, accordingly there are no place for arguments which concern the physical world. Important implication from this is the that Kant actually take an opposite direction and in his next step he applicate the concepts of the freedom to the world of nature, which is an important step in his critical project as a whole.

2) This question could be sharpened if we look at the chapter in *Critique of Practical Reason* which concerns the object of practical reason (KpV, AA 05: 57f). Here Kant introduce phenomenological distinctions in a constitution of the object of cognition, on the one side, and the object of will, on the other. Probably the most radical interpretation of this argumentative step could be found in Herman Cohen. He argues that we should distinguish different directions of consciousness (*Bewusstseinsrichtung*) for every basic faculty of the

soul, and, accordingly, different directions of consciousness constitute a different content of consciousness (Cohen 1889: 97).

Both previous questions remind us how important for Kant is a division of basic faculties of the soul. It is evident also in the fact that Kant starts *Metaphysics of Morals* with emphasis on the division of the faculties. Thus, my concerns are that Kant's argument work inside the field of the concepts of freedom, which are applicated to the physical world only in the further steps of the argument, while on Professor Westphal's account it seems that physical conditions play important role already in the first steps of the argument. Particularly, I have doubts if Kant's argument is correct if we do not distinguish the objects of the will from objects of cognition in the first steps of the argument.

3) Finally, my last comment concerns the question of the foundation of intersubjectivity in Kant, relevant, of course, for the argument about possession. In *Metaphysics of Morals*, after he introduced argument for taxation, Kant writes:

“The general will of the people has united itself into a society which is to maintain itself perpetually [...]” (MS, AA 06: 326).

It is important to notice, that, it is not a group of individuals who have united themselves, but it is a general will that has united itself into society. Further, Kant argues that the will is united *a priori*:

“a will that is omnilateral, that is united not contingently but a priori and therefore necessarily, and because of this is the only will that is lawgiving” (MS, AA 06: 263).

The question could be asked: if the will united necessarily and *a priori*, because no private law would be possible without it, or, as Alberto Pirni has argued, because it is direct implication of one of the formulations of categorical imperative, namely the formulation which concerns the realm of ends (Pirni 2016)? Kant explicitly argues for this implication, when he defines the term ‘realm’: “by a *realm* I understand a systematic union of various rational being through a common law.” If we accept this interpretation, then the intersubjectivity should not be founded in (or with the help of) anthropological presuppositions about human conditions, on the contrary, it is *a priori* (that it is independently from empirical conditions) demand, which follows from Kant's foundation of ethics.

Kenneth R. Westphal

I have even more wildly heterodox views on the ‘noumenal’ character of Kant's opening analysis of rightful possession, which I will try to characterize; I can do no more than characterize them briefly, but it's part of why it's taken me so long finally to be able to write this book because I've been sorting out those issues in Kant's theoretical philosophy in his theory of judgment. Issues about *a priori* principles or ‘foundations’ in Kant's moral philosophy are crucial, but I really do take Kant seriously in his aim to develop a Critical philosophy that

is quite radically different not only to empiricism but also to rationalism and to prior, pre-Critical metaphysics. Kant's use of the term 'noumenal' must always be carefully interpreted in context. He's often willing to use such terms, but whether he's talking about anything metaphysical needs to be carefully checked. On Kant's view anything which cannot be fully specified and justified on the grounds of empirical evidence alone will have some *a priori* aspect or other, and for that reason alone will count as 'noumenal', though this may have nothing to do with the metaphysics of transcendental idealism and its distinction between things themselves and spatio-temporal appearances to us. So when Kant speaks of 'intelligible possession', this is his way of restating Hume's and Hobbes's point that relations of possession – in contrast to mere physical holding (detention, *detentio*) – are normative. By holding this glass I don't possess it; it belongs to the Institute. Kant underscores this issue about relations of possession being intelligible in that they are not physical relations, they are instead (at least in part) *moral* relations; they are relations we establish in part by establishing publicly identifiable procedures for rightfully acquiring, possessing and using things. All of those procedures and the specific titles that those procedures can literally be used to generate and to assign, are entirely normatively structured and for that reason alone they count as 'noumenal' and 'intelligible' in Kant's view. Kant develops these principles in the opening sections on rightful possession in the "Doctrine of Justice" about the use of the concept of freedom and its relevant application to us. Yes, Kant says numbers of things about what is 'noumenal' or 'intelligible', yet I think they are not inconsistent in ways so often alleged. In the *Critique of Practical Reason*, Kant is explicit that the concepts of freedom and the moral law are reciprocal concepts; only free rational agents are subject to the moral law, and the moral law only pertains to free rational agents. Kant's question then is, Which of these principles can we use as a ground for knowledge of the other? – but at this point Kant seeks the proper *ratio cognoscendi*; when he talks about 'the fact of reason', he invokes points about rational judgment that he made already in the first *Critique* about the constitutive contrast between simply finding oneself with beliefs, thoughts or sensory appearances, on the one hand, and making judgments on the other, where making judgments involves *assessing* what beliefs or thoughts one *has* in their relevance to their purported domain of use *and* the sufficiency of one's grounds for surmising, affirming, justifying or demonstrating that the claim or the thought is correct. Those topics I discussed concisely, though in pretty fair detail, in chapter six (§27), and this is surely one of the most heterodox things I say about Kant, but I have argued this several times in other places because it is so important.

Kant simply did not need transcendental idealism at all, and especially not to defend the possibility of free rational action; sufficient grounds for ascribing freedom to us both in thought and in action come from his account of the autonomy rational judgment; that's already in the first *Critique*. About Kant's contention that he needs transcendental idealism and my contention that he didn't, one of the most basic points that I can summarize is this – Kant like

so many others took universal causal determinism within the spatio-temporal realm for granted and he thought that it was demonstrated by Newtonian physics, particularly as improved and made more precise by Laplace. Laplace did espouse universal causal determinism, but Laplace knew the difference between believing it and justifying it, yet that has been lost on his readers. What Laplace actually says and, you know, the famous example is this: of an omniscient intellect that knows current state of the entire universe, every relevant law, and the precise location and velocity of every, even the smallest particles, Laplace says such an intellect could calculate the entire state of the preceding universe and also calculate everything that comes, so that the entire history of the universe would be present to it. However, this alleged intellect is doubly subjunctive in *Laplace's formulation*. What he says is: we ought to regard (envision, *enviser*) the present state of the universe as produced by the immediately preceding state and as causing the immediately succeeding state of the universe. Now why should he say that in the preface to a book on probability? It's a methodological *presumption* of empirical inquiry, whether statistical or causal, and Kant, I'm sorry, should have recognized that Laplace stated a *regulative* principle of empirical inquiry. That's how Laplace states it, and he's right; deterministic explanation requires an exact, sufficient causal explanation of the events or of the kind of events in question, and we have no justified claim to determinism about those events *until* we've got their complete, sufficient causal explanation, and that's rare. Furthermore, causal *determinism* requires a causally closed system. Nothing in Newtonian physics entails or requires a causally closed system, and as far as human behavior is concerned, we as human beings are not causally closed systems, not remotely so; if we were, we wouldn't want a coffee break. So, this whole business about causal determinism is a complete red herring. Kant was misled by the scientific world-view of his own day, and by his own inattention to the profound implications of the distinction between the unrestricted semantic intension of the (transcendental) causal *principle*, and the domain-specific (referential) scope of any credible, sufficiently justified, objectively valid causal judgment(s) (Westphal 2017b). In the *Metaphysical Foundations of Natural Science* Kant realizes that he needs to justify not the universal causal principle, that every event has a prior and sufficient (set of) cause(s), but the much more specific principle, which he identifies as a 'metaphysical' (rather than transcendental) principle, that every physical event has a sufficient (set of) external physical cause(s) – a distinction he reiterates also in the third *Critique*. He doesn't formulate that distinction anywhere in the first *Critique*, but in fact his analysis and defense of causal judgments justifies the more specific principle, though only in those cases where we succeed in identifying causal interactions among spatiotemporal particulars. So he does have a justification within the first *Critique* of that more specific principle, but not a justification of its universal status regarding every event within space and time. We can justify claims to causal explanation only to the extent that we actually identify the relevant causal relations, and the extent of such identification may vary enormously – from precise technical

or scientific specifications all the way down to our commonsense making our way through the world, for which quite abstract, very general and unspecific claims suffice, also as foundations of intersubjectivity. I do not need relativity theory to drink a glass of water – thank goodness.

I recently published a piece which underscores some central, though neglected relations between Kant's and Aristotle's moral theories on just these points because Kant actually is quite clear that we can only come to use our innate cognitive capacities through education and upbringing, and these are central to our becoming morally competent adults (Westphal 2016b). This intersubjectivity is there at the beginning of any issues about moral philosophy, comprehensively speaking, because we do have the capacity to decide what (not) to do and we are thus obligated to consider how what we decide (not) to do may (not) affect ourselves, or others, in morally relevant ways. This social aspect to individual decision and action is further augmented by Kant's recognition, like Aristotle's, that we are mutually interdependent for reaching enough maturity even to wonder whether we can (not) steal something from the dime store – the answer by the way is: No! Hence 'the fact of reason' seems to be such a surprise for Kant to claim in the second *Critique*. I think it's not any kind of relapse into intuitionism, as has sometimes been claimed, and actually acknowledges what he already said about the rational autonomy of judgment in the first *Critique* about recognizing others as free rational agents. It's quite surprising what he says in two places: one is the "Doctrine of Method" in the first *Critique*, and again in the long general remark after §91 in the third *Critique*. He makes exactly the same argument, essentially by analogy or perhaps more precisely by abduction: Whenever we see an organism behaving in ways which are purposive, and which *cannot* be explained by appeal to causal laws of nature – this is exactly when we are entitled to ascribe to that organism, not only sensibility, but also understanding and reason. A surprising argument, if you don't read enough Kant's Critical corpus. I think he's quite right. Although Kant himself isn't quite yet a hermeneutical philosopher, but very nearly so, and his point really does concern how we understand one another to be sufficiently intelligent agents to deal with one and other *as* persons, *as* human beings – and then there are pathological cases where we realize, no, this is not a competent person, and we need either to protect ourselves, or put this person under professional supervision for his or her own good.

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I would like to start with a quotation from *Kant's Foundations of the Metaphysics of Morals*: "All moral philosophy rests entirely on its pure part and, applied to the human being, it does not borrow the least thing from our acquaintance with him (anthropology), but gives him, as a rational being, laws *a priori*; which of course still require a power of judgement sharpened by experience, partly to

distinguish in what cases they are applicable, partly to obtain for them access to the will of a human being and momentum for performance.” (Kant 2011: 7)

Now, this applicability has always been a point of interest for me, when it comes to Kant. For example, if I were to formulate a maxim saying I would dedicate my life to philosophy, what would happen if all human beings, or all rational beings were to accept that maxim as their own? What would happen if that maxim were to become universal? That would probably mean that we would all die of hunger because no one would produce food. And if we assume that the practical law is applicable to this maxim, then we would consider that maxim immoral. Or, for that matter, almost every maxim concerning professional choice. However, we can see how absurd that is. We see that division of labor is excluded from the domain of the practical law. In the Preface to the *Groundwork* when Kant says that we still require “a power of judgement sharpened by experience”, he says nothing more specific about that. He leaves the reader to her own resources. But there are certain passages in the *Groundwork* that can serve as hints as to what Kant takes this experience, relevant experience might consist of or what it might point to. The first obvious candidate is the assertoric imperative. Kant says: “there is *one* end that can be presupposed as actual in all rational beings (in so far as imperatives suit them, namely as dependent beings), and thus one purpose that they not merely *can* have, but that one can safely presuppose they one and all actually *do have* according to a natural necessity, and that is the purpose of *happiness* (...). One must present (the assertoric imperative) as necessary not merely to some uncertain, merely possible purpose, but to a purpose that one can presuppose safely and a priori in every human being, because it belongs to his essence.” (Kant 2011: 59–60) The essence of the human being that Kant is referring to is not the human being’s rational noumenal essence, but his empirical essence, as a dependent finite being, and that leads us to the second hint that Kant provides as to what is the relevant experience that sharpens our power of judgment and that is the concept of imperfect duties towards oneself and towards others, the development of my own talents and helping others in need. Kant provides quite poor arguments for the imperfect duties in the text of the *Groundwork*. It is not obvious if Kant refers there to the purposes that humans have as rational beings or empirical beings. Kant claims that one should develop her talents because they can be very useful for achieving her purposes. This can be an argument of prudence as well as an argument of morality. I believe that Kant intends to make a relevant difference here between these arguments. Also, let’s consider the imperfect duties towards others. If it is to be a universal rule that everyone should help others in need, it can be argued that it is prudent for me to act upon such a maxim and will it as a universal law because I may find myself to be in need. However, in order to make a moral argument out of it, we would require a certain notion of what it actually means to have a purpose as a rational being, not merely as a finite phenomenal being. What Kant says is that empirical knowledge is obviously of no help here because it only attains generality at best. However, Kant never says that this generality can be discarded

as useless. This general knowledge is actually part of this relevant experience needed in order to sharpen our power of judgment. Where can we see this? If Kant dismisses general knowledge, he puts himself in a very old conundrum, the same one that bothers the Stoics or Cynics. Namely, if we say that property or goods have no value, if we say that they are no *proper good*, how would we justify the claim that theft is a crime? If we say that life itself isn't a good, why would murder be a crime? Why would it be wrong to kill, rob etc. If we call them "preferred indifferents", we would only be begging the question. Thus, Kant needs this empirical generality in order to have at least a sketch of a scope of what it is to help others or what it is to develop our talents, and what it is to have a purpose at all as a finite dependant being. However, when it comes to noumenal beings and their purposes, what is to be counted as such? What can we use to describe noumenal beings?

Here I'd like to refer to a few comments made by Terrence Irwin in his *Development of Ethics*. I find Irwin's arguments in general very provocative and some of them may present a challenge for the constructivist view. Some of his comments can be well incorporated in Westphal's conception while others may take some effort to put them in line with his conception. Most of them are very provoking and very inspiring. At least, for me they were.

First, Irwin asks if we can attribute the realist view to Kant. He thinks that there certainly are passages in the *Groundwork* and in the *Critique*, or *The Metaphysics of Morals* that can bring into question that Kant is even trying to provide a realist account. He says: "Kant's claim that moral beliefs are practical and one might infer that they express a point of view we take for practical purposes, not a source of true beliefs about any independent reality (...). In the *Groundwork*, he maintains that 'every being which cannot act in any way other than under the idea of freedom is for this very reason free from a practical point of view'. Perhaps moral theory tells us the ideas under which we must act, without giving us reason to believe in any moral reality that is not constituted by our moral beliefs." (Irwin 2011: 149) Irwin doesn't believe that this is a persuasive point. Here is what he adds "This reconstruction of Kant rests on two assumptions: (1) He is right to claim that the phenomenal world described by empirical science leaves no room for moral truths. (2) His attempt to describe a noumenal reality that moral truths are about is hopelessly flawed. Each assumption is doubtful." (Irwin 2011: 150) Kant's introduction of noumenal reality, even in the First *Critique*, serves to make room for moral beliefs. If our moral beliefs do not claim to be about objective reality, then Kant would have no reason to introduce subjective noumenal properties.

The second comment, linked to this one, insists on a difference between being a legislator and being an author of the law. Kant makes a clear distinction between these concepts in *The Metaphysics of Morals*. "A (morally practical) *law* is a proposition that contains a categorical imperative (a command). One who commands (*imperans*) through a law is the *lawgiver* (*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 (*willkürlich*) law.” (Kant 1991: 53–54) In making the distinction between the legislator and the author of the law, if we want to make the law non-arbitrary, our practical reason (if it is to be the one imposing the law upon us) mustn’t be the author of the law. What Irwin is trying to say, if I understand his and Westphal’s position correctly, is that what we actually construe is not the law, but the obligation. It is the sense that I must obey, the answer to the question “Why would I obey the categorical imperative?” He continues: “The will (or practical reason) imposes the obligation of the law and does not decide what the moral law is to be but only chooses whether or not to accept it.” (Irwin 2011: 157) The concept of autonomy that is implied by this distinction between the legislator and the author of the law is in line with the traditional naturalistic concept of autonomy, claims Irwin, and this is plausible because Kant’s only point against naturalism is empiricism. Another important point about Kant’s legislator/author distinction is that it enables him to avoid the Pyrrhonian dilemma of the criterion, at least according to Irwin’s account: “if we were to claim that practical reason makes the moral law a law because of its act of declaring the law, we would make the moral law a special kind of positive law. We would then have to postulate a further moral law that authorizes practical reason to legislate. This further moral law could not itself be made law by some act of practical reason. Practical reason, therefore, can declare a moral law only by recognizing some law that exists apart from acts of declaration.” (Irwin 2011: 160) I think that is in fact consistent with Westphal’s position that we already take the social practices in the institutions and we make them into law.

My final point will be the question whether this concept of autonomy is in line with Kant’s dedication to Enlightenment. If we take that autonomy isn’t the ability of the will to be the author of its own law but only to choose what it enforces upon itself, then it is consistent to Kant’s dedication to Enlightenment because the autonomy decides, according to its own reasons and not any externally imposed authority, what it should impose on itself. Thus, to be the author of the content of the law is not required for Kant’s dedication to Enlightenment.

Kenneth R. Westphal

Again, thank you very much for your comments and passages, and for mentioning Terry Irwin, who is one of the people I think focuses too much on ethics, and not enough on moral philosophy. I think that when Irwin uses the phrase ‘noumenal reality’ he doesn’t know what Kant’s talking about; I’ll stop there, without further examining the remarks you pull out concerning autonomy and the Enlightenment and what Irwin is citing as grounds for ascribing moral realism to Kant. We agree entirely that Kant says we each authorize our own obligation to do as morality requires. We then have the question, What *does* morality require of us? If we’re not to wind up in the Hobbesian state of nature, whether verbally or worse, there must be some quite definite principles that specify what is obligatory for us as free rational agents, regardless

what we may happen to think about it. On those points Kant entirely agrees with Irwin, but I'm not at all happy with how Irwin characterizes 'moral realism' because I think he uses the phrase much too loosely. I was quite specific in rejecting the need for notions about truth-makers for moral claims, including, *e.g.*, 'Platonism' or more theological natural law theory. Yet I have not at any point said nor argued that moral realism is incorrect. I've argued that's not necessary, one way or the other. By design this kind of natural law constructivism is consistent with, *i.e.*, compatible with, at least the core of quite traditional natural law theory – whether it's Platonist, theological or *ius gentium*, and I'm very happy with that result. Indeed, I have doctoral students, observant Muslims, who realize that this is exactly why the neutrality about moral realism matters for what I'm doing and they're writing on Kant and natural law constructivism and classical Islamic natural law theory – fabulous! And partly because Kant's account of autonomy and communicability justifies a very fundamental requirement – one that is quite global, central to moral views and approaches to the world –, namely: the fundamental requirement of humility, expressed using the humanity formula: Harm no one, injure no one; this includes: Do not impose your views on others! This is consistent with our identifying, thwarting or otherwise constraining identifiable actions that are unjust – murder, mayhem, homicide and so forth. Yet that duty of humility is a quite powerful constraint on legitimate actions, whether institutional, individual, collective, commercial, domestic or international. I think that Kant is quite serious about that, and that he's right that it is central to morality and to human rights. We need to distinguish two aspects of that period we call the Enlightenment; Kant's view of enlightenment has everything to do with the autonomy of reason and reasoning, and nothing to do with the kind of one-size-fits-all mentality that was used as a pretext for far too much imperialism. I take it that's not particularly an issue right now, for us, here today. I know it's still happening; that same damn mess.

Now, about whether Kant regards us as rational beings or as empirical beings. The answer is: both! It's an extraordinarily interesting feature of our empirical nature that we happen to have the capacities to reason about what is happening and what ought to be happening and what we ought (not) to be doing. So it's extremely important to Kant; on the one hand, yes, he wants to focus on what he regards as a Critical metaphysics which consists in *a priori* principles. These *a priori* principles he thinks he obtains by analyzing a logically contingent, empirically given concept – in moral philosophy, the concept of finite, rational embodied agent. But he insists from the *Critique of Pure Reason*, the *Groundwork* and through the *Metaphysics of Morals* that this set of Critical principles, whether regarding theoretical knowledge or regarding morals, requires for its application *to us* a practical anthropology. In exactly this connection in the *Metaphysics of Morals* he says that his metaphysics of morals is *not* a complete ethics. For that we need to bring in practical anthropology and actually sort out what are our human, flesh and blood duties and permissions and prohibitions; in *these* connections as finite rational agents we

wind up having identifiable duties of mutual aid and to develop our own talents. Now, about the division of labor, and various forms of divisions of labor, Kant has unfortunately little to tell us, but the most general issue that your comments raise concerning division of labor, and our avoiding dysfunctionally lop-sided divisions of labor, I think Kant can handle; I went through this point in chapter 6 about coordination maxims. There are many kinds of permissible, elective actions that if universalized across groups would indeed cause major problems. We would completely exceed the capacities of our resources and so we can be quite happy that we do for natural and for social reasons develop different interests and capacities and useful forms – often very useful forms – of divisions of labor. Those will all be, on Kant’s view, in so far as they are legitimate, also permissible forms of activity, individually and institutionally. And, yes, if we take some of those kinds of maxims and run them through overly simplistic universalizability tests, it looks like we wind up with problems. But I think those are problems of mistaking Kant’s actual universalizability procedure and requirements, which has been all too chronic, especially by Kant’s critics, though not only his critics. Issues about coordination maxims were discussed already by Onora O’Neill (1975) in her first book and also by Barbara Herman (1993) and I have nothing to add to their accounts except to restate how their accounts fit with Kant’s criteria. So I don’t think I have, nor need to have, anything new to add to that, so I merely remind you of that point. Does that help enough?

You are right: Once we get into flesh and blood issues about human production, reproduction and economics we confront many quite specific issues of social planning procedures, principles, designations and division of labor. Now Hegel, in line with traditional natural law theory, was also impressed with the extent to which human beings actually conducting their social lives often exhibit far more credible and far better informed versions of rational organization than you get off philosophers’ (or other reformers’) *a priori* drawing boards. This is why first to take up Kant’s Critical principles and then actually to develop the full-fledged moral philosophy, not just the metaphysics of morals, but moral philosophy, in ways that provide determinate answers to what we ought (not) to do, and what we may do. To do so, Hegel brings in not only large measures of what Kant called practical anthropology, but also an enormous amount of political economy, in ways that also Sidgwick did – I’m sure without knowing Hegel had done the same. In these connections Hegel wants to recognize that, of course, in our daily lives we *do* coordinate our activities, we *do* find ways of meeting our needs, and what we need are principles and procedures for monitoring what we are doing, and monitoring unintended consequences of collective forms of action (the sociological law of unintended consequences) – and monitoring the extent to which the intended and the unintended consequences of our social, commercial and economic activities either support or thwart everyone’s legitimate claims to proper, participatory membership within society: everyone’s proper republican citizenship. These are also criteria for evaluating when we must fix some of our procedures in

order to rectify injustices or imminent failings of justice, whenever continuing to behave as we do shall become unjust unless we take proper corrective measures in advance. I think Hegel achieved this in his *Philosophical Outlines of Justice (Grundlinien der Philosophie des Rechts)*. That's a wildly heterodox reading of Hegel, I know. This shall be my second installment on natural law constructivism, which I expect to complete this summer (Westphal 2020). I hope that's some help with questions you raised; thank you for asking!

Kenneth R. Westphal: Response to Rastko Jovanov

Republican rights to citizenship and positive rights of those involved as well as duties, these are issues I'll discuss tomorrow,⁴ so I will come back to them. Kant has more to say about them than is often recognized, yet not as much as most of us would wish. He certainly has some quite direct things to say about acceptable, permissible forms of taxation and about public obligations regarding some forms of social services, *e.g.*, for healthcare, and he also mentions founding hospitals for orphans or abandoned infants. Understandably he is cautious about how much he can suggest in print. I think the principles Kant develops have quite strong implications for, let me say, participatory republicanism; Hegel was absolutely right that these principles require that everyone be provided effective opportunities actually to be recognized as a fellow citizen in good standing. Hegel is crystal clear about that benchmark in print, and he's crystal clear that this is a relative standard, it's no benchmark of mere subsistence, so that it requires providing sufficient opportunities and social resources either to avoid or to counter-act varieties of mishaps, including economic mishaps, that can reduce people poverty and threaten to reduce them below the level of actual, recognized, contributing, active citizenship within (republican) society. I think such measures follow quite clearly and directly from Kant's principles, together with a modicum of practical anthropology and rudiments of political economy; Hegel understood this and argued for just these provisions (Westphal 2017d). So, yes, the first line of complaint about democracy is an old one, an ancient one in fact, about the tendency of democracy to decline into tyranny of the majority or of the vocal minority. In recent centuries and in many regions all sorts of ways of been found to facilitate such degradations of the polity rather than to counteract them. If I could have moved to Canada I would have been happy to do so long ago. Go even a bit North of the northern US border and suddenly you are in civilization again.

In many ways Canada is remarkable because (like Australia) it made such an effective transformation of what had been a monarchical province into, in many regards, a very functional republic, obviously not without its problems – this is what politics is about: trying to identify and resolve our collective problems. So yes, I'm joining forces such as I can with people like Philip Pettit and others who are trying to regenerate the republican inclusiveness without which

4 When presenting Westphal (2017a).

democracy isn't a legitimate form of government; also when this staunch republicanism affords direct criticism of the notion that democracy can only aggregate preferences. The public office called 'citizen' has enormous responsibilities, and those responsibilities are more and more thwarted by mass media which provide only distraction. As for the country where I now live and work, we shall see what happens in the next few years. I hope it remains peaceable and that enough academic freedom is preserved that I can continue teaching there, because – setting aside for now current events – I'm having a fabulous time in Istanbul with my colleagues and students and new friends! Yet we are always on notice, wondering whether the political winds may become a tempest.

The Nordic and Scandinavian countries are the closest to Hegel's political recommendations, and not by accident, but because a student of Hegel's – Johan Vilhelm Snellman – took this staunch republicanism back to Finland, and became not only a leading critic of Swedish rule, and so was barred from academic appointment, but once Finland established its own republic, he was central to its polity and politics, also as Chancellor of the Exchequer, *i.e.*, as the chief financial Minister for years in Finland. And yes, Finland too is having its right-wing upsurge, but what modern Finland has been as a republic indeed is quite directly indebted to Hegel's republicanism, and to Snellman having taken Hegel's republicanism with him back to Finland and managing actually to institutionalize it. In these regards, Finland often been a model for the Scandinavian and Nordic countries.

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I'd like to raise several issues. First, it just happened that Ken and I talked about something that I wanted to start with, ethics and justice as separate things (as two different evaluational criteria). But, I may leave that for later, and start now with some other comments and questions. I would like to say at the outset that I enjoyed listening your talk, Ken; I have liked very much your reading, some might say your reinterpretation, of Hume. Actually, I don't think it's reinterpreting Hume *strictu sensu*, but it might easily be perceived as such, because it's not the usual interpretation. That's because you put the focus on principles, not on senses and sentiments, and it's the issue of nominalism. On page 62 of your book you have the following: "...Hume's own analysis of justice shows that certain actions are just or unjust, regardless of any agent's motive or preference and regardless of any observer's sentiments". The issue is how to come to that, how to achieve that; you, I think have to have the position that Hume really has, and that's radical nominalism which is not going to justify particle actions as such, but is aiming to give predictability of whole classes of actions; that would mean that the main reason for justice is to make society as such functional.

On other side, what we share is the Kantian approach to the philosophy and to the reality, to the life actually. You showed very nicely how Kant is relying

on Hume and Hobbes and not on Locke, finding the basis for all that, perhaps surprisingly for a Humean point of view, in freedom, which is the power to make decisions. And the problem there is that making decisions presupposes some kind of identity, a unified entity capable to decide as one, not necessarily personal identity of the individual, as it also could be collective identity – corporations, nations, maybe ideologies or civilizations. And there is obvious problem there, because the moral aspect of the worth of freedom is universal respect which is something that is a reflexive kind of relation – I cannot respect myself without respecting others, and *vice versa*, which imply forbidding me to decide for others. That’s very basic principle, I think – we are not allowed to decide for others without their free consent, anytime, because it would be disrespectful to their autonomy. In my opinion this entails that, if you should influence the behavior of others, you are not supposed to make any kind of orders or commands, but only require some restrictions to what they do. That’s the issue there. To make cooperation which is Hume interested in, possible or morally invaluable, means that we have, if we want to respect the autonomy and freedom of others, to put some restrictions on our freedom to (decide to) do whatever we want to do by excluding those decisions we are not entitled to, those which would entail deciding for others. Possession is a very fine example.

I would like to make the following comment here. What I think to be the issue in possession and property is something very simple. Persons are having their right to use things, (including themselves as things, but not as persons), for whichever purpose they deem needed. So, persons are giving a value to things by using them and that’s the basic starting point for possession. In acting we produce, or create, a value in a thing by using it, and that usage should be predictable, as all the other issues that are creating rules; maxims, according to which we act are already rules, (we cannot avoid the rules anyway). We cannot approach to the substance of the reality in other way than schematic, i. e. by acting which is rule based. Let’s go back to the right to possess; you had a very fine example in your talk: you don’t possess the glass on the table because it already has been possessed, but not only possessed, it’s the ownership of the Institute. Possession should be protected by an institution, which shows that ownership is more than possession. But possession is the most important, basic, part there; ownership is only a kind of additional protection of the possession. Which possession? That possession that is rightful, the legitimate one.

Somewhere in your writings you had an example of a stick lying next to the trail. You have been tired, and you notice the stick, and you like it. You want to use that stick for some time. In such case I wouldn’t have the right to tell you at some point – give it to me now, now it’s my turn to have it for a while. You may even bring that stick home, and it will be your possession. Will it become a property in a way of ownership is still questionable as it requires the recognition through procedure of getting the (universal) consent of (all) others. But, if we imagine that the stick proves to be something very valuable, something that is not just a thing, waiting to be used, but something which has inherent value, all of sudden my right to take it disappears. Why? Because the

value must have to be established at some prior time, so it's not the thing waiting to be used, it's a thing that already obtained its value. That's the logic that makes the possession that basic, for the predictability and for the rules. Justice and society must rely on some very stable rules and they are there to make predictability really working, not to be interrupted accidentally. That is, I think, the main point in your book, it refers to the point according to which being artificial doesn't imply being arbitrary. That is the basic point.

Now I would like to make some further remarks regarding your lecture, the beginning of it. You followed the course of the book in explaining the distinction between moral motivation and moral justification, and the differences between justification and explanation, and that's all very important... But at one point you specified it as the requirement to injure no one. That's where morality, as it seems, comes to the scene and resides. You said that's sufficient reason for an action, but later specified it as not just sufficient reason for any action, but as a sufficient reason for permissible or legitimate action, the action that could go through the test of not deciding for others. We may say that we are deciding in a negative way, indirectly, for others, even by making restrictions, but that's the point – it has to remain to be indirect, and not to become direct. That's the main part of categorical imperative, I think. That's where moral justification differs from a justification of an action as such. Any action has, or has to have, a justification in an existent reason for that action, which is a purpose, or an end that someone has set for oneself and is trying to realize. That's what makes the difference between actions and mere events. But an action has to be an event as well, not only something that is only imagined or conceived, but something really done, so, actions are events, but not mere events, they are events based in a decision (those events, i. e. actions as events, would not be there without decision, they are produced by a decision). Actions are justified by reasons to set an end which might have been not set and which still does not exist in the moment of making the decision, not even as its direct consequence. What makes the reasons real and valid is the prospect of (future) actuality of the end that has been set and then tried to be realized. But that might be some immoral or illegitimate act with a bad end set to be realized. That's very much visible in analyzing the word 'good'. 'Good' is not a moral term – a good poison is a poison that poisons efficiently, and a good poisoner is somebody who is good in poisoning, which is not necessarily morally right thing to do. So, the actions as such are justified by the end, any end, that someone has set as the goal to be achieved. That's not enough for the moral justification, and moral justification is asking for something more, something additional to be put there. If we remember that we are not allowed to decide for others at all (except on their permission or demand), moral requirement or norm must be a kind of restriction.

Coming back to Kant - my approach is something that I call *via negativa*. Morality is dealing only with restrictions, it only forbids, it doesn't command anything. Why? Because the freedom is full anyway all the time in whatever we do. We are free even in breaking laws or in being immoral; there is only

one condition to become a criminal, for example, you just have to want it. And that's at anyone's disposal. But that's the prerequisite for imputability of responsibility. So, if we differentiate morality from issuing commands, we would, in my opinion, have really pure Kantian approach, and many of those seemingly morally suspect issues of discrimination, like division of labor etc. would disappear because we would be able to say that it is the domain of free decision-making in the realm of (legitimate) happiness; it's up to us to decide whatever we want, on condition that what we want is legitimate and permissible. Morality is dealing only with what's impermissible, with limits, with what's outside of that domain. That's where the moral justification differs from the justification of any act as such.

The ignorance plays, and you mentioned in your lecture, a very interesting and very important role there and that's the point where Kant comes close to Hobbes. You said explicitly: "Ignorance is producing natural order very easily, spontaneously, in a way". So we have that order, initial natural order, here, now, around us at least latently but also, very often actually, not only latently. That's why justice must be public and known. It has to be known, not just proclaimed and kept somewhere hidden. But 'known' here, on the intersubjective level, means shared, being common. Shared sense of justice is *producing* inter-subjectivity, our inter-subjective identification, in the same way in which Hobbesian psychological ego is producing the unity of person. A schizophrenic person wouldn't be a unified free person. So, we have the Platonic or Aristotelian unity of the soul, making possible planning, predicting, acting, deciding, intending, thinking – anything! Everything is dependable on that supposition of the unity of the soul, on identity. And shared sense of justice is producing the same on the level of the society; perhaps less efficiently, less thick etc., but the function is pretty much the same. I would like to emphasize that this is very much showed here, in the book.

I could, in the end raise some specific questions. You said at the very outset of the book that: "One of our most basic ethical duties is to comply with dictates of justice". It's very much true, but not really clear what's said there. At another place, somewhere very late, on page 196, you quote Kant saying: "Freedom is the sole original right belonging to everyone by the virtue of being human." Being a "human" is a specification, but that specification is not biological; it might be, perhaps, robots or extraterrestrials or whichever other "human" it might be. But, it's clear what's meant here. And then, on page 201, you introduce the issue of a need for *mature judgment*. It might look that, on the bottom line, in Kant you have in the end only one basic duty, and that's the duty to think *seriously* (i. e. *to be responsible*) and everything would follow from that. But that's what we all have by virtue of being what we are. So, in a way, we are producing ourselves by thinking either as villains or virtuous persons, whatever we become in the end. In mature judgment it's the condition of the responsibility. So, when you, for example, say that "basic principles of justice are required to form and to maintain society which is indispensable for the human life" (p. 27), that's intersubjective, collective level; and then corroborate

this by the issue of nominalism implying that, for the rules to be functional, we have to restrict ourselves to the formal aspect of the justice and not to go to consider, or reconsider, every act *per se*. That is the only way to have predictability. Predictability is corroborated by the actuality of the capacity of freedom which is the power to rule of the future time, it's overcoming the next point in the time which means overcoming the causality, because we set the end somewhere in the future; the end doesn't exist in the point of time of its setting, it's only in our conceiving power. The freedom is the capacity to find the means to produce that end, by finding causes that will produce that end as a consequence, causes serving as "means". That is connecting knowledge, predictability and unification of the soul and identity and all that is actually functional on the collective level as well as on the individual, and depends on being so regardless of the particular motives, desires and preferences, otherwise it couldn't function. That's why we have the issues you have in your Appendix, the issues of economy, of double book-keeping, of how Greenspan became a dictator without being elected, or being elected in a very odd way, not elected by those on whose behalf he was acting and whose lives were affected... All that comes from the immaturity and lack of serious thinking when they are needed. The irresponsibility we face there is, of course, a moral matter. It entails a kind of necessity of blame for what's done but should not have to be done.

Let me raise only one question more, and that's about terminology. On page 10 you have 'noumenal' as equal to 'normative'. I for myself took 'noumenal' only as a tenet in transcendental approach, meaning that we're fallible, that we do not have a direct access to essences. Empirical approach to the reality is the only one available to us, but it is inductive, it's not perfect, not good enough etc. So, 'noumenal' might be used so as to mean a principle that should show why we, let's say simplistically, put epistemology in front of ontology. If we don't keep that in mind all the time, we became essentialists, which means that we make conclusions that are not necessarily based in valid premises, which is something that transcendental idealism tries to avoid. But here you are connecting noumenal with normative matters. Normative matters are the matters of norms, but norms, and formulating norms, are also something from within the capacity of freedom, namely we are dealing with normative matters always when we are free, because we are setting ends. However, upon been realized those ends are becoming a part of actual reality, and there is nothing normative longer there, they become effects of that process of realizing set ends. Even if those effects are institutional facts they are still real consequence of that process, having the kind of factuality that actually is even more stable than the factuality of natural facts. So, how far are you prepared to go in this equalizing 'noumenal' with 'normative'?

Kenneth R. Westphal

Thank you very, *very* much for your comments and questions and remarks! I am really delighted that you understood what I was doing so well and apparently

we have quite a good deal of common theoretical, moral ground here and it's a great pleasure, so to thank you, thank you very much!

Let me start with the last point first – about normativity and the noumenal. I do stand by what I say in the book that all normative matters as such are noumenal for the reason I indicate: their empirical specifics never suffice to identify, nor to justify, their normative status, whether regarding principles, actions or consequences. I always have fun pointing this out to my students in an introductory class about Kant's ethics. Here's the situation: You see one person racing away as fast as he can run with a fist full of money, you see another guy chasing him and you can catch only one of them. Which one you do you pick? You can't tell, right? You don't know whether in the lead is thief escaping with money he's just stolen, or if in the lead is the rightful owner of the money he just recovered, who is now chased by the enraged thief. Just seeing this mad chase doesn't suffice to specify or to indicate to us who is the rightful owner, if any one, of that money. So, freedom certainly does reside in setting ends, but also in the responsibility to set those ends that we ought, and not to set those ends that we ought not. This aspect of normativity is involved whenever we have issues about human action. That's sufficient for these issues about freedom, action, ends and responsibilities to count in Kant's lexicon as noumenal; this simply has nothing to do with the metaphysics of transcendental idealism. I'm just mentioning that again because too often, particularly by Anglophones, Kant's mention of noumena in connection with principles of justice has derailed commentators. Likewise when Kant describes rights to possession as 'intelligible', well yes they are, *literally*, for just the reasons we're now discussing. I think excess remnants of empiricism have led some Anglophones to misunderstand what Kant is actually talking about here – that, and also egregious neglect of almost all the natural law tradition. One reason Kant's account of the 'noumenal' or 'intelligible' aspect to any norm has been less often misunderstood in Europe, particularly in Germany, is that moral philosophers in Germany certainly, but also commonly in Europe, remain alert to the long tradition of natural law theory. This matters a great deal to how we understand what we're doing as moral philosophers and within moral philosophy.

Yes, it is surprising what we find, if we read Hume's *Treatise*, Book III, very carefully, especially what he actually says about the conventions woven together into the most fundamental rules of justice. These conventions really do concern principles and deciding to act on the basis of those principles and the practices they inform (structure), and also issues of our regularity, predictability and responsibility. In this regard, though Kant didn't know this because he didn't study political economy, Hume's writings on economics launched Scott's political economy. This too is part of how Hegel capitalized upon political economy as a moral science because issues about coordination and issues about how we can at all meet our legitimate ends and needs, together with the strategic question, how can we do so efficiently and reliably, are *all* of them moral issues. We have in fact been solving these problems as a species and as members of our

respective communities in all sorts of ways as long as we've been around. This is exactly why there's more reason involved in customary forms of action than rationalists or empiricists were – and still *are* – willing or able to recognize. Hegel re-examines the results of modern political economy and realizes that these practices are structured in specific ways, and these structures of action we have made for ourselves, and by developing these practices – including the entirety of the economy – we on a daily basis solve problems of basic human existence, for better or worse. The point now is simply that we do this; then the question is: To what extent or in which regards do we do so legitimately, permissibly, or as you say by a conscientious *via negativa*? So, by bringing these Kantian principles and criteria to bear within a much richer moral philosophy, Hegel examines the ways in which customary forms and even habitual forms of action integrate reason, habit, inclination, freedom and responsibility in ways Hume and Kant failed adequately to appreciate.

So, in part Kant's principle of hypothetical imperatives – strategic rationality – provides ample, I will say *prima facie*, justification for doing things in customary ways because they can be effective and efficient. These procedures, resources and forms of interaction are established. That's not a trivial requirement, nor a trivial achievement. So far, I'm merely elaborating more what I discuss in chapter 5 on Hume. Yet these very basic, very general kinds of principles of economics and of course the legal principles that any, even moderately sized economy, quickly bring in, hardly suffice to address pervasive issues of justice. Once we can no longer conduct all of our business literally on a face-to-face basis, then we need contract and law. This is not news; there's been contract law back to Babylon. That was why they were so excited to find the Hammurabi code in 1901–1902. They knew of it, but they re-discovered the stone with a massive inscription of it in 1901–1902. This was immediately translated to all modern languages, twice into English. Comparative lawyers were reading it internationally, as soon as they had it. This is no surprise. There have been far-flung economies for as long as we have human records, and there is clear evidence in pre-recorded history of far-flung – hence carefully structured, organized and monitored – economies. I don't know if you have heard of the discovery of an enormous monument, Gobekli Tepe, in Turkey. It's a monument like a Stonehenge, but much older, carefully wrought, carefully designed, and then after its building and presumably its use, no one yet knows why, it was completely buried. Just the construction of this complex indicates an enormous capacity for coordinated, sustained, long-term social cooperation, and with enough excess resources that they could devote time, energy and materials to building this enormous monument, and then to devote yet more resources to its complete burial. It's truly astounding. So the economic records go back thousands upon thousands of years; the evidence of large-scale economic coordination is prehistoric. The sheer scale of these economies raised issues about justice, the basic issues Hume identified. We know the requirements of justice are quite severe, and they count severely against an enormous range of our current economic and political activities.

Accordingly, part of my concern that comes out of the end of this book and about which I'll say more in the next, is at least to begin to raise some of these issues about how we've allowed what could be, and what could have become, much more representative forms of much more republican forms of democracy to slide into the kind of mass manipulation of voting that has become common in too many countries. Recently I've managed to trace the really quite long-term development of the current academic crisis. The direct and indirect consequences of budget constraints and constrictions, and also managerialist methods, has become acute across the Occident. And yet the forewarnings of these kinds of developments began not later than 1867 with J. S. Mill's inaugural address to the University of Edinburgh, and echoed only a very few years later in Wien by Heinrich Ahrens in the Preface to the sixth edition of his *Naturrecht*. His closing pages are a quite blunt forewarning of what is going wrong with higher education and its neglect of a sufficiently comprehensive education so that people can understand and assess what they're doing in view of all of its ramifications for society, not only for their fractional interests. And Ahrens sees in 1870 just where this is tending; he sees it, crystal-clear. Now, I don't think he has a viable normative theory; that's another issue. Yet he sees why it matters, he sees what's gone wrong with education, that the specialization and professionalization of education, including law, is tending to exactly the kind of centripetal fragmentation of studies, of life and of the professions that in short order will produce collective social disaster. I posted on my website a chronological bibliography of some two dozen pieces of quite clearheaded, informed, specific prognostications of this decline of education away from the kind of comprehensive general education, or liberal arts education – *i.e.*, the education required to be a free citizen, that's what 'liberal arts' came from – the slide away from that kind of liberal education into specialized professionalism, technical disciplines or narrowly vocational training (Westphal 2018c). So, there is one point; and then I've also been sorting out what happened to Anglophone ethics in the 20th century, and also how economics slips from political economy – and political economy conceived as a normative discipline, not only as an empirical social science – how that gets left aside only to focus upon the most technical aspects of macro- and micro-economic analysis.

My preliminary findings indicate that both of these are quite direct results of the highly ideological, individualist, supposedly liberal center, making its vehement case against what it wanted to abuse as fascist collectivism of the right or left wing, yet conveniently swallowing up all responsible forms of community responsibility within those horrid extremes. Witness all the debate about methodological individualism in the social sciences, though especially during the cold war period, while experts in the social sciences knew very well that this was a *methodological* principle only. It was not a substantive claim about whether human beings are fundamentally social; Schumpeter is crystal clear about this in 1908. And clear-headed social scientists in the 1950s saw crystal-clear that this point about methodological individualism is

a specific approach to investigating and trying to explain sociologically various social phenomena. It's not a substantive issue about human nature and whether atomistic individualism is true, or some kind of monolithic collectivism is true, or whether perhaps instead human beings and the groups to which we belong are mutually *interdependent* for their and for our existence and characteristics. Schumpeter knew that we and our groups are mutually interdependent; Hegel knew that we are, Hume knew that we are, Rousseau knew that we are, Aristotle knew that we are – and so did Plato: please reread his *Laws* at of your first opportunity! And of course Dewey and Meade knew that we are. In just this vein I've also found a wonderful book written by a fellow who trained at Oxford, but wound up in the government program at Harvard named Elliott, who only gives his first initials, being British at least of academic pedigree. He writes a tremendously lucid analysis published in 1928 of the developments within politics, within jurisprudence and even the early phases of Italian fascism; he sees exactly what's going on and he sees it going wrong because it had already turned into this ideological debate between an atomistic individualist center and monolithic collectivism of the right- and left-wing totalitarianists. Elliott said plainly that this premise is just false. So he introduces a different term, not a very elegant term, so I'm not surprised that didn't catch on, but he calls it 'co-organization', but he explicitly uses this term to designate the mutual interdependence of groups and their members for their existence and their characteristics. Elliott sees what's coming; this is after the first world war and he sees the next one is coming, there's no question about that. Part of what I've been uncovering with this kind of historical research is coming across the really quite alarming and deeply troubling phenomenon of finding during these very turbulent and crucial periods examples of absolutely lucid, clearheaded, cogent analysis, theoretical and practical both, of exactly what's going wrong and what are the mistakes and what are the dangers and yet those analyses are simply lost in the ideological melee. The weaknesses of Carl Schmitt's *Verfassungslehre* were known at the time. There is a brilliant review of it by Hartung, who sees exactly what's going wrong with Schmitt's views and his whole approach. Problems with German jurisprudence are very clearly analyzed, explained and criticized in detail by Hermann Kantorowicz, among others. After reading those I've understood better how stuff like Carl Schmitt's could ever be regarded as serious jurisprudence, because at that time there is fabulous jurisprudence and philosophy of law available from before and after the first world war, and it's just ignored, swept aside by a flood of over-heated, simplistic ideological nonsense. And yes, this looks all too much like what's going right now in my own homeland (the USA), and not only there.⁵

In the latter 19th century a professor of education pedagogy in Kiev edited all of Hegel's comments and writings on education: Gustav Thaulau – three stout volumes on education written by Hegel (1853–54); I'll show you these in

5 I detail and analyze these points in Westphal (2019).

the morning.⁶ Heidegger talks about education, but he is talking about education at the time when he and also people like Jaspers had hopes that the Nazis would actually *act* on what they proclaimed, namely that they would actually help to regenerate German culture; they hoped Nazi Germany would establish an elite university to promote German culture. Well, that's of course the last thing the Nazis would ever do. And beyond that, I'm sorry, I simply can't be much bothered, nor impressed, by whatever Heidegger might have said about education at that point.

Olga Nikolić

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First of all, after reading your book, I was very much convinced that the most fundamental moral problems are problems of social coordination, i.e. problems concerned with the question of what kind of universal normative principle should we adopt for society. So, my comments will revolve around this issue and the related concepts you discuss: justice, freedom and property.

Let me start with justice and property. What I find interesting is that if we compare Hume's and Kant's concepts of justice, we come to see that they have a different relation to property. Namely, Hume's concept of justice is derived from property relations, directly from the demand for more stable and regular property relations, necessary for the preservation of society and for enjoying the benefits of it. On the other hand, Kant's concept of justice, at least according to the universal principle of justice as cited in your book, is formulated independently from property relations. It is instead derived from the concept of freedom. It requires freedom of will to coexist with everyone's freedom in accordance with the universal law. This principle is only subsequently applied to property. So, Kant's concern is actually how to regulate property in order to preserve freedom in society. It seems to me that whereas Hume's concept of justice is limited to property relations, Kant's concept is broader, in that it concerns law in general, as the guarantor of freedom in the society. I don't know if you agree with this and if you do, do you think that this distinction between founding justice on property, on the one hand, or founding property on a more fundamental concept of justice has any practical significance, in terms of norms and principles that we adopt in our society.

Let me clarify this as I go on to my next question, I think that this issue becomes especially interesting if we consider the concept of social justice. On

⁶ Dum and Guay (2017) argue that neither Hegel nor Honneth properly understand the non-instrumental aims and importance of education. They fail to note Thaulow's volumes, and so fail to note most of Hegel's extensive concerns with education and pedagogy. Criticism requires accuracy, which requires information and understanding. This should not be necessary to remark, but it must be emphatically re-stated because training in the field, and consequently also peer assessment, have deteriorated so sharply. The referees, too, neglected Thaulow's massive edition.

the one hand, demand for social justice is the demand for redistribution – it concerns property, it proposes that more equal distribution of property is more just. On the other hand, if we want to understand reasons behind this demand regarding property, if we want to morally justify the demand for social justice, we have to go beyond simply stating that more equal distribution is more just. That is, we must go beyond property relations and into the realm of freedom. This is where the previously mentioned distinction between Hume and Kant I think plays a role: whether we base justice on the stability of property or derive it from freedom. Namely if we think the stability of property relations defines what is just, we can allow for a society in which grave inequalities exist, because what matters is only that in Nozick's words "everybody is entitled to the holdings they possess under the distribution," that they acquired their holdings in a lawful way. This is what justice means. It isn't concerned with inequalities and consequences of inequalities.

On the other hand, I think Kant's conception can be used to justify social justice demands, because it appeals to human freedom, which is *de facto* endangered in the circumstances of grave inequalities. In light of this, my question is: do you think that social justice as the principle for a society is morally justifiable and if so on what grounds? Should we appeal to basic needs, should we redefine concept of property, these are all question that come to my mind, especially because freedom, although it can be used to justify social justice, can also be used, like Nozick and Hayek showed, precisely to criticize policies of social justice.

Kenneth R. Westphal

So far as Hume develops his account of justice and of property rights, we cannot get very far with issues about social justice; indeed this was one of my points, that there is not yet enough to the principles and practices – much less to their justification – in Hume's analysis, to get very far with issues about social justice. So I think it's no surprise that he had little to say about that topic. Kant had somewhat more to say about that topic, not all of it satisfactory. This topic doesn't belong directly to what he regards as the main text of the *Metaphysics of Morals* in the section on justice; it's part of the quasi-empirical elaborations in his indented remarks. There he draws his infamous distinction between active and passive citizens, and says that it always must be allowed to work oneself up from the status of passive to active citizenship, where an active citizen has enough of his own income to be civilly independent, in contrast to laborers who must seek employment from someone else, and perhaps perform their services on someone else's land, home or facilities. Kant is concerned about how easily people in that kind of an economically dependent position might be coerced by their typical employers. That's an issue, but it's hardly solved by Kant's suggestion, and of course the other grand classification for passive citizens is: everything to do with women. Kant doesn't stop to explain how anyone can work her way up from the status of woman to the

status of an independent citizen, and there can be no such explanation. This is unhelpful. I do think, however, that Kant's principles and particularly the sole innate right to freedom sets exactly the kind of stringent benchmark for socially (un)acceptable disproportions of wealth: not only opportunity, but wealth. That's indicated already by Rousseau, who requires that, whatever may be the disproportions of wealth, they must be kept within the limits whereby no one can use wealth to command unilaterally anyone else's decision or action. Kant doesn't spell that out in his metaphysical elements of justice, which I think is not surprising. But Hegel knows that Rousseau's Independence Requirement is directly entailed by Kant's sole innate right to freedom, and he knows that entailment pops out as soon as we realize that we are economically and socially interdependent beings. Take just those two premises together with sole and innate right to freedom and the foreclosure of frontiers by contiguous national boundaries, and then from Rousseau's Independence Requirement follows a decisive corollary: The institutions, practices, procedures and legislation, and also the unintended consequences of economic activity which produce differential wealth or opportunity, must be kept within whatever limits, and in accord with whatever means, enable everyone within society to participate and cooperate with others by his or her own independent, considered choice, which requires the effective power (opportunity) *not* to engage in social activities or social coordination within the civil sphere. So, this Requirement directly rules out what Marx castigates as wage slavery. Hegel was explicit about this: Once we have an industrializing economy and a nation-state that completely occupies a designated territory, where these are contiguously bounded nation states, everyone within that nation state is now denied access to uninhabited nature by recourse to which an individual could, at least in principle, manage to survive (see Westphal 2017a).

Once society has removed that prospect, which occurred long ago, every society owes it to everyone within that society that she or he be provided sufficient genuine opportunities to earn his or her livelihood and to participate as a fully recognized, independent citizen in good standing, including political representation. Now, Hegel doesn't think we should arrange political representation by districts, for very good reason: he realizes that the district representation divides political from economic life and ensures that people enter the voting booth disregarding the economic structure and the political structure of their own societies and disregarding the kinds of indirect, unintended consequences of economic activities that create exactly the kinds of miseries we've been discussing today. Hegel's system of political representation by corporations, where corporations are for each region, township and church, and also for each sector of the economy (where economic corporations include both management and labor), whereby these corporations are to provide representatives to the legislature, to the lower house. Hegel's design aims to ensure that the entirety of the political economy is represented within the legislative process, so that people can know that the entirety of their political economy is taken into account in legislation, to protest through their representatives

if it's not, and their representatives are trained experts, not at being re-elected by district, but at the economic activities they represent on behalf of their corporation, to which they too belong. Though Hegel doesn't advertise the fact, he proposes a robust system of *universal*, inclusive representation. The only sore point is casual day laborers. How sore that point is, I think, has been over estimated by Hegel's critics, partly because once you see the kinds of civil services Hegel advocates, the administration of justice and public authorities, it's very easy to come up with the relevant solution for those who are and (for whatever reasons) remain casual laborers: namely an employment office which can help coordinate non-contract casual labor. Marxists have said this is the beginnings of a proletariat, but that's not so. The town of Hann-Münden has a very unusual geographical situation, at the intersection of three major rivers which also are not all at the same altitude. Consequently, it was a major transportation hub and a huge amount of loading and unloading of cargo occurred in Hann-Münden. Hence there were lots of jobs available even without long-term labor contracts in Hann-Münden; – by the way: give yourselves a chance to go there, it's a beautiful city, the old part of the city is really gorgeous. In one of the main streets there's a four-story house, with a grill on the front door made of iron, formed as a history tree of the owners of that building. One of them was a day laborer; in Hann-Münden a day laborer (*Lohnarbeiter*) was wealthy enough of to buy that house! That's not exactly working scum on the bottom of the proletariat. So we must be careful about work classifications (*Lohnarbeiter*) and socio-economic status. Now, perhaps that owner was the only such exception there's ever been. But we must be careful about our interpretation of these categories of employee or casual laborer, or whatever else. Actual economic history is much more interesting than the rhetorical battles about it. Unfortunately, my attempts to photograph that front door failed, and so far I have not been able to relocate it using google street view, but at some point I'll manage to get back there and get the pictures I want. (On the other end of the socio-economic spectrum, I once had the pleasure of flying from Germany to Chicago with a German banker sitting next to me. We discussed politics and policy and he volunteered his firm conviction that, of course, any corporate executive ought to be paying some 50% of his or her salary in taxes. Yes, a banker!) Is this an answer to your question?

Slavenko Šljukić

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First of all, I would like to express that I'm honored to meet you in person. In my opinion, this book is one of the most precise interpretation of Kant's and Hume's practical philosophy I've ever read. The fact that my main research interest is Kant's normative theory, even more underlines my mentioned opinion.

Because I'm doing my research on Kant's ethical, and his possibly meta-ethical theory, parts of the book that cover these areas particularly caught my

attention. I have to highlight that I completely agree with your constructivist thesis, because that's the position I would also like to defend in my PhD thesis, defending Korsgaard's interpretation primarily. So, thank you again for this great contribution that also serves as inspiration, this book will definitely take high priority in my work.

However, I have one dilemma. In the chapter "Kant's Principles of Moral Constructivism", 22.1. section "A Contradiction in Conception" you present the 'two steps' argument that saves universalization test from parodies. This argument is, in my opinion, at least extraordinary, and it solves some of my personal dilemmas, so thank you for that too. But I have one more dilemma – I don't think that we need the first column of that argument. To be precise – I don't think that we can (or at least I cannot) find an example for 'Ought!' – a maxim that is consistent with corresponding universalization and its opposite maxim that is inconsistent with its corresponding universalization. I know that Kant in his work splits our acts into permissible, prohibited and obligatory, but I think that, if he has an obligatory act, he cannot save strict formalism, and your table (and I'm very glad of it!) expresses Kant in strict formalistic sense. According to formalism (if I'm right), moral criteria represents a border between permissible and prohibited acts (or if you like permissible and impermissible acts), so there's no room, without implementing content, for obligatory acts. You can say that it is our obligation, for example, to return back money when we promise to return back the borrowed sum, but I don't think that is the "real" example of an obligatory act. This is rather the case of prohibited (impermissible) act, because what is wrong in that act is a lie (promise violation), and lie is something that we ought *not* to do. I'm not inclined to call an obligatory act our obligation to restrict us from some acts.

Furthermore, I think that request for "real" obligatory acts entails danger of paternalism because we cannot say that someone did something wrong from obligation, and not from interests for example, without looking at his or her intentions. To emphasize my point, let me give you an example: Kant's famous example for "real" obligatory act (Ought!) is to help others whenever we can. I think that such an example passes the first step in your 'two steps' argument, but also the second one, because there is no contradiction in conception when we consider a world in which nobody helps nobody, so that will be just 'May' act, not an 'Ought!' act.

To underline the point, I think that your solution for universalization test is even more greater, because I think that it implicitly shows that we cannot (or at least I cannot) find an example for the first column and, in that matter, we saved Kant's strict formalism, and consequently minimalism. The only thing that I disagree with is existence of the first column (we have to have sufficient reason for infiltrating the first column), but, as I mentioned many times, methodology for universalization test and the other two columns, are at least extraordinary. Thank you.

Kenneth R. Westphal

I think you can realize why it took me so long to figure out even this much about these issues. About intentions and moral worth at that first column (§22.2, on Kant's universalization tests), I deliberately omitted issues about motives and moral worth. I'm ready to let motives fall where they may and, for the purposes of this book, tried to identify, as directly as I could, issues about whether, how or on what basis we can credibly distinguish obligatory from prohibited from permissible actions. It's not that I think motivation is unimportant, or that issues about moral character or moral worth are unimportant; but I think that the proper relations between actions and motives are not to be forged by conceptual analysis in the way people debating internal or external relations between motives and reasons suppose. These relations are really matters for moral education and our moral self-understanding, which is to say, really: the moral dimensions of *all* our education. To properly frame, pursue and assess those aspects of education, we need rather clear-cut principles to distinguish between obligatory, prohibited and permissible forms of action. Then the further issue comes in about how these procedures, and the pure *a priori* principles that Kant thinks help to constitute these procedures, need to be used in connection with who we are as finite rational embodied agents: Kant's practical anthropology. In that connection, all three columns, or actually all four columns in the chart, are necessary. As you know, Kant's own discussion of the distinction between what's consistent in conception and what's consistent in willing concerns this issue about our obligation to lend aid to others in distress, and his own account of it already in the *Groundwork*, but I think he doesn't revise it later, I think Kant retains this account, that precisely because we are such finite beings, simple precaution requires us to be careful about and, in the event, to be prepared to deal with our own falling into distress in one way or another; at this point enters the principle of hypothetical imperatives: as rational beings, we are committed to willing whatever resources are sufficient to relieve us of that distress. Given our finitude and our social existence, among those resources is the possible voluntary assistance of other people. What the universalization test rules out is anyone willing that others aid oneself, though one refuses to aid them. That's exactly the kind of exception in one's own case to the universal requirement Kant's test is designed to rule out. Yet you're right: None of the broad duties can be specified only at the level of formalism. Even property rights only matter to us because part of our finitude lies in the fact that we can do nothing *ex nihilo*; for us to do anything, we must make use of material resources – space, time, a whole variety of things. So, right there we're stuck with the task of sorting out how we can effectively and legitimately coordinate our actions so that we each can make sufficiently reliable, appropriate use of sufficient resources to maintain our own freedom of action. The obligation to truthfulness also depends on our practical anthropology. Kant makes this very plain in the last section of the anthropology lectures; probably you know this passage. He asks us to imagine a species on some

other planet that are mostly like us, except for one thing: this race of rational beings can only think by speaking aloud. That's a race who cannot engage in deceit because they can only execute a planned deceit by planning aloud and announcing their plans while carrying them out, including announcing it to their intended victims. It's almost as bad as trying to lie to the Omniscience. You can prove you're an utter fool who understands nothing; but no one can act effectively on the deranged attempt, either to deceive someone to whom you're blathering all of your deceitful plans, or by trying to lie to the Omniscience who already knows what you're trying to do, and by the way also knows the truth of the matter. So, I think that Kant's practical anthropology must be taken into account, especially so for broad duties of virtue; Kant's view is not, and never was, a mere formalism. I'm trying to think of an example, and I think the example of truthfulness will actually do here; I wanted example that doesn't depend upon legal institutions.

We're obligated to speak the truth, but that doesn't always necessarily require us to speak the whole truth, and we know that Kant acted on that policy. The other point, thanks for reminding me, about the two columns (§22.2), is that if we appeal to some features of Kant's account of judgments and negation, we could eliminate one of the columns, but then we would have to run the tests twice over, depending on where we put negation into the relevant maxim. Yes, that can be done, but given the specifics and intricacies of Kant's tests, I much prefer risking a bit of redundancy to losing how precise is Kant's test to the often quite silly misreadings too often presented as *reductios*. I hope you forgive me; you're certainly right, we could deal with it by more rigorous logic, but then all we've done is complicated the use of the one remaining column.

Kenneth R. Westphal: Response to Rastko Jovanov

I should go back and look at that part of Rawls and see what I want to say about his distinction between 'basic' and (merely by contrast) non-basic structures of society, or of justice. To make this distinction in abstraction from actual kinds of actual institutions frustrates analysis and understanding; whose institutions these are matters vitally, and if republicanism (small 'r' republicanism, please!) is indeed justified, *we* are responsible for our institutions, and no one else can be. This too is completely Hegelian; I want to be careful about which aspects of the development or initiation of institutions matter normatively. Typically institutions get started because at least someone is able, and some group is able, by developing this institution to achieve some of their free aims; then the issue is whether their so doing is justifiable, acceptable, legitimate, or may even be something we ought carefully to protect because it in fact contributes to everyone's legitimate freedom of action.

So I'm entirely with Hegel against the historical school of law, and again with Hegel against confusing issues of historical origins or development with issues of normative assessment or justification. Certainly we can identify various social institutions that were instituted by corrupt, impermissible means,

just as Hume surmises that, historically, institutions of government grew out of military conquest. This is one regard in which Hegel points out that many of our customs, laws and institutions develop much more locally and without premeditation, and yet may in fact achieve legitimate purposes, and may (or may be modified to) meet them legitimately. This is why the issues of our assessment matter so much in justice and in justification. Certainly on Hegel's account of the institutions he identifies within civil society, the administration of justice and the public authorities, all of these institutions are on Hegel's view required by principles of justice and can be and must be assessed in accord with principles of justice; this holds too for the entire legal structure of a society, including the administrative law which allows the formation and operation of those institutions called corporations and foundations, and so forth. So we can get very quickly into some real nuts and bolts issues about what kinds of institutions we're talking about. My guess is that Hegel's theory of justice will get us into those nuts and bolts a lot quicker and with much better criteria for assessment than Rawls'. I think that's what I can say now, but I will come back to it tomorrow. Thank you all very much for your interest, your kind remarks and questions; thank you, thank you all very much.

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