

# The London School of Economics and Political Science

*Freedom Under the Law: Right and Revolution in Kant's Theory of Justice*

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## **Declaration**

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## Abstract

This thesis addresses the "air of paradox" that continues to plague Kant's absolute prohibition of revolution. In seeking to identify the source of this contention, I investigate a possible inconsistency within Kant's *Doctrine of Right* as a doctrine of external freedom. Taking my lead from Christine Korsgaard's idea of "perverted justice", I explore the idea that states can exist that undermine their own purpose, in their denial of the freedom which is their end.

Establishing the possibility of perverted justice takes us into an inquiry into the nature of Kant's moral theory as a theory of freedom, and specifically, the particular kind of freedom that *Right* takes as its end. I take the contrast between the ethical and juridical domains as my point of departure, defending Kant's strict division between the two domains. In doing so I defend the moral status of *Right* against commentators who exclude it on grounds of its external nature, arguing for a conception of practical freedom that is broader than the internal freedom of autonomy, and hence can include *Right* under its scope. From this I offer an account of external freedom as acting in accordance with the Universal Principle of *Right*, which is nothing more than the constraint of one's choice under universal law.

In conclusion, I argue that *Right* (justice) cannot be frustrated in the way that Korsgaard's idea of perverted justice suggests, due to the formal nature of external freedom. Obedience to positive law cannot deny external freedom in the way she suggests; rather, our constraint under law is constitutive of our freedom as the end of political society. There is therefore no inconsistency to be found within Kant's *Doctrine of Right* between the idea of external freedom as the end of *Right* and his absolute prohibition of revolution.

## Abbreviations

CF	<i>The Contest of the Faculties</i>
CPR	<i>Critique of Pure Reason</i>
CprR	<i>Critique of Practical Reason</i>
IUH	<i>Idea for a Universal History</i>
G	<i>Groundwork of the Metaphysics of Morals</i>
ML	<i>Lectures on Metaphysics</i>
MM	<i>The Metaphysics of Morals</i>
PP	<i>Toward Perpetual Peace ('Perpetual Peace')</i>
R	<i>Religion Within the Boundaries of Mere Reason ('Religion')</i>
RS	<i>Review of Schulz</i>
TP	<i>On the Common Saying: 'That may be correct in theory, but it is of no use in practice' ('Theory and Practice')</i>
WIE	<i>An Answer to the Question: What is Enlightenment? ('What is Enlightenment')</i>

Full details of editions used are listed in the Bibliography

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## Freedom under the Law: Right and Revolution in Kant's Theory of Justice

### Introduction

Kant's position on revolution is given in no unclear terms. It is in "the highest degree wrong", treason that "must be punished by nothing less than death". Its prohibition is absolute, and stands even in cases of the "unbearable abuse of supreme authority" (PP 8:382; MM 6:320). He retains this prohibition across all his works on political philosophy, from the pre-critical historical essays to his main systematic treatment of Right in the *Metaphysics of Morals*.

However, despite the apparent strength and consistency of Kant's arguments, many commentators nonetheless see a need to challenge Kant's absolute prohibition.<sup>1</sup> John Stuart Mill offers some insight into our dissatisfaction with Kant's position, writing against philosophies of absolute obedience that such a policy "would often protect pernicious institutions against the only weapons which, in the state of things existing at the time, have any chance of succeeding against them".<sup>2</sup> Mill expresses the common concern that an absolute prohibition of revolution puts the weight of advantage on the side of despots and tyrants, and deprives people in the most oppressive and tyrannical states of their only means of protecting themselves. This concern is still prevalent in contemporary thought on revolution. As J. Angelo Corlett argues, while very few people would *unconditionally* support a right to political violence, many still believe it to be an important limiting condition on the

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<sup>1</sup> Hill, T., "Questions About Kant's Opposition to Revolution" in *The Journal of Value Inquiry* 36: 283-298, 2002, p. 283

<sup>2</sup> Mill, J.S., *Utilitarianism* (2<sup>nd</sup> edn.). (Indianapolis, IN: Hackett, 2001), p. 44



power of authoritarian and oppressive regimes.<sup>3</sup> Even those who are wary of overly permissive arguments in favour of political violence nonetheless warn that “[i]t would be just as wrong, however, to interpret revolution too restrictively”.<sup>4</sup> These authors represent a general trend within liberal political theory to oppose an absolute prohibition of revolution in protection of basic rights and freedoms.

This trend has led a number of commentators to reject Kant’s position on grounds of a purported inconsistency between his absolute prohibition on the one hand and his commitment to freedom on the other. The suspicion is that a theory of justice as freedom must somehow make allowance for violent action against the state, at least in certain extreme cases. Commentators have therefore explored all different parts of Kant’s writings – his *Doctrine of Right*, his ethics, and his philosophy of history – in seeking to identify the precise nature of this inconsistency, and find a more moderate view on revolution. The hope is that in doing so, we can resolve our liberal intuitions in favour of political violence, and hence rid ourselves of the “air of paradox” when it comes to Kant’s position on revolution.<sup>5</sup>

This thesis investigates this “air of paradox”. Specifically, I investigate a purported contradiction within Kant’s metaphysics of morals, between external freedom as the *end* of political society (Right), and positive law as a *necessary condition* of that society. This proposed contradiction arises in conditions where positive law is thought to deny the realization of freedom which justice takes as its end. As such, a dilemma arises: in order to realize the end of freedom, we must obey the law; and

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<sup>3</sup> Corlett, J.A., *Terrorism: A Philosophical Analysis*. Dordrecht: Kluwer Academic Publishers, 2003, p 10

<sup>4</sup> Coates, A.J., *The Ethics of War*. (Manchester: Manchester University Press, 1997), p 139

<sup>5</sup> Hill, 2002, p 288

yet in obeying an unjust state's law, we violate the very end we are trying to pursue. Put another way, obedience to positive law is a necessary condition of possible freedom claims, but the realization of that freedom is precluded by obedience to unjust law. The supposed contradiction is therefore within Kant's *Doctrine of Right*, caused by a conflict between his thematization of moral laws as laws of freedom, and his political doctrine of positive laws as absolute laws.<sup>6</sup>

This proposed contradiction, as I present it, is a version of that mooted by Christine Korsgaard, who suggests that in conditions where the procedures of justice turn against its end, justice is "perverted".<sup>7</sup> It is the possibility of this perversion that I investigate in this thesis. After a thorough investigation into the nature of external freedom as Kant conceives of political freedom, however, I shall reject the possibility of such a conflict, on grounds that it relies on a *substantive* reading of external freedom as the end of Right. This is inconsistent with the *formal* nature of Right and external freedom on Kant's *Doctrine of Right*. As such, Korsgaard's argument for the perversion of justice fails.

## ***1) Setting up the problem***

### *1.1) Challenging the status quo on Kant and revolution*

My reason for addressing this "air of paradox" in Kant's political philosophy is twofold. My first reason, discussed in this section, is that the two strands of thought

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<sup>6</sup> Note that I refer to *Right* and *justice* interchangeably in this thesis.

<sup>7</sup> Korsgaard, C., "Taking the Law into Our Own Hands: Kant on the Right to Revolution" in A. Reath, B. Herman, & C. Korsgaard (eds.), *Reclaiming the History of Ethics: Essays for John Rawls*. Cambridge: Cambridge University Press, 1997,

dominant in current commentary provide unsatisfactory responses to our moral intuitions as Kantians. It is for this reason that we are left with a sense of paradox and persistent suspicion that Kant made some sort of error in committing to an absolute prohibition of revolution.

The most common approach to Kant's position on revolution is to attempt a defence of our liberal intuitions in the face of his absolute prohibition. Commentators such as Allen Rosen and Thomas Hill acknowledge the formal consistency of Kant's arguments, and the *legal* prohibition of revolution within his *Doctrine of Right*, but nonetheless argue that his position can be modified to better accommodate our liberal ideals. A popular strategy is to argue that these ideals are readily available to us, within Kant's moral theory, in its emphasis on the rights of freedom, independence and equality, and that we must simply prioritise these where necessary in order to override his overly conservative conclusions regarding revolution:

Kant's conservative predilections may have prevented him from recognizing some of the implications of his own belief that one should not obey positive laws that conflict with the moral law.<sup>8</sup>

On this view, Kant's position on revolution results from a mistaken betrayal of his liberal ideals to his more conservative leanings, which mistake may be corrected in the "spirit" of Kant's liberal commitments in order to better align with our contemporary notions of justice.<sup>9</sup>

This approach is to be criticized on two grounds. Firstly, in emphasizing what they

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<sup>8</sup> Rosen, A., *Kant's Theory of Justice*. Ithaca: Cornell University Press, 1993, p 158

<sup>9</sup> Rosen, A., 1993, p 164 & Hill, T., "A Kantian Perspective on Political Violence", *Journal of Ethics*, Vol. 1, No. 2, (June 1997), pp 106-7

take to be the liberal strand of Kant's philosophy, commentators such as Rosen and Hill promote an overly substantive conception of justice. Rosen, for example presents an interpretation of justice as "[protecting] individual rights, primarily civil liberty, legal equality, and political freedom".<sup>10</sup> I argue against these kinds of accounts in chapter 5, which erroneously introduce substantive conceptions of justice and freedom into Kant's *Doctrine of Right*. They do so in an attempt to mitigate what they perceive to be an "extreme formalism"<sup>11</sup> as the source of the conservative strand in Kant's philosophy. However, in doing so they not only fail to appreciate the distinctive nature of Kant's moral theory, they also do a disservice to the coherence of that theory. In identifying "alternating strands of conservatism and liberalism" in Kant's moral theory,<sup>12</sup> commentators present a picture of Kant's philosophy as "a puzzling, even inconsistent, combination of views, suggesting that Kant was ambivalent or vacillated in his position".<sup>13</sup>

In fact, it is these commentators who are guilty of inconsistency, in the modifications that they propose in order to soften Kant's absolutism. This provides the second ground for criticizing this approach, namely, the significant departure that these arguments make from Kant's doctrine of morals. In recognizing the force of Kant's arguments against a *legal* right to revolution, commentators are compelled instead to turn to Kant's *ethics*, arguing for a *moral* right to revolution.<sup>14</sup> In doing so, they argue that there are adequate grounds within Kant's moral theory to challenge his absolute prohibition, but that in order to make them available to ourselves, we

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<sup>10</sup> Rosen, A., 1993, p 115

<sup>11</sup> Rosen, A., 1993, p 166; Beck, 1971, p 413

<sup>12</sup> Rosen, 1993, p 116

<sup>13</sup> Hill, 2002, p 284

<sup>14</sup> Rosen, 1993, p 157

must reject his strict division between ethics and Right.<sup>15</sup> While this is explicit in Rosen's case, it is implicit in many more, for example in Hill's argument for revolution grounded in the categorical imperative, and in Korsgaard's appeal to the indirectly ethical duty of justice.<sup>16</sup> However as I argue in chapter 2, such an appeal to ethics represents a significant revision of Kant's moral theory, sacrificing our consistency as Kantians to our intuitions as liberals.

There are commentators such as Hill and Allen Wood who see no problem with such a re-writing, arguing that our task as Kantians is to "criticize and modify the theory Kant put forward as well as sympathetically interpret or defend it".<sup>17</sup> However, in current literature on revolution, commentators do not only modify peripheral elements of Kant's practical philosophy. They abandon or ignore central and defining features in order to present a theory that is in the "spirit and tradition" of Kant's philosophy, but which also sees significant development away from its original form.<sup>18</sup> Consequently, these commentators sacrifice their claim to a faithful interpretation of Kant, and revert instead to a Rawlsian position of Kantian resemblance, on which certain elements of Kant's philosophy are adapted, but certain central ideas are also abandoned.<sup>19</sup> This, as Rawls, acknowledges, does not present an interpretation of Kant's actual doctrine, but rather of a Kantian theory of justice which merely resembles Kant in some key respects. While this poses no problem in cases such as Rawls, where this departure is acknowledged, it gives rise to interpretative difficulties in cases where commentators claim to be offering an

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<sup>15</sup> Rosen, 1993, p 171

<sup>16</sup> Hill, T., 1997, pp 116-134 & 2002, pp 292-296; Korsgaard, 1997. I discuss Korsgaard's argument in detail in chapter 1.

<sup>17</sup> Wood, A.W., *Kantian Ethics*. Cambridge: Cambridge University Press, 2008, p 2

<sup>18</sup> Hill, T., "A Kantian Perspective on Political Violence", *Journal of Ethics*, Vol. 1, No. 2, (June 1997), pp 106-7

<sup>19</sup> Rawls, J., *A Theory of Justice*. London: Oxford University Press, 1971, pp 251-257

account of Kant's philosophy as he presented it.

The alternative to these interpretations, and the second strand of argument in current literature, is represented by Peter Nicholson, who argues that, though contentious, Kant's absolute prohibition is nonetheless valid, and his conclusions plausible. Going against the liberal trend of questioning Kant's absolutism, Nicholson does not accept our intuitions as sufficient reason for disputing Kant's position in the face of its philosophical consistency. Instead, he argues that we should accept it as a viable, if more conservative, alternative to liberal theories of political obligation.<sup>20</sup> This is seen as an advantage, offering a more moderate and formal liberalism that does not make excessive appeal to substantive liberal values. As Berndt Ludwig puts it, in contrast to the theories of Hobbes, Montesquieu or Rousseau, "Kant's *Doctrine of Right* seems to contain relatively little in the way of new directives for organizing the state, but rather provides a new foundation for traditional institutions".<sup>21</sup> Nicholson's suggestion, then, is that we should yield our intuitions when it comes to revolution, and instead recognise the appeal of Kant's unique moral and political conservatism.

The problem with Nicholson's line of argument, however, is that it requires us to sacrifice our ordinary morality. It is this that perpetuates the suspicion that Kant's moral theory is inconsistent with some deeper liberal principle. Consequently, an "air of paradox" continues to plague Kant's political philosophy, and the matter of his absolute prohibition remains unresolved. Both of the dominant strands of

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<sup>20</sup> Nicholson, P., "Kant on the Duty Never to Resist the Sovereign" in *Ethics*, Vol. 86, No. 3 (Apr., 1976), p. 230

<sup>21</sup> Ludwig, B., "'The Right of a State" in Immanuel Kant's *Doctrine of Right*" in *Journal of the History of Philosophy*, Vol. 28, No. 3, July 1990, pp 403-415, p 404

interpretation are therefore found to be lacking, in their failure to present an account of justice as freedom that is consistent both with Kant's philosophy, and with our liberal intuitions regarding revolution.

1.2) *Kant's relevance to contemporary political theory: terrorism and substate violence*

My second reason for addressing Kant's position on revolution concerns our wider understanding of Kant's political philosophy and its relevance to contemporary political theory. For a philosopher's answer to the question of whether violence is ever permitted against the state casts light on the nature and extent of political power, the relationship between subjects and ruler, and the parameters of political obedience. As Hill observes, the apparent tensions in Kant's position on revolution may reflect deep moral problems, both in Kant's own philosophy, and in contemporary moral debates.<sup>22</sup> Not only does a discussion of Kant's position draw attention to these debates within political philosophy more generally; it is also illuminating for Kant's own philosophy. In investigating and seeking to resolve the apparent tension in Kant's views on this matter, we shed light on his basic moral principles, the nature of Right, and its relation to other aspects of his practical philosophy. An investigation into the controversy behind Kant's absolute prohibition is therefore relevant not just to his own position on revolution, but also to our understanding of his theory of justice more generally, and to contemporary debates on political violence.

With regard to Kant's theory of justice in particular, I draw out certain elements of his moral doctrine through my analysis of Korsgaard's idea of "perverted justice".

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<sup>22</sup> Hill, 1997, pp 106-7

In exploring whether such cases can arise within Kant's metaphysics of morals, I discuss the nature of freedom as the end of political society; the formal nature of justice; the relation of justice to ethics within Kant's moral theory; and the metaphysical foundations of Kant's moral theory. My particular focus within these discussions is the nature of external freedom as the end of political society on Kant's doctrine of moral laws as laws of freedom. Far from being a peripheral or minor concern for political philosophers, their position on revolution is therefore illuminating of much deeper, foundational commitments and assumptions in their political theory, and in our conception of morality more generally.

## **2) *Kant's prohibition of revolution***

### *2.1) Kant's legal prohibition of revolution*

In this section I offer a brief outline of Kant's arguments against the possibility of revolution, before addressing some common approaches that challenge it. I do not offer a detailed analysis of these arguments, as they have been discussed exhaustively elsewhere.<sup>23</sup> Instead, my aim is to provide a synopsis, both in order to map out the current territory of literature on Kant's prohibition of revolution, and to further illuminate certain aspects of his *Doctrine of Right* and his practical philosophy which will later become relevant in my own analysis.

We find two main strands of argument against revolution in Kant's writings: his *legalistic* arguments against the possibility of such a right; and his *moral* argument grounded in the duty to enter political society. The first is based on what Rosen

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<sup>23</sup> See for example Rosen, 1993; Hill, 2002; Beck 1971; Nicholson 1976



refers to as the “logic of sovereignty”;<sup>24</sup> that is, what rights Kant can permit given the nature and extent of sovereignty as he conceives it. Kant’s conception of sovereignty prohibits a right to revolution on grounds that allowing such a right would give subjects a right to judge how the constitution is administered. Revolution is “to coerce the government to take a certain course of action”, which is for the people to “[perform] an act of executive authority” (MM 6:322). Granting such a right would thus mean that the people could challenge or even override the authority of the sovereign, effectively putting them in a power-sharing agreement with their subjects.

Kant’s objection here is not that allowing such a right would cause instability; it is a conceptual one made on the basis that sovereignty must be illimitable and indivisible if a state of Right is to obtain. There must be a lawful supreme power under which to unite the people’s will if man is to coexist in political society (MM 6:372).<sup>25</sup> Yet allowing a right to revolution would give rise to an opposing power, meaning that a sovereign could no longer be considered the head of state. This is clear, argues Kant, if we consider a disagreement between the people and the sovereign. In such circumstances there would be no one to decide what justice requires, thus necessitating a yet higher authority (TP: 8:300; MM 6:319-20). And herein lies the contradiction. For were a higher authority allowed to supersede the authority of the sovereign, then the sovereign would no longer be head of state. In such a case, the civil condition would either be annulled with the removal of the

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<sup>24</sup> Rosen, 1993, p. 166

<sup>25</sup> I discuss the idea of a single legislative will as a necessary condition of political society in more detail in chapter 1.

sovereign, or this higher authority would itself become sovereign.<sup>26</sup> Yet in neither case could the people hold a right to revolution. For in the first, political society is dissolved, and with it all juridical rights; in the second, were the people to retain this right against the new sovereign, the problem would repeat itself. Thus it is that Kant concludes that a juridical right to revolution is “self-contradictory”, a conceptual impossibility.

There is a second sense in which Kant sees such a right as being self-contradictory, namely, in relation to the idea of rightful coercion. For were the people to hold a right against the sovereign, that right must, by its very nature, be enforceable.<sup>27</sup> Thus the sovereign would be subject to legal coercion. Yet as Kant writes, “[the head of state] alone is not a member of the commonwealth but its creator and preserver [and he] alone is authorized to coerce without himself being subject to a coercive law” (TP 8:292). Thus to allow a right to revolution would be to allow a coercive right against the sovereign, which would mean that he is no longer sovereign. For “if he could also be coerced he would not be the head of state and the sequence of subordination would ascend to infinity” (TP 8:291).

The contradiction here does not arise through the idea of being subject to legal constraint *per se*. For as Rosen points out, a sovereign need not be omnipotent; his authority may be limited by the constitution without denying that he is the supreme lawmaking power.<sup>28</sup> Rather the contradiction lies in the fact that coercion must be a

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<sup>26</sup> Henrich, D., “On the Meaning of Rational Action in the State” (transl. Velkley, R.L.) in R. Beiner & W.J. Booth (eds.), *Kant and Political Philosophy: The Contemporary Legacy*. (New Haven, CT: Yale University Press, 1993), p. 107

<sup>27</sup> Rosen, A. 1993, p 167

<sup>28</sup> Rosen, A., 1993, p 167

solely executive function, exercisable only by the supreme authority.<sup>29</sup> Thus a coercive right held against the sovereign would mean that he can no longer be considered the supreme authority. Consequently, we encounter the same contradiction as before via a different route: such a right would mean that a yet higher authority must be posited, causing “the sequence of subordination [to] ascend to infinity” (TP 8:291).

Kant’s argument concerning the self-contradictory nature of a right to revolution is further developed in *Perpetual Peace*, where he discusses the principle of publicity, applicable to both ethics and right as a test of the morality or justice of a maxim:

All actions relating to the rights of others are wrong if their maxim is incompatible with publicity (PP 8:381).

Kant lists several ways in which a maxim cannot be made public: if it cannot be declared openly without it frustrating its end (for example making a false promise to secure a loan), or must be kept secret if it is to succeed (in the case of a surprise attack). Kant’s objection to revolution, however, is the third sense in which a maxim may not be made public: it cannot be publicly *acknowledged*.<sup>30</sup> For as a juridical right, it would have to be granted in the form of a positive law. And this, as argued above, would be to allow the people legal authority over their ruler. In echo of the argument in *Theory and Practice*, Kant reminds us in *Perpetual Peace* that were both the people *and* the sovereign given coercive rights through positive law, then the establishment of the state would become impossible, as there could be no supreme head of state (PP: 8382). Thus as Nicholson rightly points out, Kant’s primary

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<sup>29</sup> Rosen, A., 1993, p 168

<sup>30</sup> For a discussion of the different ways in which maxims cannot be made public, and their application to Kant’s stance on revolution, see Nicholson, 1976, p. 224

objection in *Perpetual Peace* is a repeat of the logic of sovereignty argument: such a maxim cannot be made into positive law without being self-contradictory.<sup>31</sup>

While the above arguments pose objections to the conceptual possibility of granting a juridical right to revolution, Kant's other main line of objection is to the act of revolution itself. Specifically, it is to the consequence of the act, which he argues to be the inevitable dissolution of civil society. Revolution would "annihilate any civil constitution and eradicate the condition in which alone people can be in position of rights generally" (TP 8:299). As in the case of the logic of sovereignty argument, this objection is to the destruction of one of the necessary conditions of civil society: a single legislative will. But rather than focusing on the juridical requirement of an absolute sovereign, as in the former case, Kant's argument against the act of revolution takes us deeper into his metaphysics of morals, and the moral duty to enter the civil condition as a condition of external freedom under a general united will:

only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative (MM 6:314).

It is only through uniting under a general legislative will, given by the sovereign body of a state, that a people can form themselves into a political society at all. And it is only through forming themselves into a political society that people can be granted any rights with regard to themselves or public property. It is therefore a duty of morality, according to Kant's postulate of public right, to enter the civil condition in accordance with a general legislative will. For only in such a condition can man enjoy his innate rights and freedom in his relations to others (MM 6:306-7).

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<sup>31</sup> Nicholson, 1976, p. 224

I discuss Kant's idea of the general will in more detail in chapter 1. For now, I simply note Kant's argument that to revolt against the sovereign is to revolt against the general will; it is to seek to overthrow not just the head of state, but the rule of law itself.<sup>32</sup> This makes revolution not only *unjust*, but an act that stands in opposition to the very *condition* of justice (MM 6:340; TP 8:301). To remove the sovereign is to destroy the general will, and to destroy the general will is to remove a necessary condition of the civil condition. Therefore to revolt against the sovereign is to seek to remove the very foundation of Right, and as such, violates man's a priori duty to enter and remain in the civil condition (MM 6:307).

Kant's objection to the act of revolution is therefore not an empirical one grounded in actual concerns regarding anarchy. Rather, it is a conceptual one, grounded in the idea that a legal order presupposes a supreme authority.<sup>33</sup> The existence of positive law requires a single legislative will whose laws bind universally; and a single legislative will requires an absolute sovereign body that cannot be opposed or divided. As Beck puts it: "Revolution abrogates positive law; therefore positive law and its system condemn revolution".<sup>34</sup>

## 2.2) *The possibility of a moral right to revolution*

Having ruled out the possibility of a juridical right to revolution within Kant's *Doctrine of Right*, many commentators have wondered whether there is a moral right

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<sup>32</sup> Korsgaard, 1997, p. 311 & Reiss, H.S., "Kant and the Right of Rebellion" in *Journal of the History of Ideas*, Vol. 17, No. 2. (Apr., 1956). p. 182

<sup>33</sup> Hill, 1997, p 114

<sup>34</sup> Beck, 1971, p 414

to be found instead. As Hill puts it, "Calling something a crime is not the same as saying that it is immoral. It is at least logically possible that crimes in certain circumstances are morally justified".<sup>35</sup> However, such an argument is ruled out on systematic grounds for Kant, due to the distinction that he draws between ethics and Right. I discuss this in detail in chapter 2, but for now the salient point to note is the *self*-coercive nature of ethics contrasted to the *other*-coercive nature of Right. Due to the external and interpersonal nature of Right, an agent can be forced to comply with positive law if needs be (MM 6:219/231). Ethical duties, however, cannot be enforced in this way. As "internal act[s] of the mind", ethical duties cannot be exacted through force; they must be voluntary, a product of the will (MM 6:239). Consequently, moral rights and duties cannot fall within the compass of Kant's doctrine of Right, as they cannot be enforced through legal channels.<sup>36</sup>

It is this division based on the coercibility of rights in the political domain that leads Allen Rosen to suggest that if we want to argue for a moral right to revolution, we must, to some degree, abandon the distinction between ethics and Right.<sup>37</sup> However, as he rightly points out, to collapse this distinction "would mean removing the central pillar of Kant's taxonomy of rights and duties".<sup>38</sup> I discuss this common blurring of the boundaries between ethics and Right in chapter 2, where I argue for a strict division of the two domains, thereby blocking such lines of argument.

There is, however, an alternative appeal to morality made by Lewis White Beck. This is not an attempt to argue for a moral right to revolution; but rather to show an

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<sup>35</sup> Hill, 2002, pp 289-290

<sup>36</sup> Rosen, A. 1993, p. 170

<sup>37</sup> Rosen, A., 1993, p 171

<sup>38</sup> Rosen, A., 1993, p 171

inconsistency in Kant's moral theory based on a distinct moral duty which Beck argues comes into conflict with the juridical duty of obedience. He therefore concludes that Kant's system of rights and duties is inconsistent,

for it includes both the teleology of seeking to bring about the rule of law under a republican constitution (which may, in fact, require not merely efforts at reform but actual violence) and a formalism of obedience to the powers that be.<sup>39</sup>

Specifically, Beck finds a contradiction between the juridical duty of obedience and the moral duty to progress. Kant's philosophy of history tells us that this progress will be brought about through peaceful reform, guaranteed by nature. However, Beck rightly draws our attention the importance of freedom of the pen in this account of historical progress, and suggests that such freedom may be denied by tyrannical sovereigns.<sup>40</sup> In such cases, he finds a conflict in Kant's practical philosophy:

We are to work towards the end of the improvement of mankind by striving to secure a political stage on which the rights of man will be respected and war will be abolished. But in so doing, we are not to overthrow by violence even a tyrannical government which blatantly traduces these rights, for to do so would conflict with a duty of perfect obligation.<sup>41</sup>

Beck's proposed argument is that there are certain political constitutions in which our fulfilment of our juridical duty of absolute obedience precludes our fulfilment of our moral duty of progress through free speech.<sup>42</sup> This would explain our intuition

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<sup>39</sup> Beck, 1971, pp 419-20

<sup>40</sup> Beck, 1971, pp 414-5

<sup>41</sup> Beck, 1971, p 420

<sup>42</sup> As Flikschuh notes, there is a structural similarity here with Korsgaard's argument against Kant's absolute prohibition (Flikschuh, 2008, p 144). While both acknowledge the consistency of Kant's arguments against revolution, they similarly take this prohibition to be in tension with Kant's emphasis on the duty to moral progress, yielding cause for revolt, but no right to do so. I discuss the precise nature of Korsgaard's argument in the following chapter.

against Kant's prohibition of revolution in such cases, grounded in a systematic conflict within his framework of rights and duties.

Such a conflict does not, however, provide a justification for revolt on Beck's analysis. This is due to the distinction Kant makes between ethics and Right, discussed above. According to Kant's division of rights and duties in the *Metaphysics of Morals*, juridical duties are always perfect, while ethical ones are imperfect (MM 6:240). Due to the fact that perfect duties give specific prescriptions, whereas imperfect duties may be fulfilled in a number of ways, juridical duties will thus always take precedence over ethical ones. Hence:

The duty we have to contribute to the progress of mankind is a duty of imperfect obligation, is unenforceable, and leaves elbow room for its realization. The latter, the duty we have to fulfil the requirements of the established law, is a duty of strict or perfect obligation, and is thus for Kant *priori* in its claims to the former.<sup>43</sup>

Beck is therefore forced to conclude that, while he takes there to be a conflict of duties within Kant's moral theory, this cannot form the basis of an argument in favour of revolution. The duty to progress can never override the duty of obedience, because perfect duties always take precedence over imperfect duties. Instead, we must simply accept the conflict, and the inadequacy of Kant's system of rights and duties in resolving it.<sup>44</sup>

In fact, as I will address in the final chapter, Beck is incorrect that such a conflict can arise on Kant's practical philosophy. This is not simply because Kant denies the possibility of conflicts of duties in general (MM 6:224). Rather, Beck's argument is shown to be unfounded once we provide a full account of Kant's philosophy of

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<sup>43</sup> Beck, 1971, p 420

<sup>44</sup> Beck, 1971, p 422



history, which guarantees mankind's progress even in the most tyrannical states. As Wood puts it: "Kant's moral outlook is...fundamentally determined by a subtle, shrewd, historically self-conscious (and characteristically Enlightenment) conception of human nature and psychology that most treatments of Kantian ethics (even sympathetic ones) have overlooked".<sup>45</sup> Once we come to appreciate this oversight on Beck's part, we see that the conflict which he supposes is in fact dissolved by Kant's teleological conception of history.

### *3) Challenges to Kant's position: his philosophy of history and his conception of law*

In the previous two sections, I have provided an outline of Kant's arguments against both a juridical and a moral right to revolution. A legal right to rebel is self-contradictory on Kant's conception of justice, and a moral right to revolution is unjustifiable on his system of rights and duties.<sup>46</sup> However, this acknowledgement that there can be no *right* to revolution has not stopped Kantians from seeking to question Kant's absolute prohibition in other ways. I now outline two other common approaches, one grounded in Kant's philosophy of history, and the other in his conception of justice, for these challenges to Kant's prohibition are illuminating of aspects of his practical philosophy more broadly, and of the nature of Right in particular. I then move in the final section to my particular approach to Kant's position on revolution and the "air of paradox" that continues to plague it.

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<sup>45</sup> Wood, 2008, p 4

<sup>46</sup> Beck, 1971, p 417

### 3.1) Kant and the French Revolution

I begin with Kant's philosophy of history, and its apparent inconsistency with his *Doctrine of Right*, focused on his support of the French revolution (CF 7:85-6). This support, it is argued, apparently contradicts Kant's condemnation of revolution as being "in the highest degree wrong", and has prompted commentators such as Beck to ask how it is that "a man of Kant's probity could sympathize with revolutionists and yet deny the right and justification of revolution?"<sup>47</sup> This is not simply a concern that Kant did not support privately what he expounded publicly; rather it is a charge of potential inconsistency within his practical philosophy, between his *Doctrine of Right*, which prohibits revolution, and his philosophy of history, which appears to support it as a means to progress.

Following Nicholson, there are two main charges of inconsistency against Kant with regard to his support for the French Revolution. Firstly, there is the concern that while he condemned revolutions on principle, he supported some in practice. Such a position would be contrary to his unconditional a priori moral system, in supporting revolution as an *immoral* means to a *moral* end.<sup>48</sup> Secondly, commentators worry that while Kant's *Doctrine of Right* entails the prohibition of revolution, his philosophy of history requires it.<sup>49</sup> So while the first entails a betrayal of grounding principles within his doctrine of morals, the second posits an inconsistency between different aspects of his practical philosophy.

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<sup>47</sup> Beck, 1971, p 411

<sup>48</sup> Hill, 2002, p 285

<sup>49</sup> Nicholson, 1976, pp 225-6

I will discuss this second point in more detail in the final chapter. For now it suffices to say that Kant's teleological conception of history does not demand violent action against the state. Instead, mankind's progress is guaranteed by peaceful mechanisms (PP 8:360-1). So while revolution *may* be a part of nature's plan for progress towards a perfectly just constitution, it is not a *necessary* condition.<sup>50</sup> His philosophy of history therefore does not make necessary something that his *Doctrine of Right* prohibits.

The first charge – that Kant's sympathy for the French Revolution evidences support of immoral means to achieve moral ends – would be more serious, were it correct. In fact Kant does not promote a sympathetic response to the French Revolution on grounds of the end or purpose that it actually achieves. Rather, the revolutionaries are to be applauded for their *spirit*, demonstrated in their motivating ideals of freedom, equality and independence. While these ideals are, in part, to be identified in the *purpose* of the revolutionaries, our sympathy is not to be taken as an indication that we approve of their *actions*; nor of an implicit sanction of immoral means to achieve moral ends. Rather, it is inspired by our recognition of moral principles in the revolutionaries' striving for a constitution governed by laws of Right. This may, as a matter of historical fact, be brought about by revolution; but it is not this bringing about that is to be praised. Rather, it is the principles they espouse. Thus while there are, for Kant, revolutions towards the better and revolutions towards the worse, depending on their motivating ideals, "*qua* revolution both are to be condemned".<sup>51</sup>

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<sup>50</sup> Beck, 1971, p 418

<sup>51</sup> Beck, 1971, p 418

### 3.2) *The dissolution of legitimate authority*

Kant's philosophy of history therefore does not pose any serious threat to the validity of his absolute prohibition of revolution, nor to the overall consistency of his practical philosophy. There is no inconsistency to be found on these grounds. This, alongside the appeal to Kant's ethics discussed in sections 1 and 2, are the most common approaches in trying to soften Kant's absolute prohibition of revolution.

There is, however, a third possibility which has enjoyed resurgence in recent years, in the forfeiture of power argument. This argument is unusual in the face of a general acceptance of the strength and coherence of Kant's arguments against revolution, for it is grounded within his *Doctrine of Right* itself. On such an argument, we do not appeal to a legal *right* to revolt; rather, we argue for the *dissolution* of legitimate political authority in cases of injustice, which then frees subjects from their juridical obligation to obey the sovereign. Absent this duty, we are then able to appeal to a natural right in acting against the (illegitimate) sovereign. This is in clear contradiction of Kant's postulate of public Right, and the moral requirement that we enter and remain in political society. However, the argument is that, regardless of this postulate, there are some states that are simply too unjust to constitute a legal condition at all. As such, the return to a state of nature is unavoidable.<sup>52</sup>

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<sup>52</sup> Byrd, B.S. & Hruschka, J., "The Natural Law Duty To Recognise Private Property Ownership: Kant's Theory of Property in his *Doctrine of Right*" in *University of Toronto Law Journal* (LVI no. 2, 2006), p. 243

An appeal to the forfeiture of power is perhaps best known from John Locke. On Locke's account of political legitimacy, it is people's consent that takes them out of the state of nature, and which therefore forms the basis of their political obligation.<sup>53</sup> Through their consent, they give up their executive rights, but retain certain of their natural rights of self-government. These rights are given up to a particular end, for "advancing the good of the people who created [the government]".<sup>54</sup> Consequently, if the government fails in this task, then their authority is forfeited.<sup>55</sup> Where the sovereign violates the authority given him through a contract with the people, he "ceases in that to become a Magistrate, and acting without authority, may be opposed".<sup>56</sup> This means that when the people rebel in such cases, they are not "rebels" in the strict sense, as the government no longer exists.<sup>57</sup>

As is commonly acknowledged, Kantians do not have recourse to Lockean forfeiture arguments grounded in voluntarism. For while Kant's language of an original contract and united will often leads to his theory of legitimation being aligned with contract theorists such as Locke and Hobbes, consent does not actually have any role to play in Kant's theory of legitimation.<sup>58</sup> The original contract is, in Kant's words, simply a "tool of reason"; it is not an appeal to the actual, or even hypothetical, consent in grounding political obligation. This is important, for in Locke's case it is the fact that the legitimacy of a government is grounded in the people's consent that allows for a right of opposition against the sovereign. Yet in

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<sup>53</sup> Simmons, 1993, p 19

<sup>54</sup> Simmons, 1993, pp 62-6

<sup>55</sup> Simmons, 1993, p 72

<sup>56</sup> Locke, J., *Two Treatises of Government* (P. Laslett ed.). Cambridge: Cambridge University Press, 2000, §202

<sup>57</sup> Simmons, 1993, p 162

<sup>58</sup> Kersting, W., "Politics, freedom and order: Kant's political philosophy" in P. Guyer (ed.), *The Cambridge Companion to Kant*. Cambridge: Cambridge University Press, 1992, p. 354

Kant's case, the civil condition is a duty of pure practical reason grounded in a priori principles. Thus, a people withdrawing their consent does not dissolve legitimate authority or provide grounds for opposition against the sovereign.<sup>59</sup>

As an alternative however, a new forfeiture of authority argument has been suggested more recently by Byrd and Hruschka, grounded not in the subjects' consent, but in the a priori ideal of justice given by the original contract.<sup>60</sup> They argue that while Kant's postulate of public right tells us that it is a duty to enter the civil condition, and prohibits us from leaving it once we are in it, this does not mean that any civil construct that calls itself a state is in fact a condition of Right. In certain cases, the violation of man's inalienable rights may be so gross that a legal state reverts back to a non-legal state. While they do not go into detail as to the precise nature of these injustices – "Where to draw the line between a legal and a non-legal state cannot be specified exactly" – the implication is that in cases where man's external freedom is denied or seriously threatened, the state's legitimacy is therefore dissolved.<sup>61</sup>

Such arguments are, of course, rejected by Kant. For as discussed in section 2, to forfeit one's legitimate authority would remove a necessary condition of civil society, thereby dissolving the political condition amongst men.<sup>62</sup> There can be no rights and no laws absent political society; and there can be no political society

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<sup>59</sup> Kersting, 1992, pp 353-4 & Nicholson, 1996, p. 218

<sup>60</sup> Byrd & Hruschka, p. 243

<sup>61</sup> This is implicit in their earlier statement that "By saying that dependence on law in a legal state is a *sufficient* condition for our external freedom of choice, we do not mean to suggest that one is always free in any existing state" (Byrd and Hruschka, p 241)

<sup>62</sup> Hill, 1997, p. 111

absent a head of state to represent the general united will.<sup>63</sup> This, as Rosen points out, is why we have a duty to enter political society even if it is not a *just* society.<sup>64</sup> For it is only in a political condition that we have *any* rights at all granted to us under coercive law. Kant's conception of justice combined with the postulate of public right therefore precludes any appeal to Lockean and Thomistic lines of argument for the forfeiture of authority, for legitimacy is a necessary condition of political society, and political society is a necessary condition of our enjoyment of our innate rights and freedom in relation to others. Therefore any argument for revolution that rests on the forfeiture of legitimate authority is inconsistent with Kant's *Doctrine of Right*, and must therefore be rejected.

#### 4) *The argument of this thesis*

Given the inadequacy of these attempts to reconcile Kant with himself, an air of paradox continues to plague his theory of justice. In seeking to explain this, I follow those commentators who suggest that it is caused by an apparent inconsistency between Kant's political *absolutism* and his thematization of morality as *freedom*. As such, my suggestion is that Kant's absolute prohibition of revolution is inconsistent with his metaphysics of morals as a metaphysics of freedom.

In investigating this proposed inconsistency, I adopt Korsgaard's idea that justice can become "perverted". That is, that freedom, as the end of political society, can be frustrated by positive law as a necessary condition of that society. While I reject the particular way in which Korsgaard characterizes such conditions, in her appeal to

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<sup>63</sup> I discuss this in more detail in chapter 1

<sup>64</sup> Rosen, A., 1993, p 119

Kant's *ethics*, I argue that her problematization of Kant's theory of justice is promising. In squaring up to Kant's absolute prohibition of revolution, Korsgaard's strategy is to look for the root cause of the sense of paradox within Kant's doctrine of morals as a doctrine of *freedom*.

Aside from its thematization of freedom as the end of political society, the particular promise of Korsgaard's idea of "perverted justice" is that it captures the intuitive concern that we have in cases of gross injustice. That is, in denying its citizens their freedom, the state undermines its own purpose: "justice turns against itself". Under such circumstances, a dilemma is thought to arise: in order to realize the end of freedom, we must obey the law; and yet in obeying an unjust state's law, we violate the very end we are trying to pursue.

In exploring this dilemma, however, I do not pursue Korsgaard's argument for perverted justice in its original form, in the idea that the state violates its citizens' innate right to freedom as self-mastery. This argument makes an appeal to Kant's ethics and the idea of autonomy, which, as discussed above, is unwarranted in a discussion of his philosophy of *Right*. Instead, I adopt a version of Korsgaard's argument situated entirely within the juridical domain, in the idea that the procedures of justice, in positive law, turn against the end of *Right*, as external freedom. Departing from Korsgaard, I therefore argue that if her argument for perverted justice has any warrant, then it comes from within Kant's *Doctrine of Right* as a doctrine of external freedom.

In investigating the possibility of perverted justice within Kant's metaphysics of morals, I adopt Thomas Hill's proposed strategy, which is to engage in a thorough



analysis of the basic elements of Kant's moral philosophy,<sup>65</sup> and in particular, his metaphysics of freedom. Specifically, my main point of focus is Kant's thematization of moral laws as laws of freedom, and the nature of external freedom as the freedom of political society. This analysis is necessary if we are to establish whether external freedom can come into conflict with positive law, and poses one of the biggest challenges in providing a cogent account of the fundamental elements of Kant's *Doctrine of Right*. As Wood puts it, Kant's concept of freedom is a "moving target", which makes it difficult to present a single, self-consistent doctrine of freedom.<sup>66</sup> In resolving the proposed dilemma that Korsgaard's argument suggests, I therefore provide an account of Kant's conception of justice as a condition of freedom, and the nature of that freedom in political society.

In chapter 1, I outline Korsgaard's argument for perverted justice, questioning its ethical foundation, and instead arguing for its reformulation within Kant's *Doctrine of Right*, as a conflict between the procedures of the state, as a necessary condition of Right, and external freedom, as the end of Right. In doing so, I outline Kant's idea of the general will, and his distinction between legitimacy and justice. In chapter 2, I begin my investigation into Kant's doctrine of moral laws as laws of freedom. My concern in this chapter is two-fold: firstly, to elucidate the distinction between ethics and Right within Kant's moral theory; and secondly, to defend the inclusion of Right within Kant's doctrine of morals. This is necessary if we are to retain an appeal to the concept of moral freedom in characterising conditions of perverted justice.

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<sup>65</sup> Hill, 2002, p 294

<sup>66</sup> Wood, 2008, p 123

I continue this discussion of moral (practical) freedom in chapters 3 and 4, seeking a reading that is sufficiently broad to include external freedom, as the end of Right, under its scope. In chapter 3, I examine those accounts which seek to avoid any metaphysical dependence in the practical domain of morals. I argue that these are unsuccessful in their failure to provide an account of moral agency independent of the causality of nature. In chapter 4, I therefore commit to a reading of practical freedom that is dependent on the transcendental concept. In doing so I follow Berndt Ludwig in providing an account of moral agency as law-governedness grounded in Kant's transcendental idealism; that is, as acting on principle.

In chapter 5, I present an account of external freedom as the freedom of political society, defending its formal and interpersonal nature. External freedom is nothing more than the constraint of one's will under universal law. With this definition in hand, I move in chapter 6 to a final assessment of the idea of perverted justice as a contradiction between our obedience to positive law, as a necessary condition of Right, and external freedom as the end of Right. I argue that Korsgaard's problematization of Kant's theory of justice, as a tension between the end of justice and its procedural elements, is ill-founded. Such an argument requires appeal to a *substantive* concept of freedom as the end of Right; yet as argued in chapter 5, Kant's concept of external freedom is *formal*. As such, Korsgaard's argument for perverted justice fails, both in its original form, and in my revised version. Any disquiet we feel about Kant's absolute prohibition of revolution is not to be explained in this way.

## Chapter 1

### Korsgaard's argument for taking the law into our own hands and the idea of perverted justice

Korsgaard's argument for taking the law into our own hands offers an alternative strategy to Kant on revolution compared to those currently pursued by most commentators. In line with Kant's *Doctrine of Right*, she supports the absolute prohibition of the act, arguing that on Kant's understanding of right, this prohibition is unproblematic.<sup>67</sup> In doing so, she acknowledges the consistency and validity of Kant's arguments against revolution. Yet she goes on to claim that, nonetheless, "sometimes the good person finds she must rebel".<sup>68</sup> Her position is therefore unusual, spanning two contrasting trends in the literature. In supporting Kant's arguments against revolution, she aligns herself with commentators such as Peter Nicholson, who defend the consistency of Kant's *Doctrine of Right*, and accept the juridical duty not to revolt.<sup>69</sup> Yet despite this, Korsgaard argues that there are situations in which morality requires that we rebel.<sup>70</sup> In this, she follows those such as Thomas Hill and Allen Rosen, who argue that Kant's moral theory must, if it is to remain consistent with the values of freedom and humanity at its core, make provision for violent action against the state.<sup>71</sup>

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<sup>67</sup> Korsgaard, C., "Taking the Law into Our Own Hands: Kant on the Right to Revolution" in A. Reath, B. Herman, & C. Korsgaard (eds.), *Reclaiming the History of Ethics : Essays for John Rawls*. Cambridge: Cambridge University Press, 1997, p 315

<sup>68</sup> Korsgaard, 1997, p 298

<sup>69</sup> Nicholson, P., "Kant on the Duty Never to Resist the Sovereign". *Ethics*, Vol. 86, No. 3 (Apr., 1976) pp. 214 - 230; Korsgaard, 1997, p 297

<sup>70</sup> Korsgaard, 1997, p 320

<sup>71</sup> Hill, T., "A Kantian Perspective on Political Violence", *Journal of Ethics*, Vol. 1, No. 2, (June 1997) & Rosen, A., *Kant's Theory of Justice*. Ithaca: Cornell University Press, 1993

My concern in this chapter is two-fold. Firstly, I outline and evaluate Korsgaard's case for revolution, grounded, as she sees it, in the ethical duty to respect the rights of humanity. I argue that her position does not withstand scrutiny. Korsgaard misinterprets the ethical duty of obedience, and specifically, the ethical requirement that we obey the law from respect for the law. This leads to an interpretation of the virtue of justice that is unwarranted according to Kant's ethics, and as such, her construction of a moral impasse as grounds for revolution collapses. However, I argue that the idea of perverted justice, which arises in circumstances where the procedures of justice purportedly come into conflict with its end, still holds some promise. In particular, this idea captures our intuitive concern regarding Kant's absolutism, that there are constitutions which are unjust to such a degree that they cannot be obeyed as a matter of justice.

This brings me to the second part of my objective in this chapter, which is to take Korsgaard's idea of perverted justice and resituate it within the juridical domain. In doing so, I argue that there might exist a conflict *within* justice, between positive law and external freedom. That is, that the procedures of the state, as a *necessary condition* of political society, deny the realization the external freedom as the *end* of political society (Right). The proposed contradiction is thus that Kant's absolute prohibition of revolution rests on an argument for obedience to positive law grounded in the possibility of man's freedom claims, which claims that sovereign authority denies through its legislation of positive law. As such, in conditions of perverted justice, the realization of external freedom as the end of Right requires that we obey the law; and yet in obeying an unjust state's law, we violate the very end we are trying to pursue. In re-characterizing Korsgaard's argument in this way, I offer an outline of Kant's idea of the general will, and his argument for obedience

to the law as a necessary condition of Right. I then go on to identify external freedom as the end of Right, the nature of which I then investigate in detail in subsequent chapters.

## **1) Korsgaard's argument for revolution**

### *1.1) Korsgaard's argument for taking the law into our own hands*

We can best understand Korsgaard's argument for revolution by considering the circumstances in which she thinks the virtuous person has reason to take the law into their own hands. Such cases are very specific, and Korsgaard makes it clear that she does not mean to sanction violence against the state every time the government makes an unjust decision. Rather, it is only in a limited number of cases, when "justice is turned against itself" that the virtuous person has grounds for revolt.<sup>72</sup>

In order to illustrate such cases, Korsgaard offers a number of examples, one being Apartheid South Africa. She describes this regime as one which "mocked" justice with its outward forms of legality and its use of "the very language of rights" to commit abuses against its citizens.<sup>73</sup> What is normatively relevant in such cases is the use of the procedures of justice to commit an injustice: "an evil act [is presented] in the outward forms of a lawful one".<sup>74</sup> This brings with it the effective legalisation of an act which we think is directly at odds with the idea of justice, and it is for this reason that Korsgaard describes these cases not just as ones of "imperfect justice",

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<sup>72</sup> Korsgaard, 1997, p 317

<sup>73</sup> Korsgaard, 1997, p 317

<sup>74</sup> Korsgaard, 1997, p 318

but rather of “perverted justice”.<sup>75</sup> The perversion in such cases lies in the idea that *justice turns on itself*. In these cases, the procedures of justice turn against the substantive element of justice as the end of Right. This end, Korsgaard argues, is “to preserve the rights and freedom of everyone”, and it is in cases where “the procedures of justice [are] used *against these very ends*” that justice is perverted. The very rights that the law was created to protect are now under attack by its procedures.<sup>76</sup> They are not only put to improper use, they undermine their very purpose.

This “perversion”, Korsgaard suggests, creates a “tension” in Kant’s moral theory, between the procedural element of justice and its end.<sup>77</sup> This tension does not arm the virtuous revolutionary with a straightforward case for revolution. Rather it presents them with a moral dilemma:

Concern for human rights leads the virtuous person to accept the authority of the law, but in such circumstances adherence to the law will lead her to support institutions that systematically violate human rights.<sup>78</sup>

Korsgaard’s argument here depends on conceiving a particular kind of relationship between the rights of humanity and the procedures of justice.<sup>79</sup> Given that the end of justice is the preservation of the rights and freedom of everyone, one should, Korsgaard argues, further this end in obeying the law. The virtuous person “respects the rights of humanity, and for this reason respects the government that

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<sup>75</sup> Korsgaard, 1997, p 318

<sup>76</sup> Korsgaard, 1997, p 317

<sup>77</sup> Korsgaard, 1997, p 312

<sup>78</sup> Korsgaard, 1997, pp 318-9

<sup>79</sup> Note that Korsgaard’s analysis equates human rights with the rights of humanity, and uses the two terms interchangeably. This is potentially contentious, as “human rights” in its contemporary sense is not a term that is used by Kant.

enforces those rights".<sup>80</sup> Korsgaard supports this inference with appeal to Kant's claim in the *Doctrine of Virtue* that through obeying the law "one thereby *makes* the rights of humanity, or also the right of human beings, one's *end*" (MM 6:390). One therefore respects the law because the procedures of the law respect the rights of humanity. Cases of perverted justice thus present the virtuous person with a moral dilemma, because the connection between the law and the rights of humanity, as she posits it, breaks down. In obeying the law, it is no longer the case that one make the rights and freedom of humanity their end. Precisely the opposite is the case: "adherence to the law will lead her to support institutions that systematically violate human rights". This brings the virtuous person to a moral impasse. In obeying the law, they are complicit in its violation of human rights; yet if they defend human rights against this law, then they fail in their duty of obedience to the sovereign. Where it is the laws themselves that violate human rights, the virtuous person is left in a position where they cannot avoid doing wrong.

As we will see below, this connection between the rights of humanity and the procedures of justice rests on a sleight of hand on Korsgaard's part concerning the indirectly ethical duty to obey the law. However, leaving this aside for now, Korsgaard's proposed solution to this moral impasse is that the virtuous person revolt:

The person with the virtue of justice, the lover of human rights, unable to turn to the actual laws for their enforcement, has nowhere else to turn. She may come to feel that there is nothing for it but to take human rights under her own protection, and so to take the law into her own hands.<sup>81</sup>

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<sup>80</sup> Korsgaard, 1997, p 317

<sup>81</sup> Korsgaard, 1997, pp 318-9

This is not a descriptive claim about what people will be driven to do under such circumstances, but rather a moral justification of the act. We have, she claims, a “deep” moral responsibility to revolt, in order to protect the end of justice. In order to illustrate this, she appeals to an analogous case of someone who wants to commit suicide.

When we see someone perverting or destroying the humanity or autonomy in his own person, our respect for his humanity or autonomy is turned against itself. Respect for his autonomy demands that we respect his right to choose. But if we respect his autonomy we cannot stand quietly by and watch while he destroys it.<sup>82</sup>

In this case and in that of perverted justice, we are faced with having to violate the very thing that we take as our object in order to protect it. In the case of justice, we revolt in order to protect the rights and freedom of humanity that it takes as its end; in the case of the person who wants to commit suicide, we thwart their actions in order to protect the autonomy in their person.

Like justice in an unjust state, [a suicide’s] autonomy requires protection against itself. And so like the revolutionary, the paternalist violates his respect for autonomy in order to save its object.<sup>83</sup>

It is for this reason that Korsgaard describes revolution as taking the law into our own hands. In acting as such, the paternalist violates the moral law in “in order to make sure that the world remains a place where morality can flourish.”<sup>84</sup>

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<sup>82</sup> Korsgaard, 1997, p 320

<sup>83</sup> Korsgaard, 1997, p 320

<sup>84</sup> Korsgaard, 1997, p 320. Korsgaard’s account of revolution as a paternalistic act is in fact seriously flawed, in the way that it conceives the relationship between morality and freedom. This is not of concern to me in the context of my evaluation of cases of perverted justice, as in adopting this problematization of Kant’s theory of justice as a theory of freedom, I am not committed to adopting Korsgaard’s subsequent argument for revolution. However, the problem with her argument is worth noting, as it draws attention to a shifting relationship between morality and freedom on her account. This is not directly related to my argument, but it has bearing on the overall consistency of Korsgaard’s position in light of her later account of morality and freedom, which I discuss in the following chapter.



## 1.2) *The nature of the tension in Kant's moral theory: critiquing Korsgaard's argument*

This is Korsgaard's argument for revolution: cases of perverted justice create a tension in Kant's moral theory, which brings the virtuous revolutionary to a moral impasse that can only be resolved through violent action against the state. In clarifying the precise nature of this tension, however, Korsgaard's argument unravels. For she grounds her case for revolution in the ethical duty to respect the rights of humanity. While this allows her to move her argument to the ethical domain, her argument rests on a misrepresentation of what it is to act from respect for the moral law. This, in turn, leads to a reinterpretation of the virtue of justice, on which her argument for a moral impasse rests. Rather than a procedural requirement that one act from moral motivation, Korsgaard affirms a substantive requirement to obey the law because it respects the rights and freedom of humanity.

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The particular way that Korsgaard characterizes the relationship between freedom and morality becomes apparent in her description of the paternalistic action of revolution as being simultaneously *moral*, and one which *violates* morality. On the one hand, she describes the conscientious revolutionary as a "moral agent" who "judges that, for moral reasons, she must take the law into her own hands" (1997, pp 298; 319-321). On the other hand, Korsgaard argues that the conscientious revolutionary "leave[s] the moral law behind, in order to make sure the world remains a place where morality can flourish". In such cases a "gap" opens up in the moral world (1997, pp 319-320). This places the revolutionary's actions outside the parameters of the Kantian moral domain. Korsgaard cannot, therefore, characterize the act as *moral*; but instead characterizes it as a "*deep*" *moral responsibility*; so deep that it is not grounded in the moral law at all, but rather in something even more foundational to Kant's moral theory: the concept of freedom. We see this in her claim that "The revolutionary does not *become* strong and free when he picks up his gun. Instead, he proves to us that he has been free all along" (1997, p 323). This clearly makes use of a concept of freedom that exists independently of the moral law. For the moral law does not countenance such actions, and yet such actions are still considered as freely performed by a moral agent.

This is a highly problematic claim on Korsgaard's part, for it implies that freedom and the moral law are distinct; yet this is neither Kant's nor Korsgaard's final position. Rather, freedom for Kant is to act *under the moral law*. I defend this reading in particular in chapters 4 and 5. It is also put forward by Korsgaard, though in a different form, in her article "Freedom as Morality" in *Creating the Kingdom of Ends*. (Cambridge: Cambridge University Press, 2000), which I discuss in detail in chapters 2 and 3. Korsgaard's argument for the act of revolution is therefore inconsistent with her own mature reading of the relationship between morality and freedom, and also with Kant's theory of moral laws as laws of freedom.

Once we deny Korsgaard this move, her argument collapses, as she cannot set up the moral impasse which the argument depends on.

The sleight of hand in Korsgaard's argument becomes evident once we look more closely at the way she sets up the moral impasse that the virtuous revolutionary faces. Given the way she characterises the dilemma, we might be tempted to understand the tension she highlights as one that is created by a *conflict* of duties. On the one hand agents have a duty to obey the law, and on the other, a duty to respect the rights of humanity. As discussed in the Introduction, it is an argument of this kind that is appealed to by Lewis White Beck.<sup>85</sup> His and Korsgaard's arguments exhibit similarities in that they both appeal to ethics in the face of a juridical duty of obedience, and both appeal to a tension between the rule of positive law on the one hand, and an ethical duty on the other. In contrast to Beck, however, Korsgaard does not rest her justification of revolution on a systematic conflict *between* juridical and ethical duties. Rather, she sets up the moral dilemma purely *within* the ethical domain, arguing that the problem faced by the virtuous revolutionary is that "a single duty...*implodes* when we try to act on it in an unjust world".<sup>86</sup>

The duty that implodes in cases of perverted justice is the indirectly ethical duty of obedience: the virtue of justice. The juridical duty of obedience is also a duty of virtue insofar as "all duties, just because they are duties, belong to ethics" (MM 6:219). While the juridical duty of obedience is to obey the law in one's outward actions, those actions may also be performed *from respect* for the law, a requirement of ethics (MM 6:390 / G 4:400). For this reason, all juridical duties are also indirect

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<sup>85</sup> Beck, L. W., "Kant and the Right of Revolution" in *Journal of the History of Ideas*, Vol. 32, No. 3. (Jul. - Sep., 1971), esp. p 414

<sup>86</sup> Korsgaard, 1997, pp 320-1 (my emphasis)

ethical duties, insofar as the agent may not only perform the required action, but may also do so from moral motivation (MM 6:390). It is this indirectly ethical duty that paves the way for Korsgaard to move her argument for revolution to the ethical domain. For obeying the sovereign is not only a question of justice, but is also one of virtue: one not only obeys the law, but does so from respect for the law.

However, while Korsgaard makes her initial move to the ethical domain on these grounds, she then goes on to offer a different interpretation of the virtue of justice that is not grounded in the procedural requirement of moral motivation. Instead, she characterises it as the demand that one obey the law from respect for the rights and freedom of humanity that justice has as its end. Obeying the law from respect for the law thus becomes a matter of obeying the law in so far as it takes the rights and freedom of humanity as its object. It is this that allows Korsgaard to argue for an *implosion* of the selfsame duty, rather than a conflict between duties, on the grounds that it becomes impossible to fulfil this duty in cases where justice is perverted:

When the very institutions whose purpose is to realize human rights is used to trample them, when justice is turned against itself, the virtue of justice is turned against itself too.<sup>87</sup>

Korsgaard's argument is that under circumstances of perverted justice, it becomes impossible to obey the law from respect for the law. For on her interpretation of the virtue of justice, that respect is grounded in our respect for the rights of humanity. We respect the law because the law respects those rights, and yet in cases of perverted justice, the law violates those rights. The duty of virtue as a duty to respect those rights therefore becomes impossible to fulfil, and it is on this basis that

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<sup>87</sup> Korsgaard, 1997, p 318

Korsgaard argues that it self-destructs – or “implodes” – and with it, the ethical duty to obey the law.<sup>88</sup>

Once we appreciate Korsgaard’s reinterpretation of the virtue of justice however, we see how she fails to construct a moral impasse. Specifically, her argument rests on an unwarranted equation of acting from respect for the law and acting from respect for the rights and freedom and humanity. I highlighted this above, but we see how she leans on this idea in the following passage:

It is because justice is a virtue that there is an ethical duty, as well as a duty of justice, not to revolt. The just person respects the rights of humanity, and for this reason respects the government that enforces those rights.<sup>89</sup>

Korsgaard’s argument is that we have an indirectly ethical duty to obey the law out of respect for the rights of humanity that it takes as its end, but that in cases where the government violates the rights of humanity, that law can no longer be an object of our respect. As such, the indirectly ethical duty of obedience becomes impossible to fulfil: a moral impasse is created, and the duty implodes.

If we analyse Korsgaard’s argument into seven distinct steps, we can the better locate the unwarranted move she makes:

1. All juridical duties are indirect ethical duties to obey the law from respect for the law
2. To obey the law from respect for the law is to obey the law from respect for the object which that law takes as its end

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<sup>88</sup> Note that In making this argument Korsgaard is not arguing for a duty to revolt, but rather a suspension of the obligation not to. For a further discussion of this see Flikschuh, K., “Sidestepping Morality: Korsgaard on Kant’s no-right to Revolution” in *Jahrbuch für Recht und Ethik, Band 16 (2008)*, p 134

<sup>89</sup> Korsgaard, 1997, p 317

3. The end of the law is the rights and freedom of humanity
4. To obey the law from respect for the rights of humanity is therefore to obey the law from respect for the government which enforces those rights (from 2-3)
5. There are cases (of perverted justice) in which the government violates the rights of humanity
6. In cases of perverted justice we are unable to obey the law from respect for the law (from 2 - 4)
7. In cases of perverted justice, we are unable to fulfil our ethical duty of obedience, and the duty therefore implodes

An immediate question that comes to mind here is why Korsgaard thinks injustice leads to the *self-destruction* of the ethical duty (6-7), rather than simply to its absence. If, as she suggests, we have an ethical duty to obey the law grounded in the government's enforcement of the rights of humanity (2-4), then in cases where the law does not take these rights as its end, it seems that she should simply say that there exists no duty to obey at all. Yet this is not her claim. Rather, she argues that in cases of perverted justice we *have* an ethical duty to obey the law, but that in trying to act on it in an unjust world, we cause it to implode.<sup>90</sup>

This puzzle regarding her conclusion is in fact a result of a far more serious concern over the way Korsgaard characterizes the indirectly ethical duty of obedience earlier in her argument. I first of all set this out, and contrast it to the way in which Kant characterizes such duties. I then use the above construction to show where precisely

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<sup>90</sup> Korsgaard, 1997, p 321

Korsgaard makes her shift from Kant's procedural characterization to her own substantive one.

As discussed above, Korsgaard suggests that this virtue of justice is grounded in the government's protection of the rights of humanity: "the just person respects the rights of humanity, and for this reason respects the government that enforces those rights". However, this is not the way in which Kant grounds our indirectly ethical duty of obedience. Rather, as Korsgaard rightly acknowledges, this duty exists simply by virtue of the fact that all juridical duties can also be performed from moral motivation:<sup>91</sup>

Duties in accordance with rightful lawgiving can be only external duties, since this lawgiving does not require that the idea of this duty, which is internal, itself be the determining ground of the agent's choice...On the other hand, ethical lawgiving, while it also makes internal actions duties, does not exclude external actions but applies to everything that is a duty in general (MM 6:219).

As mentioned above, ethical duties are those that must be performed from the motive of duty; that is, from respect for the law (G 4:400 / MM 6:383). By contrast, juridical duties do not require any such internal motivation, only an external action (M 6:219). However, insofar as the action required by justice may also be performed from the motive of duty, from respect for Right, then the action may not only be *just*, but also *virtuous* (MM 6:390). As such, our juridical duties are not just something that others can require of us, as a matter of external constraint; they are also something that we should require of ourselves.<sup>92</sup>

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<sup>91</sup> Korsgaard, 1997, p 317

<sup>92</sup> Flikschuh, 2008, p 137

It is for this reason that juridical duties are described as indirect ethical duties. As matters of external relations of one person to another, they are not given directly by Kant's *Doctrine of Virtue*, but rather by his *Doctrine of Right*. But insofar as they can be performed from the relevant moral motivation, they are also included under the umbrella of Kant's ethics. Korsgaard acknowledges this relationship between juridical duties and indirect ethical duties when she writes that "It is a duty of virtue to do the duties of justice from the motive of duty".<sup>93</sup> Our indirectly ethical duty of obedience is grounded in the procedural requirement that we perform our duties of Right from respect for the law. However, while Korsgaard *begins* with this procedural characterization of the virtue of justice, this is not the interpretation that she then *carries forward* in her argument for revolution. Rather, her argument for a moral impasse in cases of perverted justice rests on a *substantive* interpretation of obeying the law from respect for the law. We have an ethical duty to respect the rights of humanity, and the law makes those rights its end; therefore we also have an ethical duty to respect the law.<sup>94</sup> This grounds the virtue of justice not in the idea of moral motivation, as acting from duty, but rather in the idea of respecting the end of justice as the rights of humanity.

Using my reconstruction of her argument above, we can see where Korsgaard shifts from Kant's procedural characterization of the virtue of justice to a substantive one. She begins, at step 1, by moving her argument for revolution into the ethical domain in her appeal to the indirectly ethical duty of obedience grounded in the juridical. She makes this claim as per Kant's argument outlined above. That is, because we have a juridical duty to obey the law, we also have an indirectly ethical duty to fulfil

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<sup>93</sup> Korsgaard, 1997, p 317

<sup>94</sup> Flikschuh, 2008, p 134

that duty from the motive of duty. From here, however, she moves to an argument grounded in the end of justice as the rights and freedom of humanity. This takes place at steps 2-3, where she equates acting from respect for the law with acting from respect for a government that protects the rights of humanity. It is her shift to this argument which caused the initial puzzlement as to her conclusion, raising the question as to why she does not simply deny the existence of the duty in the first place. For steps 2-3 make our ethical duty of obedience contingent on the government's promotion of the rights and freedom of humanity. It should therefore follow that where they fail to do so, the ethical duty of obedience does not obtain. Once we acknowledge this, Korsgaard's argument for revolution becomes one grounded in the *absence* of an ethical duty not to revolt, rather than the *implosion* of the duty. This alters the way in which Korsgaard's argument creates "moral space" for the virtuous revolutionary to act in situations where a moral impasse arises.

However, the more serious problem with Korsgaard's argument comes earlier, in her argument for the existence of such an impasse. Specifically, it lies in her substantive interpretation of obeying the law *from respect for the law* as obeying the law *from respect for its end* (step 2). This runs contrary to Kant's procedural requirement that acting from respect for the law is to act *from* a particular principle of the will. According to this requirement we must make the moral law the determining ground of our choice, fulfilling our duties from the motive of duty alone (G 4:400; MM 6:218-9). Indeed, Kant explicitly rules out any considerations of "effects" or "proposed ends" in the fulfilment of these duties (G 4:394):



an action from duty has its moral worth *not in the purpose* to be attained by it but in the maxim in accordance with which it is decided upon, and therefore does not depend on the realization of the object of the action but merely upon the *principle of volition* in accordance with which the action is done (G 4:399-400).

By contrast, Korsgaard's argument from duty depends on the realization of a proposed end, grounding the ethical duty of obedience in the promotion of the rights of humanity as the end of justice.<sup>95</sup> This means that the fulfilment of the duty of obedience depends on attainment of the substantive end. As Korsgaard puts it, the rights of humanity "is the end we have in view when we carry out our moral duty to obey the law".<sup>96</sup> As such, her equation of acting from respect for the law with respecting the rights and freedom of humanity, as per step 2, leaves behind the procedural requirement of Kant's ethics. Instead, she grounds the duty of obedience in a substantive end.

Korsgaard makes this move by sleight of hand, playing on the idea of acting from respect for the law. Rather than acting from respect for the *moral* law, in performing a duty from duty, Korsgaard's virtuous revolutionary acts from respect for the *positive* law of the government, which makes the rights of humanity its end. However, once we see that the Kantian duty to obey the law from respect for the law does not, contrary to Korsgaard's position, require us to take particular laws and institutions as the object of our respect, then her argument comes unstuck. For if, consistently with Kant's ethics, we ground the ethical duty of justice in the procedural requirement that we act *from* duty, we can no longer appeal to a substantive end. Consequently, Korsgaard is unable to construct the moral impasse that she claims faces the virtuous revolutionary.

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<sup>95</sup> Flikschuh, 2008, p 134

<sup>96</sup> Korsgaard, 1997, p 317

## 2) Resituating the idea of “perverted justice” in the juridical domain

Korsgaard therefore fails to construct a moral impasse within the domain of ethics. As a result, her argument for taking the law into our own hands collapses. However, the root of her concern with revolution, in the idea that justice can become perverted, is something that I argue we should further investigate. This idea captures our intuitive concern with Kant’s absolutism, i.e. the worry that states can exist that undermine the very purpose of justice and which, as a result, cannot be obeyed as a matter of justice. In contrast to Korsgaard’s development of her argument as an *ethical* argument for revolution however, I adopt the idea of perverted justice as expressing a concern that there might exist a conflict *within* justice, between positive law and external freedom. That is, that the procedures of the state, as a *necessary condition* of political society, deny the realization of external freedom, as the *end* of political society (Right). Were such circumstances to arise on Kant’s *Doctrine of Right*, then we would be faced with a dilemma: in order to realize a condition of external freedom as the end of Right, we must obey the law; and yet in obeying an unjust state’s law, we violate the very end we are trying to pursue.

Were such a contradiction to be found between the procedures and the end of Right, then this would explain the air of paradox that plagues Kant’s theory of justice. However, if we are to show the existence of such a dilemma within Kant’s *Doctrine of Right*, further investigation is required into external freedom as the end of political society, in order to establish how precisely positive law might frustrate that end. In this second section, I first of all offer an outline of Kant’s idea of the general will, and his argument for positive law as a necessary condition of Right. This is

important in setting up the proposed conflict in cases of perverted justice. I then go on to outline Kant's concept of external freedom as the end of Right, the precise nature of which I then go on to investigate in detail in subsequent chapters.

### 2.1) *The general will and Kant's absolute prohibition of justice*

In order to understand how a contradiction might arise between the procedures of the state as a necessary condition of Right, and external freedom as its end, we must begin with man's duty to enter political society. This duty is given by Kant's postulate of public right:

when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition (MM 6:307).

In a condition in which man cannot avoid contact with others, his freedom of choice is only compatible with others' under the rule of positive law. This is because for individuals' freedom of choice to be mutually compatible, an enforcing authority is required, according to which rights claims are granted, and each is given equal assurance that the other will observe the same restraint (MM6:307). Given that the pre-political condition is characterised by the *absence* of such an authority, man thus has a duty to enter the civil condition in order to make such rights claims possible.

The requirement for such an enforcement authority rests on the distinction between unilateral and omnilateral willing according to Kant.<sup>97</sup> Rights claims and disputes cannot be settled by individual wills, which are by nature partial, and thus non-binding on others. They may only be settled by means of a common, public will.<sup>98</sup>

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<sup>97</sup> Flikschuh, 2008, p 129

<sup>98</sup> Flikschuh, 2008, p 131

a unilateral will (and a bilateral but still *particular* will is also unilateral) cannot put everyone under an obligation that is in itself contingent; this requires a will that is *omnilateral* (MM 6:263).

It is for this reason that Kant takes the idea of the general will to be the ground of political society, in the provision of a publicly binding legislative will:

Now, a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (*common*) will, that can provide everyone this assurance. – But the condition of being under a general external (i.e. public) lawgiving accompanied with power is the civil condition (MM 6:256).

If there is to be an enforcement authority that guarantees rights and freedom claims, then it must be a common, omnilateral will that “decides the same thing for all and all for each” (MM 6:314). It is this idea of mutual assurance and enforcement that grounds Kant’s argument for entrance into the civil condition. Though such claims may be raised in the pre-civil condition, it is only under a publicly instituted omnilateral will that authority can be legislative, and hence binding (MM 6:263).

Thus only in the civil condition, under the rule of a public law-making authority, is it possible to grant rights claims, and thus “for the free choice of each to accord with the freedom of all, and therefore possible for there to be any right, and so too possible for any external object to be mine or yours” (MM 6:263). The idea of a general united will provides a common law that is mutually binding, and hence makes freedom claims possible in relation to others, and to external objects of our choice.<sup>99</sup> As “the coalition of every particular and private will within a people into a

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<sup>99</sup> Flikschuh, 2008, p 130. Note that such passages which emphasise the possibility of private property might lead us to attribute a libertarian account to Kant, on which the purpose of

common and public will” it forms the idea of a united legislative will which “determines for everyone what is to be rightfully permitted or forbidden him” (TP 8:294/8:297).

As a “coalition of particular wills”, the general will is, however, just an idea of reason. It is an “idea of unity”, which illustrates the insufficiency of private willing as a foundation for the political condition.<sup>100</sup> In practice, this will is given by the head of state. This need for a representative is not grounded in a *practical* consideration regarding the impossibility of establishing unity in a collective of individuals. Rather, it is a conceptual requirement. For if a people is to exist as a collective at all, “[they] must be regarded as already united under a general legislative will” (MM 6:318). Thus,

to constitute a people, the multitude of unilateral wills must be unified by a government capable of representing the idea of its unity [therefore] no one other than the government may legitimately claim to be speaking in behalf of the people.<sup>101</sup>

As such, the *people* themselves cannot be considered the source of the general united will, as they do not exist as a people prior to being united under the authority of that will:<sup>102</sup> “no people without the general united will, and no general united will without a sovereign to represent it”.<sup>103</sup> The provision of a united legislative will

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political society is the realization of private property claims. This is perhaps understandable, given his extensive discussion of private property in reference to our duty to enter the civil condition (MM 6:261-270 and 6:306-7). However, as Katrin Flikschuh notes, the problem of provisional rights in relation to private property is just one example of a deeper problem, which is how we are to make *any* kind of rights claim against others in conditions of unavoidable co-existence (Flikschuh, 2010, pp 295/297). As such, the obligation to enter political society is grounded not in private property claims, but rather in the possibility of making *any* freedom claims at all.

<sup>100</sup> Flikschuh, 2008, p 131

<sup>101</sup> Flikschuh, 2008, p 131

<sup>102</sup> Korsgaard, 1997, p 313

<sup>103</sup> Flikschuh, 2008, p 131

must therefore come from the institution of a sovereign body, prior to the establishment of the people as a collective.

It is now clear why Kant thinks that to revolt against the sovereign is to destroy the general will, and with it, the very existence of political society. As “the practical institutionalisation of the idea of the general united will”, sovereign legislation is a necessary condition of political society, and with it, of possible freedom claims.<sup>104</sup> To remove the sovereign is thus to destroy the general will and hence to “annihilate any civil constitution and eradicate the condition in which alone people can be in position of rights generally” (TP 8:299). It is for this reason that Kant argues that “the presently existing authority ought to be obeyed, whatever its origin” (MM 6:319). As the representative of the united general will, the coercive authority of the sovereign is a necessary condition of possible rights claims, and hence of a possible condition of Right in which “the free choice of each [accords] with the freedom of all” (MM 6:263). Obedience to the state, whatever its form, is therefore a necessary condition of justice. We cannot have *just* lawmaking if we have *no* lawmaking.

However, while Kant argues that obedience to the sovereign is a necessary condition of justice, we should not mistake it for a sufficient one. Kant is not advancing a legal positivist position. This is clear in his own rejection of Hobbes’ claim that a head of state can do no wrong:

This proposition would be quite correct if a wrong were taken to mean an injury that gives the injured party a *coercive right* against the one who wronged him; but stated so generally, the proposition is appalling (TP 8:303-4).

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<sup>104</sup> Flikschuh, 2008, p 131

Here Kant defends the legitimacy of the existing sovereign, and lack of any juridical warrant to oppose the head of state. But he nonetheless acknowledges the possibility of injustice or wrongdoing on the part of the sovereign. Thus while a sovereign must always be obeyed, as the only way to legitimately enforce one's rights, they are not always just. That is, there will be states in which sovereign legislation, as the representative of the idea of the general will, is not carried out in accordance with that idea, but rather reflects their own *unilateral* will.<sup>105</sup> Thus on Kant's *Doctrine of Right*, there are *legitimate* regimes that are *unjust*.<sup>106</sup>

In fact, Kant's *Doctrine of Right* takes unjust states to be inevitable. They are something we must tolerate if an ideal state of justice is ever to be achieved, what Rosen calls "historically necessary precursors of fully just states".<sup>107</sup> This, as Flikschuh argues, is attested to by Kant's emphasis on the need for reform of defective constitutions towards a more just state (MM 6:321-2).<sup>108</sup> In opposition to a legal positivist position, Kant's distinction between legitimacy and justice, combined

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<sup>105</sup> Flikschuh, 2008, p 129

<sup>106</sup> Flikschuh, 2008, p 132. There is some ambiguity in Kant's thought regarding sovereign legitimacy and Kant's claim that all governments must be obeyed. Specifically, there is a question over whether the sovereign's provision of a legislative will (as a representative of the general will) is a *sufficient* condition for legitimate political authority, or is simply a *necessary* one. Korsgaard suggests the former, grounded in Kant's claim that the extant government must always be obeyed. Her interpretation equates the provision of a legislative will with legitimate authority, arguing that "Kant's view is that *all* governments should be taken to be legitimate. That is, any regime's decisions are the voice of the general will of its people; and its procedures for making those decisions must be taken to be ones the people have agreed to" (1997, pp 303-4). Flikschuh, however, suggests that a sovereign is legitimate not simply by virtue of fulfilling a necessary condition of the possibility of justice; rather, subjects must also acknowledge that the sovereign serves as the representative of the general will in order for them to be considered legitimate: "any government whose coercive authority over them is *acknowledged by its subjects* necessarily represents the idea of the general will" (2008, p 132, my emphasis). On this reading, it seems that while not all governments are *legitimate*, all governments must be *obeyed*, as this is the only way that there can be any lawgiving, which is a pre-condition of legitimacy. With reference to Kant's prohibition of revolution, however, the important point is Kant's claim that all governments must be obeyed. I take this to be grounded in the necessity of public lawmaking procedures for the possibility of justice. For ease of terminology, I refer to this as legitimacy.

<sup>107</sup> Rosen, A., 1993, p. 128

<sup>108</sup> Flikschuh, 2008, p 132

with the idea of reform, thus allows us to accept the authority of unjust states while still holding them to a higher standard. I discuss this reformative nature of Kant's political philosophy in chapter 6, in assessing the practical realization of Right.

## 2.2) *External freedom as the end of Right*

I have outlined above Kant's argument for obedience to positive law as a necessary condition for the possibility of justice. We cannot have *just* lawmaking if we have *no* lawmaking. It is for this reason that the existing sovereign should always be obeyed. This accounts for the first element of the proposed contradiction above; namely, obedience to positive law as a necessary condition of Right. In this final section, I now outline Kant's concept of Right as a condition of external freedom, giving us the end of Right. It is to an exposition of this freedom that I then turn to in the rest of the thesis, in order to establish whether it can come into conflict with positive law as suggested by the idea of perverted justice.

In defending external freedom as the end of Right, I follow commentators such as Paul Guyer, and Sharon Byrd and Joachim Hruschka, who argue that pure principles of Right are principles of external freedom.<sup>109</sup> Moral laws are laws of freedom according to Kant (MM 6:239), and in the case of Right, this freedom is concerned with our external relations to others and to objects of our choice:

the concept of an external right as such proceeds entirely from the concept of freedom in the external relationship of people to one another (TP 8:289).

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<sup>109</sup> Guyer, P. "Kant's Deductions of the Principles of Right" in Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays*. Oxford: Oxford University Press, 2004; Byrd, B.S. & Hruschka, J., "The Natural Law Duty To Recognise Private Property Ownership: Kant's Theory of Property in his *Doctrine of Right*" in *University of Toronto Law Journal* (LVI no. 2, 2006)



As discussed above, Kant's *Doctrine of Right* is concerned with realizing man's freedom in the external domain. A condition of Right is thus one in which "the free choice of each [accords] with the freedom of all" with reference to one's external relations (MM 6:263). It is concerned with man's free choice in "the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other" (MM 6:230).

Rightful legislation is thus given "in accordance with the axiom of outer freedom" (MM 6:267). Such legislation, Kant tells us, is that which "proceeds from a will united *originally* and *a priori*"; that is, from the a priori idea of the general united will. Thus the general will serves not only as the ground for political authority, as a necessary condition of the *possibility* of justice; it also serves as a legislative requirement for *just* rule, and hence of Right:

only in accordance with this principle of the will is it possible for free choice of each to accord with the freedom of all, and therefore possible for there to be any right (6:263).

Justice is thus a condition of external freedom in which "each decides the same thing for all and all for each" (MM 6:314). It is the *equal* and *reciprocal* subjection to public law conceived in accordance with the universalisability requirement of the idea of the general united will as a public, omnilateral will.<sup>110</sup>

This universalisability requirement is then formalised by Kant in the universal principle of Right as a principle of rightful legislation:<sup>111</sup>

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<sup>110</sup> Flikschuh, 2008, p 129

<sup>111</sup> Byrd and Hruschka additionally trace this "axiom of freedom" through the idea of the original contract, as the "touchstone of any public law's conformity with right" (TP 8:297). This contract, they argue, "reflects the 'originally and *a priori* united will' of all", and as such, is seen as pre-empting Kant's later idea of rightful legislation as expressed in the *Doctrine of*

Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with universal law (MM 6:230)

This principle clearly reflects the external nature of the freedom of Right, in its concern with one's freedom claims in relation to *others'* such claims.<sup>112</sup> A *rightful* condition is one in which each person is granted equal amounts of freedom in their external relations to others (and to external objects) under a general system of laws. A condition of Right is thus a system of public lawgiving in accordance with the universal principle of Right as a principle of external freedom.

External freedom is therefore the end of Right: to be in a rightful condition is to be governed by laws of external freedom.<sup>113</sup> With this in hand, we are now in a position to see how a dilemma might be thought to arise within Kant's *Doctrine of Right*, between positive law as a necessary condition of Right, and external freedom as the end of Right. For on Kant's political philosophy, sovereign legislation is a necessary condition of possible freedom claims: it is from this that political authority derives. Yet under the proposed conditions of perverted justice, the realization of that freedom as the end of political society is denied by positive law. Were such

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*Right* and the universal principle of Right: "The notion of a contract is an extension of the notion of (external) freedom" (p 244). As "a principle of cognition" the original contract helps us acknowledge the idea of the united general will in the requirement that a sovereign "give his laws in such a way that they *could* have arisen from the united will of a whole people" (TP 8:297). So the original contract is conceived as a standard of judgement for rightful legislation, given that the end of Right is external freedom. However, the relationship between the idea of the united general will and the original (social) contract is left unexplained by Kant. In particular, it is not clear that the two ideas should be thought to be equivalent, as in Byrd and Hruschka's interpretation (pp 245-6). As such, I leave the idea of the original contract to one side. The idea of external freedom as the end of Right can be established without appeal to this idea, making reference instead simply to Kant's *Doctrine of Right*.

<sup>112</sup> I discuss the contrast between external freedom as the end of Right and internal freedom as the end of ethics in detail in the following chapter.

<sup>113</sup> Flikschuh, K, "Innate Right and Acquired Right in Arthur Ripstein's *Force and Freedom*" in *Jurisprudence*, Vol. 1 (2), 2010, p 297

conditions to arise, then we would be obliged to obey the law as a necessary condition of external freedom as the end of Right; and yet in obeying the law, we would violate that freedom as the very end we are trying to pursue. In establishing whether a contradiction of this form can indeed arise, my investigation thus focuses on the precise nature of external freedom as the end of political society. It is this that I now take up in subsequent chapters.

### *Conclusion*

My concern in this chapter has been two-fold. Firstly, I have offered an assessment of Korsgaard's case for taking the law into our own hands, which I have argued is fundamentally flawed due to a misinterpretation of the ethical requirement that we act from respect for the law. However, while Korsgaard's approach to the problem of revolution is misguided in its appeal to ethics, I am sympathetic to her problematization of Kant's theory of justice. In squaring up to Kant's position on revolution, Korsgaard's strategy is to look for the root of the problem—and its resolution—within his doctrine of morals as a doctrine of freedom. As such, I have argued that the particular promise of Korsgaard's argument lies not in its case for revolution on *ethical* grounds; rather, it lies in her *problematization* of Kant's absolute prohibition in the idea of perverted justice. Such an argument, situated within Kant's *Doctrine of Right*, has appeal in acknowledging the consistency of Kant's arguments against revolution, as encouraged by commentators such as Nicholson, while offering an explanation of the "air of paradox" that continues to plague Kant's theory of justice in liberal commentary such as Hill's and Rosen's.

In taking up her concern that there can exist conditions of perverted justice, I have proposed a characterization of such conditions as ones in which the procedures of the state, as a necessary condition of political society, undermine external freedom, as the end of Right. My second aim has therefore been to resituate Korsgaard's idea of "perverted justice" in the juridical domain, as a conflict between the procedures of the state, as a necessary condition of Right, and external freedom, as the end of Right. The proposed argument is that under conditions of perverted justice, the state denies the realization of the very freedom which it exists to promote. This, it is then mooted, creates a dilemma: subjects are required to obey the law as a necessary condition of external freedom, yet in doing so, they preclude the realization of that freedom.

However, if we are to show that such conditions do indeed arise within Kant's *Doctrine of Right*, we must provide an account of the precise nature of external freedom, in order to establish whether it can indeed come into conflict with positive law as the idea of perverted justice suggests. In order to establish this, I now go on to conduct an investigation into the nature of moral laws as laws of freedom, beginning with a characterization of Right in contrast to ethics.

## Chapter 2

### **Kant's Doctrine of Right and external laws as laws of freedom**

In the previous chapter I diagnosed a possible contradiction within Kant's theory of justice, between external freedom as the end of Right, and obedience to positive law as a necessary condition of Right. In what now follows, I investigate the precise nature of Right, and of juridical laws as laws of external freedom, in order to establish whether the procedures of justice can in fact ever come into conflict with its end given by the concept of freedom. I begin in this chapter by examining the precise nature of Right in contrast to ethics. Kant's division of these two domains within his doctrine of morals is important in understanding both the true nature of Right, and in illuminating some common errors commentators make in seeking to characterize and resolve the problem of revolution in Kant. Korsgaard is one such example. For in providing an ethical answer to the juridical problem of revolution, she not only assumes that both domains have a shared (moral) end, in the idea of autonomy, but additionally, that the moral demands of Right are abrogated by those of ethics. It is this which leads her to believe that the juridical duty of obedience can be overridden by an appeal to Kant's doctrine of Virtue, allowing for an ethical solution to a juridical problem.

However, in defining the precise nature of Right as a discrete domain of Kant's doctrine of morals, we are brought up against a dispute over its moral status. Kant's claim that moral laws are laws of freedom suggests that laws of Right, as laws of external freedom, are a part of his moral doctrine. However, in defining the external freedom of Right in contrast to the internal freedom of ethics, this moral status is

brought into question. Specifically, this question concerns the absence of individual moral incentive in the case of Right, and the apparent exclusion of Right from Kant's definition of morality on these grounds. Rebutting this conclusion is important if we are to set up the kind of moral tension within Kant's *Doctrine of Right* which supposedly arises in cases of perverted justice; that is, between freedom as the end of morality, and the practical procedures of a particular sovereign state which deny that freedom. Only if the *morality* of Right is established can we bring justice under the auspices of Kant's metaphysics of morals as a metaphysics of freedom. Without this, Right is simply a prudential principle. This would cast the problem of revolution in completely different terms; that is, rather than being a moral concern grounded in the principle of freedom, it would simply be a prudential matter grounded in practical considerations.

I begin in section one with an outline of Korsgaard's ethicisation of Kant's doctrine of morals, and the similarities it shares with Allen Wood's interpretation of Kant's moral theory. As I will argue in detail in the following chapter, this ethicisation has consequences for her characterization of moral freedom, and hence the normativity of Right. Taken to extremes it can lead to the exclusion of Right from Kant's doctrine of morals entirely. Indeed, this is Allen Wood's conclusion, whose analysis of the relationship between ethics and Right has this ethicisation in common with Korsgaard, but who makes the stronger claim that Right has no place in the moral domain. I respond to Wood in section 2 by turning to Kant's thematization of moral laws as laws of freedom, and his characterization of the principle of Right as a principle of external freedom. However, this still leaves the problem posed by incentive, which I consider in section three. There I dispute the general relevance of the *Groundwork* conception of morality, arguing it only provides a treatment of the

ethical branch. This means that the ideas of incentive and moral worth which were the root of the problem in section 2 are no longer applicable to the domain of Right. In sum, the present chapter makes a *negative* case for the morality of Right, by denying the force of objections to such a reading. I then proceed to make my positive argument in subsequent chapters, grounded in the concept of practical freedom.

### 1) *The ethicisation of Kant's doctrine of morals*

#### 1.1) *An introduction to the ethicisation of Kant's Doctrine of Morals*

As mentioned in the previous chapter, Korsgaard's argument for revolution offers an *ethical* solution to a *juridical* problem. In situating the problem of the virtuous revolutionary in the ethical domain, her argument relies heavily on the status of duties of Right as indirect ethical duties in order to bridge the gap between the two branches of Kant's moral theory. Indeed, in blurring the boundaries between the two domains, she goes as far as to suggest that they are interdependent at times. Her argument implies that the fulfilment of our *ethical* duty to protect and promote the rights of humanity relies on a particular *juridical* state of affairs obtaining: we protect and promote those rights through obeying a law which takes them as its end. Conversely, the normative force of our *juridical* duty to obey the law is dependent on the *ethical* end which political society protects and promotes: "The just person respects the rights of humanity, and for this reason respects the government that enforces those rights, and the juridical condition that makes their

enforcement possible".<sup>114</sup> Justice, as a matter of Right, is grounded in the fulfilment of the ethical duty to protect and promote the rights and freedom of humanity.

In this blurring of Kant's division between ethics and Right, Korsgaard reveals an underlying interpretation of the relationship between the two domains. Firstly, she posits a common moral end, in the form of the rights and freedom of humanity. This brings both domains under the heading of Kant's doctrine of morals, and indicates a reading on which the principle of Right is considered a moral principle. Secondly, in arguing for the fulfilment of one's ethical duty through obedience to the positive laws of the state, she assumes an overlap between the domains of ethics and Right. Thirdly, in moral dilemmas such as revolution, where this overlap causes a conflict between the two domains, she prioritizes ethics over Right: despite their juridical duty of obedience, the virtuous revolutionary has a moral 'calling' to act in protection of the rights and freedom of humanity.

Duties of Right are therefore abrogated by duties of ethics; or as Korsgaard puts it, "Virtue also encompasses the duties of justice".<sup>115</sup> This prioritization is a consequence of Korsgaard's more general ethicisation of morality. This is most clearly demonstrated in her article "Morality as Freedom", through her equation of moral freedom with the internal freedom (autonomy) of ethics.<sup>116</sup>

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<sup>114</sup> Korsgaard, C.M., C., "Taking the Law into Our Own Hands: Kant on the Right to Revolution" in A. Reath, B. Herman, & C. Korsgaard (eds.), *Reclaiming the History of Ethics : Essays for John Rawls*. Cambridge: Cambridge University Press, 1997, p 317. Note that these are not necessary connections for Korsgaard: she thinks that the ethical duty can be fulfilled via other means (e.g. revolution) when the state fails to uphold the rights and freedom of humanity; and she also argues that the juridical duty to obey the law still holds even when the law fails to further the ethical end. However, her reading certainly implies some kind of mutual interdependence in the fulfilment of ethical and juridical duties.

<sup>115</sup> Korsgaard, 2000, p 20

<sup>116</sup> Korsgaard, "Freedom as morality" in *Creating the Kingdom of Ends*, Cambridge: Cambridge University Press, 2000, pp 159-187. I mentioned the relationship between



The distinction between internal and external freedom underpins Kant's distinction between ethics and Right, and is explicated through the ideas of incentive and coercion (MM 6:218).<sup>117</sup> As discussed in relation to indirect ethical duties, lawgiving that requires the moral law to be the determining ground of choice is ethical; it requires the setting of certain ends from duty, and as such, concerns our motives. Lawgiving which does not require any such moral ground, but merely requires the performance (or omission) of an action, is juridical.<sup>118</sup> Korsgaard emphasizes the concerns of incentive and end-setting in her analysis of moral freedom, thereby offering a reading that is synonymous with the internal freedom of ethics. She then goes on explicitly to characterize freedom as virtue:

The appearance of freedom in the phenomenal world, then, is virtue – a constant struggle to love and respect the humanity in oneself and others, and to defeat the claims inclination tries to make against humanity.<sup>119</sup>

In her appeal to the *Groundwork* and the second *Critique* ideas of self-determination and humanity as an end in itself, Korsgaard clearly ties her reading of Kant's concept of moral freedom to the ethical conception of autonomy, and with it, ethicizes the moral theory for which it serves as a foundational principle.<sup>120</sup> Morality as freedom is a morality of ethics: "the moral law is the law of the free will".<sup>121</sup>

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morality and freedom in the previous chapter with reference to her argument for revolution, which implies that the two are distinct. As I noted there, this is at odds with her reading of morality elsewhere, and in particular, in this article. It is her view from "Morality as Freedom" that I take to be her considered position on the matter, which is what I discuss in this chapter and the following.

<sup>117</sup> I will elaborate on these distinctions in the following sections

<sup>118</sup> Korsgaard, 2000, pp 19-20

<sup>119</sup> Korsgaard, 2000, p 182

<sup>120</sup> Korsgaard, 2000, pp 18-20 / 162-166

<sup>121</sup> Korsgaard, 2000, p 160

Not only does Korsgaard ethicize Right with her blurring of the distinction between the two domains; she politicises ethics as well. I gestured at this above, when I noted that Korsgaard's argument for revolution makes the fulfilment of our ethical duty to protect and promote the rights of humanity dependent on a particular juridical state of affairs obtaining. This fulfilment of our ethical duties through the civil condition is also present in her account of the Kingdom of Ends as a moral ideal.

[In the Kingdom of Ends] freedom is perfectly realized, for its citizens are free both in the sense that they have made their own laws and in the sense that the laws they have made are the laws of freedom – the juridical laws of external freedom and the ethical laws of internal freedom.<sup>122</sup>

The Kingdom of Ends is constituted as a moral community through individuals' mutual self-legislation of the moral law. But they are constituted as a republic through the instantiation of that moral law as positive law. This allows for an ideal realization of individuals' internal freedom, for they are "free both in the sense that they have made their own laws and in the sense that the laws they have made are the laws of freedom – the juridical laws of external freedom and the ethical laws of internal freedom".<sup>123</sup> Korsgaard even talks of using the ideal of the Kingdom of Ends as a thought experiment to test the morality of our positive laws: "The laws we would choose to be under, if it were ours to choose, would be moral laws".<sup>124</sup> This underlines the point I began with, which is that Korsgaard posits a two-way relationship between ethics and Right: on the one hand, the purpose of a state of Right is to help realise an ethical state of affairs; on the other, such an ethical ideal is only realisable through its institution in positive law. While ethics is prioritized in

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<sup>122</sup> Korsgaard, 2000, p 23

<sup>123</sup> Korsgaard, 2000, p 23

<sup>124</sup> Korsgaard, 2000, p 24

her reading of Kant's moral theory, it includes both Kant's *Doctrine of Virtue* and his *Doctrine of Right* as interdependent domains.

1.2) *Wood's interpretation of the relationship between ethics, Right, and morality*

This politicization of ethics will be of significance in the final section of this chapter, where I argue against a tendency on the part of contemporary Anglo-American Kantians to synthesize the two branches of Kant's metaphysics of morals into a single, moral domain. Thus while I support Korsgaard's move to bring Kant's *Doctrine of Right* under the heading of his doctrine of morals, I do not support the means by which she does it. For now though, I remain with the specific issue of the ethicisation of Right, and the effect this has on our reading of the moral status of the juridical domain.

Allen Wood shares Korsgaard's equation of morality with the ethical branch of Kant's metaphysics of morals, but in contrast to Korsgaard, maintains a strict division of ethics and Right.<sup>125</sup> In consequence, Wood excludes Kant's theory of justice from the moral domain. Wood's ethicisation of morality is evident in his discussion of moral freedom as autonomy in *Kantian Ethics*.<sup>126</sup> In considering the possibility of a supreme moral principle as the foundation of Kant's moral doctrine, Wood equates the concept of practical freedom with the idea self-legislation as inner freedom:

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<sup>125</sup> Wood, A.W., *Kantian Ethics*. Cambridge: Cambridge University Press, 2008. p. 193

<sup>126</sup> Wood, 2008. See esp. pp 123-141

So if there is [a supreme moral principle], and we have the capacity to legislate and obey it, then we are practically free in the positive sense. If we are practically free in the positive sense, then the highest capacity included in that freedom must be to give the moral law to ourselves and be able to obey it, on the basis of reasons lying in our faculty of reason itself.<sup>127</sup>

As in Korsgaard's case, the concept of moral freedom is here narrowed to the ethical concept of autonomy, or freedom of the will through self-legislation according to principles of pure practical reason. This is to be contrasted with the juridical concept of external freedom as freedom of choice, which does not require self-legislation, but instead is coercively protected and promoted by the state, and as such, may be other-legislated.<sup>128</sup> Wood also emphasizes the idea of *willing* as constitutive of the moral law, and the absence of this in the case of the external, action-oriented principle of Right.<sup>129</sup>

The equation of moral freedom with the internal freedom of autonomy has a knock-on effect for both Korsgaard's and Wood's interpretations of the normativity of Right. In Korsgaard's case, it leads her to subsume juridical duties under Kant's *Doctrine of Virtue*, treating them as indirect ethical duties. This subsuming of Right under Kant's ethics is made possible by her interdependent reading of the two domains, and is necessary if she is to incorporate Right under Kant's doctrine of morals grounded in the ethical principle of autonomy. Only conceived as indirect ethical duties do juridical duties meet the moral requirement of willing according to reason, and hence fall under the concept of moral freedom as autonomy (MM

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<sup>127</sup> Wood, 2008, p 130

<sup>128</sup> Wood, 2008, p 205. I discuss this contrast below in section 2, and the equation of moral freedom with autonomy more generally in the following chapter

<sup>129</sup> Wood, A., "The Final Form of Kant's Practical Philosophy" in Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays*. Oxford: Oxford University Press, 2004, p 9

6:390).<sup>130</sup> Her equation of moral freedom with autonomy also explains her prioritization of ethics over Right within Kant's doctrine of morals. For it is only considered as a sub-category of duties of virtue that duties of Right meet the standard of moral freedom as autonomy.

Wood shares Korsgaard's ethicisation of morality. In his case, however, it leads to the exclusion duties of Right from Kant's doctrine of morals entirely, due to the strict distinction that he maintains between ethics (as morality) and Right (as justice). In direct opposition to Korsgaard's interdependent reading of the relationship between the two domains, Wood argues against the "infection" of Kantian morality with the external concerns of Right:

Kantian morality, however—though the *content* of its duties may be socially oriented—is never about the *social* regulation of individual conduct. It is entirely about enlightened individuals autonomously directing their own lives.<sup>131</sup>

While he concedes, in line with Korsgaard, that juridical duties are moral duties insofar as they are considered as indirect ethical duties, he argues that as a distinct branch of Kant's practical philosophy, Right is only of prudential value. The normativity of Right lies in the fact that it provides a system of norms that "underlies the political state and its external legislation, constituting a rational structure of juridical duties that is distinct from the system of ethical duties".<sup>132</sup> Right determines the boundaries of external freedom as freedom from constraint by

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<sup>130</sup> This is also a point that Wood notes: "In so far as juridical duties are regarded as ethical duties, they can be brought under the principle of ethics, which can also be used to show that we have good reasons for valuing external freedom (or right) and respecting the institutions they protect through external coercion. To this extent, it may be correctly said that Kant's theory of right falls under or can be derived from the principle of morality. That is, this may be said *in so far as juridical duties are regarded not merely as juridical but also as ethical duties*" (2004, p 9).

<sup>131</sup> Wood, 2004, p 9

<sup>132</sup> Wood, 2008, p 161

another's will, and provides laws which protect and promote that freedom within those boundaries.<sup>133</sup> These norms, however, while grounded in Kant's practical philosophy as a philosophy of freedom, exist entirely independently of the supreme principle of morality.<sup>134</sup> As such, their normativity lies in their practical, and not in their moral value.

Wood is correct in identifying strict Right as our concern. This is to consider it as a discrete domain, in contrast to Korsgaard who considers juridical duties as a subset of ethical duties. What is puzzling about Wood's analysis, however, is the way he conceives of the *Doctrine of Right* as a non-moral component of Kant's practical philosophy. For while he wants to exclude Right from Kant's moral theory, he goes on to suggest that as part of his practical philosophy, it still stands in some kind of relationship to that moral theory:

Kant...devised an entire practical philosophy, a theory about the foundations of right and ethics, and a theory of justice and ethical duties and a theory of justice based upon it. If we are to do Kantian ethics properly, we must constantly ask how Kant's moral convictions relate to his practical philosophy as a whole – for instance, how, or even whether, these convictions can be supported by his theory.<sup>135</sup>

This passage is striking. For in contrast to the strict distinction mentioned above, Wood groups ethics and Right together here, under the heading of Kant's practical philosophy. Not implausibly, it seems that on Wood's interpretation, political society is situated on a moral spectrum, though does not, in itself, constitute part of Kant's moral theory per se.

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<sup>133</sup> Wood, 2008, pp 162/205

<sup>134</sup> Wood, 2008, pp 194/205-6

<sup>135</sup> Wood, 2008, p 206

Although this reading of Wood might not seem to sit well with the purely rational reading of Right that he argues for, it makes far more sense if we consider it within the context of his Hegelianism. Wood describes civil society in Hegel's practical philosophy as "a form of ethical life". This is the case insofar as Right, as part of that practical philosophy, makes possible the exercise of individual morals through private property relations. In addition, it instils "ethical dispositions, values and interests" in individuals, through their interaction with others in their estate.<sup>136</sup> This grounding of ethics in human interaction and political society is a result of Hegel's anti-metaphysical philosophy as contrasted with Kant's metaphysics of morals.<sup>137</sup> What both philosophers appear to share in common on Wood's account, though, is that a state of Right provides a structure within which we can develop our ethical nature. It is in this sense that, while not constituting part of morality for Kant, Right provides a structure of moral norms.

That Wood's reading makes a departure from Kant's moral theory to something more Hegelian is not surprising. For he acknowledges in the Preface to *Kantian Ethics* that his primary aim is not to provide a study of Kant's writings, but to "develop out of Kant's thought the most defensible theory possible".<sup>138</sup> My concern here, however, is not to make sense of Wood's rational reading of Right in relation to Kant's ethics, or his practical philosophy more broadly; rather, it is to refute his non-moral reading of Right entirely. In refuting Wood's position, I do not go into detail on his objections that centre on the analytic nature of Right versus the synthetic nature of the supreme moral principle, as this has been discussed

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<sup>136</sup> Wood, A.W. *Hegel's Ethical Thought*. Cambridge: Cambridge University Press, 2002. pp 26-7

<sup>137</sup> Wood, 2004, pp 5-6

<sup>138</sup> Wood, 2008, p ix

exhaustively elsewhere.<sup>139</sup> Instead, I focus on the implicit argument that Wood presents against a moral reading of Right based on the issue of moral incentive. I take this to be a more serious threat to the morality of Right than the objection based on the analytic-synthetic distinction, due to the fact that it is rooted in Kant's own system of Rights and duties, in his distinction between ethics and Right as the two branches of his doctrine of morals. In contrast to the conjectural arguments drawn from notions of analyticity and deduction in the first *Critique*, such an argument would directly confirm the non-moral nature of Right from within Kant's own moral framework.

## *2) Defending the morality of Right: incentive and freedom in Kant's doctrine of morals*

### *2.1) Casting doubt on the morality of Right: the problem of moral incentive*

As noted above, Wood raises the issue of moral incentive as a part of his discussion on the analyticity of Right. This analyticity, Kant tells us, is given by the fact that we do not need to go beyond the concept of Right in order to see that it contains a warrant to coerce (MM 6:396). It is a subject of debate between commentators because Kant's moral principle is, in contrast synthetic (G 4:447). The deduction of Kant's universal principle of Right from his supreme moral principle would therefore appear to be ruled out, causing problems for a moral reading of Right.<sup>140</sup>

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<sup>139</sup> For a detailed response to Wood on this matter, see Guyer, P., "Kant's Deductions of the Principles of Right" in Timmons, 2004. See also Henrich, D. "Kant's Notion of a Deduction and the Methodological Background of the First *Critique*" in *Kant's Transcendental Deductions: The Three Critiques and the Opus Postuum*. Stanford, CA: Stanford University Press, 1989. pp 29 - 46 for a discussion of syllogistic versus historical notions of a deduction.

<sup>140</sup> Guyer, 2004, p 25



In response to this debate, Wood therefore considers a possible counter-argument to an analytical reading of Right. His suggestion is that if the principle of Right is to provide us with a moral reason to act, then it must go *beyond* the concept of Right in order to incorporate the idea of moral incentive.<sup>141</sup> If this were the case, then this would make the principle of Right dependent on a further proposition, a “third element”, and would therefore make it synthetic, not analytic. This would then neutralise concerns about the impossibility of the derivation of Right from a more fundamental moral principle, allowing for a moral reading of Right.

As I said above, my concern with this argument of Wood’s is not to revisit the analyticity debate; rather, I want to focus on the problem that the idea of incentive introduces for a moral reading of Kant’s Doctrine of Right. This is due to the distinction that Kant draws between the juridical and ethical domains on these grounds. We first encounter this in Kant’s discussion of lawgiving in the Introduction to *The Metaphysics of Morals*. Here he tells us that all legislation contains two elements: the law, which gives a particular action as a duty, and the incentive, which connects the action to the subject through the determining ground of the choice that they make. He goes on to distinguish between ethical and juridical lawgiving on the basis of the latter:

That lawgiving which makes an action a duty and also makes this duty the incentive is *ethical*. But that lawgiving which does not include the incentive of duty in the law and so admits an incentive other than the idea of duty itself is *juridical* (MM 6:218).

As noted in section 1, while ethical duties must be performed from the moral incentive of duty, juridical duties are defined as those where the incentive need not

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<sup>141</sup> Wood, 2004, pp 7-8

be duty (MM 6:214).<sup>142</sup> Thus non-moral incentives, such as a fear of punishment or a self-interested desire, may all serve as reasons to respect the external freedom of others.<sup>143</sup> Indeed, considered as a strict duty of Right, the moral incentive of duty *cannot* be the determining grounds of action. The performance of strict duties of Right are cases in which the required action is “not mingled with anything ethical [and] requires only external grounds for determining choice” (MM 6:232). The duty is performed with no moral motive present.<sup>144</sup>

It is on these grounds that Wood concludes that the principle of Right does not need to be extended in order to include the concept of moral incentive: juridical duties are defined precisely by the *absence* of such an incentive. The idea of incentive therefore fails to provide a solution to the analyticity debate under discussion by Wood. In fact, the idea of incentive becomes problematic in itself for a moral reading of Right, once we consider it in light of Kant’s discussion of morality in the *Groundwork*. It is here that Kant claims to lay down a foundation for his entire metaphysics of morals, and where he famously equates moral worth with acting *from* duty, rather than simply *in conformity* with it (G 4:397). Morality is a question not just of performing

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<sup>142</sup> Wood, 2004, p 8

<sup>143</sup> Willaschek notes that “pathological determining grounds of choice” are sufficient but not necessary motives to action; we may be coerced into fulfilling juridical duties, for example through physical means such as detainment. So non-moral incentives are not confined to the pathology of the agent, but may also be external incentives to action. Willaschek, M., “Why the *Doctrine of Right* does not belong in the *Metaphysics of Morals*”, *Jahrbuch für Recht und Ethik, Band 5* (1997), p 218

<sup>144</sup> Note that by contrast, duties of Right considered as indirect ethical duties are those in which the action is performed out of respect for Right (MM 6:390-1). It is this that Kant refers to when he writes that “ethical lawgiving, while it also makes internal actions duties, does not exclude external actions but applies to everything that is a duty in general” (MM 6:219). As discussed in the previous chapter, all duties, both ethical and juridical, belong to the Doctrine of Virtue in this sense. However, I am not concerned with the morality of Right in this sense, but rather as a discrete moral domain, independently of that of ethics. It is therefore the moral status of duties of Right absent any moral incentive that must be established.

the required action, but rather of doing so from a *moral incentive*. This characterization of morality therefore seems to confirm Wood's exclusion of juridical duties from Kant's system of moral duties. For Kant's characterisation of these duties, in contrast to those of ethics, is that the action may be performed only in conformity with duty: the incentive to act may be some inclination or aversion. And yet he tells us in the *Groundwork* that an action, "however it may conform with duty and however amiable it may be, has nevertheless no true moral worth but is on the same footing with other inclinations" (G 4:398). This seems to force the conclusion that juridical duties, by definition, command actions which Kant tells us lack moral worth (G 4:398). If this conclusion cannot be refuted, Wood's non-moral reading of Right is confirmed, preventing us from bringing the juridical domain, and with it the problem of revolution, under the heading of Kant's moral theory as a theory of freedom.

## 2.2) *Moral laws as laws of freedom*

In trying to forestall the exclusion of Right from the moral domain, we might appeal, as Paul Guyer does, to Kant's thematization of freedom as the ground of morality (G 4:446-463). This promises a positive argument in favour of the morality of Right as a principle of freedom, based on Kant's distinction between ethics and Right on the grounds of inner versus outer freedom:

This distinction [between the Doctrines of Virtue and Right], on which the main division of the *doctrine of morals* as a whole also rests, is based on this: that the concept of **freedom**, which is common to both, makes it necessary to divide duties into duties of *outer freedom* and duties of *inner freedom*, only the latter of which are ethical (MM 6:406-7).

Right, as a principle of external freedom, appears confirmed as a moral principle here (MM 6:230).<sup>145</sup> It is passages such as these to which Paul Guyer appeals in making an argument for the morality of Right:

The foundational assumption of Kantian morality is that human freedom has unconditional value, and both the Categorical Imperative and the universal principle of right flow directly from this fundamental normative claim...Thus the universal principle of right may not be derived from the Categorical Imperative, but it certainly is derived from the conception of freedom and its value that is the fundamental principle of Kantian morality.<sup>146</sup>

Indeed, even Allen Wood concedes that in the Introduction to the *Metaphysics of Morals* Kant seems to offer a general and formal idea of lawgiving grounded in the positive concept of freedom. Here, "laws of freedom", which are called "moral laws", are distinguished as being either *juridical* or *ethical* laws, depending on whether they are directed "merely to external actions and their conformity to law", or whether they also require that "the laws themselves be the determining grounds of actions" (MM 6:214).<sup>147</sup> An appeal to freedom therefore offers a way to affirm to morality of Right in the face of its supposed non-moral status that a distinction based on incentive seemed to force upon us.

However, in trying to employ the concept of freedom to navigate around the problem posed by incentive, we find that it in fact fails to provide a solution to the *Groundwork's* exclusion of juridical duties from Kant's moral theory. Instead, it suggests two apparently contrasting distinctions between ethics and Right: one

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<sup>145</sup> Guyer, 2004, pp 23-24

<sup>146</sup> Guyer, 2004, p 26

<sup>147</sup> Wood, 2004, p 6. As mentioned above, Wood's objection to this reading, however, is that this fundamental principle of morality is synthetic, whereas the principle of Right is analytic: thus the latter cannot be derived from the former.

which includes Right under Kant's doctrine of morals as a doctrine of freedom, and the other which excludes it, on grounds that juridical duties contain no moral incentive, and thus command actions that lack moral worth.

The apparent inconsistency between Kant's two alternative distinctions between ethics and Right presents an interpretative problem, which is embodied in the conflict between Guyer's moral reading of Right as per the main body of the *Metaphysics of Morals*, and Wood's prudential reading of Right in light of the *Groundwork's* concern with incentive. The two different interpretations of the morality of Right offered by Guyer and Wood, one stressing the concept of freedom, the other incentive, reflect what Höffe refers to as "the problematic unity of the *Groundwork*...with the [*Doctrine of Right*]".<sup>148</sup> While incentive is emphasized as the ground of moral worth in the *Groundwork*, the *Metaphysics of Morals*, and specifically the doctrines of Right and of Virtue therein, leans more heavily on the idea of freedom. The disagreement between Wood and Guyer therefore seems to be a matter of which text, and therefore which concept, one prioritises in one's reading of Kant's doctrine of morals.

However, in trying to overcome this interpretative problem, we see that it is not a question of arguing for the predominance of the morality as freedom interpretation, but in fact of reconciling the two readings. For upon closer analysis of Kant's concepts of inner and outer freedom, we see that the distinction based on freedom appears to express the same idea as that of incentive. A distinction between ethics

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<sup>148</sup> Höffe, O., "Kant's Principle of Justice as Categorical Imperative of Law" in Y. Yovel (ed.), *Kant's Practical Philosophy Reconsidered*. Dordrecht: Kluwer Academic Publishers, 1989, p 153

and Right drawn along the lines of internal and external freedom not only fails to overcome the problem posed by incentive, but in fact compounds it.

The distinction between inner and outer freedom is first presented by Kant in the Introduction to *The Metaphysics of Morals*. Inner freedom, as discussed in section 1, is already familiar to readers as the concept of autonomy from the *Groundwork*. As a condition of all duties of virtue, it requires that one “determine oneself to act through the thought of the law” (MM 6:407). This requires that one’s power of choice (*Willkür*) be ruled by one’s rational will (*Wille*), thereby “subduing one’s affects and governing one’s passions” in the fulfilment of one’s duty (MM 6:407). Virtue is “the moral strength of a *human being’s* will in fulfilling his *duty*, as moral *constraint* through his own lawgiving reason, insofar as this constitutes itself an authority *executing* the law” (MM 6:405). Inner freedom is thus characterised as an intrapersonal relationship between one’s rational will and one’s power of choice as subject to passion and inclination; it is a question of self-constraint according to reason in the performance of one’s duty from the thought of the law.

By contrast, external freedom is concerned with the coexistence of different agents’ freedom of choice (*Willkür*) in their external actions (MM 6:230-1). Right is concerned “only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have...influence on each other” (MM 6:230). Right is therefore interpersonal, rather than intrapersonal; its object is the protection of each person’s freedom to act from the infringement and limitation by another’s choice. What’s more, unlike virtue, “it does not at all expect, far less demand, that I *myself should* limit my freedom to those conditions just for the sake of this obligation”; rather “reason says only that freedom *is* limited to those conditions in

conformity with the idea of it and that is may also be actively limited by others” (MM 6: 231).

This draws out a further point of distinction between internal freedom and external freedom: while the latter is externally enforceable, internal freedom is not. As a matter of external relations between one person and another, external freedom may be “actively limited by others”. What Kant means by this is elaborated on in a subsequent passage, in which we are told that Right contains the idea of coercion:

Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws...coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right (MM 6:231).

Right, as external freedom, requires that we refrain from certain uses of our own freedom of choice, namely, when that use of freedom “is itself a hindrance to freedom in accordance with universal laws”. Therefore, when we do hinder another’s freedom in this way, we may be forced to refrain from such actions as a “hindering of a hindrance to freedom”.<sup>149</sup> By contrast, internal freedom cannot contain the idea of coercion. Instead, it requires that one determine one’s own will through the idea of the law. One must set *oneself* an end, given as a duty by reason, and this, by definition, cannot be coerced. It must be self-legislated:

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<sup>149</sup> For Kant, freedom of choice implies freedom of action in the external domain of Right. I shall henceforth use freedom of choice / freedom of action interchangeably.

I can indeed be constrained by others to perform *actions* that are direct as means to an end, but I can never be constrained by others *to have an end*: only I myself can *make* something my end (MM 6:381).

Kant expresses this thought when he declares that “*coercion* to ends is self-contradictory”. For if an end must be prescribed by my own will, as ethics requires, then this requirement is not fulfilled if that end is enforced by others. Indeed, as an “internal act of the mind” it cannot be coerced: “No external lawgiving can bring about someone’s setting an end for himself” (MM 6:239). Therefore by definition internal freedom, as a matter of self-constraint, cannot be governed by external force.<sup>150</sup>

Kant therefore concludes that “[what] essentially distinguishes a duty of virtue from a duty of right is that external constraint to the latter kind of duty is morally possible, whereas the former is based only on free self-constraint” (MM 6:383). This gives us a distinction between ethics and Right on the basis of internal and external freedom, that is self-legislation and external-legislation, which in turn implies the self- versus external-constraint in accordance with these principles.

### 2.3) *Reconciling the morality of the Groundwork and The Metaphysics of Morals*

With a more detailed analysis of the distinction between internal and external freedom in hand, we now see how it is that these two alternative distinctions based on freedom and incentive appear to express the same idea. Inner freedom, as the freedom of ethics, requires that, through self-legislation according to the moral law,

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<sup>150</sup> Höffe, 1989, p 153



one “[determines] oneself to act through the thought of the law”. And to act from the thought of the law is to make duty the determining ground of choice: duty must be the incentive to action. Thus the idea of acting from a moral incentive and the idea of self-legislation (or constraint) according to the moral law are one and the same thing. By contrast, the incentive to action in the case of outer freedom, though it may be internal in the form of (non-moral) inclinations or aversions, crucially, may also be external. That is, where we are concerned with compelling a person to act or refrain from acting in order to prevent the restriction of another’s external freedom, then “it may also be actively limited by others”. Indeed as we have seen, external freedom, by virtue of the fact that it is distinguished from internal freedom as a matter of *self*-constraint, is therefore a question of *external* constraint by positive law. This is not to say it must always be so, but that it *can* be so.<sup>151</sup> The distinction between inner freedom and outer freedom is therefore drawn along similar lines as that based on incentive, forming the two defining features of Right: i) in fulfilling obligations of Right, the motivation to act need not be that of duty; and ii) obligations of Right need not be self-legislated – one may fulfil one’s duty of Right through being externally coerced into performing the particular action that Right requires.<sup>152</sup>

In reconciling the ideas of incentive and freedom, we are thus returned to the conclusion reached in 2.1, which confirmed Wood’s objection that the idea of incentive excludes Right from Kant’s doctrine of morals. In fact, if we now look again to the *Groundwork*, this time with the distinction based on freedom in mind,

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<sup>151</sup> I discuss the nature of external freedom as law-governed action under coercive law in detail in chapter 5.

<sup>152</sup> Ludwig, B., “Whence Public Right? The Role of Theoretical and Practical Reasoning in Kant’s Doctrine of Right” in Timmons (ed.), 2004, p 160

we find that the problem posed by incentive not only remains unresolved, but is compounded. The problem lies in the account that Kant gives of the supreme moral principle as a principle of autonomy:

Autonomy of the will is the property of the will by which it is a law to itself...The principle of autonomy is, therefore: to choose only in such a way that the maxims of your choice are also included as universal law in the same volition...[That] the above principle of autonomy is the sole principle of morals can well be shown by mere analysis of the concepts of morality (G 4:440).

It is this passage that lends support to Wood's equation of morality with autonomy, and underpins his ethicisation of Kant's doctrine of morals. For in identifying autonomy as the basis of the supreme principle of morality, Kant now ties morality to the idea of *inner* freedom, the will as a law to itself. And as we have seen, "the property of the will by which it is a law to itself" is applicable only to ethics, and not to Right. By definition, Right makes no reference to inner freedom. Furthermore, Kant argues that the supreme moral principle "commands neither more nor less than just this autonomy" (G 4:440): it is not to be extended beyond the idea of internal freedom. From this it would seem that we are forced to conclude that as a principle of external freedom, Right does not fall under Kant's supreme moral principle as given in the *Groundwork*. The external freedom of Right is not, and cannot, be included in Kant's principle of morals

In arguing for the moral status of Right we are therefore confronted with two related problems, both stemming from the account of morality given in the *Groundwork*. The first is the distinction based on incentive, and Kant's account of moral worth; the second is the distinction based on freedom, and the solely internal account offered as the basis of the supreme moral principle. In both cases, Wood's

equation of morality with ethics seems confirmed, and with it, the conclusion that Right, by definition, falls outside of the moral domain. Thus if we are to defend the moral status of Right in the face of Wood's reading, we must explain how we can acknowledge the account of moral worth and moral freedom given in the *Groundwork*, while at the same time arguing for a moral reading of Right as a principle of external freedom as per Kant's account in *The Metaphysics of Morals*.

Rephrased, the question therefore becomes one of how we can reconcile the moral reading of Right as a principle of freedom offered by Kant in *The Metaphysics of Morals* with the exclusionary account of morality given in the *Groundwork*. Or, as Höffe puts it, how can we "understand the problematic unity of the *Groundwork* (and the *Critique of Practical Reason*) with the [*Doctrine of Right*]"<sup>153</sup> In fact, as I will now go on to argue, these two readings do not need to be *reconciled*, but rather the relevance of each and their respective domains must be more clearly delineated. Following Höffe, I argue that, contrary to the suggestion of its title, the *Groundwork* in fact only discusses the *ethical* branch of Kant's doctrine of morals; it does not provide a general or comprehensive foundation for morality. It is therefore not applicable to Right. Once we acknowledge this, we may dispute Wood's objection that Right fails to meet the (specifically ethical) criteria of incentive and autonomy, and by doing so, we prevent Right's exclusion from Kant's doctrine of morals.

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<sup>153</sup> Höffe, 1989, p 153

### 3) *Defending the morality of Right against the Groundwork's morality*

#### 3.1) *Disputing the general nature of the Groundwork: Maxims, laws and private versus public morality*

In disputing the general nature of the *Groundwork's* morality we might be tempted simply to appeal to the existence of Kant's later *Metaphysics of Morals*, and his reference to the *Doctrine of Right* as "the first part of the doctrine of morals" (MM, 6:205). Even Marcus Willaschek, who argues against a moral reading of Right, concedes that "the whole structure of the *Metaphysics of Morals*, with its basic distinction between right and ethics, is built on [this] official view about the relation of morality and right".<sup>154</sup> In light of this, the fact that the incentive based account of morality given in the *Groundwork* seems to preclude the inclusion of Right would already seem to provide reason enough for doubting that it offers a general reading of morality. As Höffe puts it,

the fact that Kant sets personal motivation at the core of the *Groundwork* speaks against the claim that the categorical imperative in the *Groundwork* is a general categorical imperative indifferent to the Law/Ethics distinction.<sup>155</sup>

However, since the distinction drawn between ethics and Right, and the resulting moral status of Right, is precisely what is under discussion here, it is preferable to avoid any appeal to these arguments in contradiction of a general reading of the *Groundwork*. This would be to argue that we are entitled to take a purely ethical reading of the *Groundwork* in order to allow for a moral reading of Right; because otherwise we cannot make room for a moral reading of Right as suggested in *The*

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<sup>154</sup> Willaschek, p 223

<sup>155</sup> Höffe, 1989, p 151

*Metaphysics of Morals*. This sets up the *aim* of my argument as *justification* for taking such a position, and is dangerously, if not outright circular.

Instead, I will demonstrate the specifically ethical content of the *Groundwork* through its discussion of the categorical imperative as the principle of ethics, and the idea of a self-given maxim as the object of that imperative.<sup>156</sup> As subjective practical principles, maxims relate to “the conditions of the subject” (G 4:421n); that is, to an individual’s goals, attitudes and circumstances.<sup>157</sup> This is not to say that the maxim is subjective in the sense that it seeks to fulfil that particular agent’s desires.<sup>158</sup> Certainly maxims *may* be subjective in this further sense, but it is not in this way that Kant means to contrast them to objective practical principles. Rather, they are subjective in their reference to an agent’s particular conditions.

Maxims also are subjective in the sense that they are determinations of that individual’s *will*, rather than externally prescribed principles of action. As O’Neill puts it, “it is only an agent who can adopt, modify, or discard maxims:<sup>159</sup>

a maxim represents an obligation of the specific subject in relation to itself. The maxim does not express what one in general should do, but rather what a particular individual actually wills to do. Maxims are ‘self-chosen’, and this is a specific achievement of the subject insofar as it thereby binds itself in its actions to ‘rules which it lays upon itself’ (G 4:438).

Maxims are therefore not just subjective in the sense that their content is given by the particular conditions of the agent; they are also subjective in the deeper sense

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<sup>156</sup>Albrecht, M., “Kant’s Justification of the Role of Maxims in Ethics” in K. Ameriks & O. Höffe (eds), *Kant’s Moral and Legal Political Philosophy*. Cambridge: Cambridge University Press, 2009, p 134

<sup>157</sup> Höffe, 1989, p 152; Albrecht, 1994, p 137

<sup>158</sup> O’Neill, O., *Constructions of Reason*. Cambridge: Cambridge University Press, 1989. p 83

<sup>159</sup> O’Neill, 1989, p 88

that they are self-legislated: “the condition is regarded by the subject as holding only for his will” (CprR 5:19). It is this that distinguishes maxims from objective practical principles: as “principles that one makes for oneself” maxims hold only in relation to a particular agent’s will, whereas objective practical principles hold for all rational beings (CprR 5:19-20).<sup>160</sup>

The subjective nature of maxims means that they are not considered practical laws that bind necessarily; that is, they are not universally valid. As such, they cannot serve as the material basis for the moral law (CprR 5:19/27). However, as an agent’s practical principle of action, it is the maxim which determines the *moral worth* of that action. That is, the action’s moral worth depends on the moral content of the maxim it springs from.<sup>161</sup> This is not given materially, but rather by the form of its maxim: that is, whether it can satisfy the universalization requirement of the categorical imperative (CprR 5:27).<sup>162</sup> This is determined by the motive to act. Only if reason is the determining ground of the maxim is it “independent of conditions that are pathological”, and hence capable of holding (necessarily) for the will of every rational being (CprR 5:19-20). This is not to say that the specific formulation of the maxim is tested against the criterion of universalization; rather, it is the underlying principle or intention which is being tested.<sup>163</sup> It is this, in turn, which determines the moral worth of the action: only if the maxim is motivated by moral duty, and

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<sup>160</sup> Albrecht, 1994, p 138. However, as both Albrecht and O’Neill note, although maxims are the principles of particular agents at particular times, the same maxim may be adopted by a number of different agents (O’Neill, p 84)

<sup>161</sup> Timmerman, J., *Kant’s Groundwork of the Metaphysics of Morals: A Commentary*. Cambridge: Cambridge University Press, 2008, p 179

<sup>162</sup> Albrecht, 1994, p 137

<sup>163</sup> O’Neill notes problems with this reading of the universality test, “namely that it seems easy enough to formulate *some* principle of action for any act...which can meet the criterion of any universality test, whatever the act”. The example that O’Neill gives is that of genocide (1989, p 87).

not inclination, does it have moral content (G 4:398).<sup>164</sup> In the case of both moral permissibility and moral worth, then, the categorical imperative tests the agent's *motivation*, or the underlying determination of their will in formulating the maxim. It does not test the material content or outcome of the maxim itself. This is made explicit by Kant in his later second *Critique* discussion when he writes that "practical laws refer only to the will, without regard to what is attained by its causality" (CprR 5:21).

The *Groundwork's* moral principle, then, is a universality test that applies only to underlying intentions or principles in the form of maxims; it does not test the outward rightness of actions.<sup>165</sup> This provides a stark contrast with the object of Kant's *Doctrine of Right*, which is not concerned with determinations of the will, but rather gives laws directly for *actions* (MM 6: 389).<sup>166</sup>

Thus the universal law of right, so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with universal law, is indeed a law that lays an obligation on me, but it does not at all expect, far less demand, that I *myself should* limit my freedom to those conditions just for the sake of this obligation...When one's aim is not to teach virtue but only to set forth what is *right*, one may not and should not represent that law of right as itself the incentive to action (MM 6:231).

We are told explicitly that, when dealing with (strict) Right, the idea of the principle of duty as being "the law of your own will" is not applicable: "it does not at all expect, far less demand, that I *myself should* limit my freedom to those conditions

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<sup>164</sup> It is for this reason that O'Neill's point about the subjective nature of maxims not being one of heteronomous nature is important. For maxims to have moral worth, they must be capable of being motivated by the concept of duty, and not by inclination

<sup>165</sup> O'Neill, 1989, p 88. This is at odds with Rawls' interpretation of the CI-procedure, which I discuss in more detail in chapter 4

<sup>166</sup> Höffe, 1989, p 152

just for the sake of this obligation". In contrast to ethics, Right does not require that the idea of duty be the incentive to action; it simply requires the performance or omission of outward actions. As Ripstein puts it, "Ethical conduct depends upon the maxim on which an action is done; rightful conduct depends only on the outer form of interaction between persons".<sup>167</sup>

It is in this way that the idea of a maxim as the object of the categorical imperative helps illuminate the specifically ethical nature of the *Groundwork*. Specifically, it is the *Groundwork's* categorical imperative, and its "ethic of maxims", that restricts its focus to the personal domain of self-legislation (G 4:401n; CprR 5:19).<sup>168</sup> For as Höffe points out, it is ethics that gives a law for *maxims* of actions, that is, for self-imposed principles of the will:<sup>169</sup> "That I make it my maxim to act rightly is a demand that ethics makes on me" (MM 6:231). By contrast, Right takes externally mandated positive law as its object (MM 6:389). As such, the concept of a maxim is simply not appropriate when formulating a universal principle of Right. The categorical imperative is irrelevant to the external concerns of Right, which "has as its object only what is external in actions" (MM 6:232). This means that the supreme moral principle developed in the *Groundwork* cannot be applied to the Doctrine of Right.<sup>170</sup>

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<sup>167</sup> Ripstein, 2009, p 11

<sup>168</sup> "Ethic of maxims" is Höffe's term. Höffe, O. *Immanuel Kant*. Albany, NY: State University of New York Press, 1994, p 150

<sup>169</sup> Höffe, 1989, pp 151-2

<sup>170</sup> It should be noted that, despite his argument for an *ethical* focus in the *Groundwork*, Höffe in fact disagrees that the categorical imperative is not applicable to Right. Instead, he seeks the foundations of a general moral principle in that work, based on a twofold definition of ethics. So while the *Groundwork's* account of morality as self-constraint cannot be applied to the Doctrine of Right, this is ethics considered *formally*. *Materially*, however, he argues that there is something shared between ethical and juridical duties, in their content. That is, in the sense that juridical duties are duties at all, juridical duties fall under the requirement of the ethical duty to fulfil one's duties from moral motivation: they are, as we saw, "indirect ethical duties" (1989, p 154). It is in this sense that they have shared content, a shared determining ground, and are therefore not excluded from the morality presented in the *Groundwork*. Höffe therefore concludes that, "[m]aterially, therefore, the *Groundwork*



Thus on Höffe's conclusion, it seems that "the *Groundwork* does not lay the basis of the whole metaphysics of morals, but only part thereof, viz., ethics".<sup>171</sup>

As such, the concept of a maxim as the object of the categorical imperative serves to further explicate the difference between the two branches of Kant's metaphysics of morals. As a principle of the will, a self-given law, the concept of a maxim limits moral activity to the personal domain of self-legislation. This, as discussed in section 2, defines the ethical domain in contrast to the juridical, which is concerned with the public domain of social legislation:<sup>172</sup>

The concept of duty stands in immediate relation to a *law*...The formal principle of duty, in the categorical imperative "So act that the maxim of your action could become a universal *law*," already indicates this. Ethics adds only that this principle is to be thought as the law of *your* own will and not of will in general, which could also be the will of others; in the latter case the law would provide a duty of right, which lies outside the sphere of ethics (MM 6:389).

The reason this particular aspect of the distinction between ethics and Right is salient in the present context is that in employing it, I avoid the circularity that threatened above in appealing to the supposed morality of Right in supporting a reading of the *Groundwork* that allows for that morality. This circularity is avoided because maxims are not in and of themselves moral; they are simply the subjectively

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furnishes the basis for the entire *Metaphysics of Morals*; formally, however, it does so only for the second part, the Ethics" (1989, p 155). However, in his appeal to indirect ethical duties, Höffe is not, as he claims, drawing our attention to a "frequently overlooked two-fold definition of Ethics". Rather, what he is actually appealing to is a two-fold definition of *Right*; that of strict *Right* on the one hand, and duties of *Right* as indirect ethical duties on the other. And the *Groundwork*, in laying a foundation for a material conception of morality, only lays a foundation for the latter; that is, for duties of *Right* as indirect ethical duties. Höffe's argument therefore ethicizes *Right* in a similar way to Korsgaard's, and therefore provides a moral foundation for *Right* only insofar as it is a sub-section of ethics.

<sup>171</sup> Höffe, 1989, p 152

<sup>172</sup> Höffe, 1994, p 148

valid principles on which human beings act (CprR 5:19).<sup>173</sup> As such, this distinction does not need to be employed in defining the morality of ethics versus that of Right; rather, it serves as a way of distinguishing between the two domains distinct from that. It can therefore provide grounds for a specifically ethical interpretation of the *Groundwork* while remaining separate from the question of the moral status of Right.

### 3.2) *Defending the discrete nature of the ethical and juridical domains*

The above argument entitles me to conclude that the *Groundwork* does not offer a general foundation for morality, but rather only for ethics. This then frees us from the problem that the notion of moral incentive posed, apparently excluding juridical duties from Kant's doctrine of morals on grounds that they have no moral worth. To interpret the morality of Right in light of the account of morality in the *Groundwork* is to make a category mistake. It is to over-extend the reach of this text, and with it, to bring about the unwarranted ethicisation of Kant's moral theory. Once we acknowledge this, the absence of moral incentive and self-legislation no longer stands to exclude Right from Kant's doctrine of morals. Such criteria, while morally relevant to the domain of Virtue, do not constitute the morality of Right. Having established this defence against Wood's objection, this then opens the way to making a positive case for the morality of Right grounded in Kant's thematization of moral laws as laws of freedom. It is this which I will undertake in the following chapters.

Before drawing the discussion of ethics and Right to a close, however, I want to revisit the alternative way in which the ethicisation of morality impacts our

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<sup>173</sup> Timmerman, p 179

understanding of Kant's *Doctrine of Right* and its morality. That is, the problematic tendency on the part of Rawlsian interpretations to blur the distinction between the two domains. I discussed this with regard to Korsgaard in section 1.1, but want to now reinforce it in light of the strict division that I have argued for in this chapter. For while such interpretations do not lead to the exclusion of Right from Kant's doctrine of morals, as in Wood's case, they unavoidably skew interpretations of the morality of Right as a doctrine of external freedom. It also leads commentators to cast the problem of revolution as an *ethical* problem, one of autonomy, rather than as one of justice and external freedom in the state. This was seen in Korsgaard's interpretation, but is also the case in Thomas Hill, as discussed in the Introduction.

This tendency on the part of "Rawlsian-Kantians" to ethicise Right is noted by Höffe, who suggests that our understanding of Kant's legal philosophy is limited by an unwarranted focus on the *Groundwork* and the second *Critique*.<sup>174</sup> While Wood sees this as a barrier to a moral reading of Right, Rawlsians produce a reading of Kant's moral theory which rests on a prioritization of the ethical domain, under which Right is then subsumed as a sub-section of Kant's moral theory, rather than as a distinct domain. As Ripstein puts it, "the lesson that many have taken from...Rawls, whether rightly or wrongly, is that Kantians suppose that the autonomous life is the best one, and political institutions must be designed to promote autonomy".<sup>175</sup> According to these Rawlsian interpretations, morality, both personal and public, is defined by the ethical concerns of self-legislation and self-perfection. This results in an amalgamation of ethics and Right into a single, moral

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<sup>174</sup> Höffe, 1989, pp 149/153

<sup>175</sup> Ripstein, A., *Force and Freedom*. Harvard: Harvard University Press, 2009, p 11

domain, which has the effect not only of ethicizing Right, as in Korsgaard's case, but additionally, of politicizing ethics.

While I suggested in 1.1 that such a stance is implicit in Korsgaard's interdependent reading of the relationship between ethics and Right, the amalgamation of the two domains into a single moral system is explicit in Andrews Reath's reading of the Highest Good.<sup>176</sup> In opposition to traditional, theological interpretations of the Highest Good as the (material) end of ethics,<sup>177</sup> Reath argues for a secular, or "political" conception.<sup>178</sup> As opposed to positing ontological notions such as God and the afterlife in order to guarantee its realization through "divine agency",<sup>179</sup> Reath's political conception of the Highest Good relies on human agency in political society. On this interpretation,

the Highest Good [is] a social goal to be achieved in history through human agency and the ordering of social institutions.<sup>180</sup>

Reath's institutional emphasis is grounded in the third *Critique* and *Religion*, rather than the second *Critique* discussion, which is the source of the theological interpretation (CprR 5:115/124-6/129).<sup>181</sup> In particular, Reath leans on the *Religion's* notion of an ethical commonwealth (R 6:94). From this he takes the idea of a political society founded on moral principles, with institutions aimed at bringing about various moral ends.

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<sup>176</sup> Reath, A., "Two Conceptions of the Highest Good in Kant" in *Journal of the History of Philosophy*, 26:4 (1988: Oct.) pp 593-619

<sup>177</sup> For an example of a theological interpretation see Silber, J.R., "The Importance of the Highest Good in Kant's Ethics" in *Ethics*, Vol. 73, No. 3. (Apr., 1963), pp 179-197

<sup>178</sup> Reath, p 594

<sup>179</sup> Reath, p 613

<sup>180</sup> Reath, p 603

<sup>181</sup> Note that in this sense he does not fit Höffe's model of the Rawlsian Neo-Kantian who reads Kant's moral theory through the *Groundwork* and second *Critique*

The secular version is an ideal by which to guide our conduct. It tells us to aim at bringing about a world in which individuals can develop a morally good character, and have the ability and means to achieve their permissible ends. Further concrete guidance would follow from determining what arrangement of social institutions is needed for the realization of these ends, and how best to bring these social arrangements into existence.<sup>182</sup>

Reath therefore presents a reading of the Highest Good as the end of *ethics* on which duties of *Right* create the space in which individuals can pursue moral ends and develop a virtuous character.<sup>183</sup> Specifically, the Highest Good, understood as a political conception, “would be realized through a system of social institutions...[which] create conditions which would be conducive to moral conduct”:<sup>184</sup> man achieves happiness in proportion to virtue through guidance by a shared (institutional) system of moral principles.<sup>185</sup>

Reath ties our ethical duties in with those of *Right* using what he calls the principle of social cooperation, taken from the first *Critique* (CPR B837-8):

Kant suggests that some system of social institutions is needed as a stabilizing force—both as a source of moral education, but also to provide background conditions that are conducive to moral conduct and the maintenance of the moral disposition on the part of individuals.<sup>186</sup>

This is reminiscent of Korsgaard’s suggestion that the fulfilment of our ethical duty to protect and promote the rights and freedom of humanity is dependent on a particular state of affairs obtaining. While Korsgaard does not explicitly posit a particular kind of political society as a necessary condition of that fulfilment, she

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<sup>182</sup> Reath, pp 606-608

<sup>183</sup> Reath, p 616

<sup>184</sup> Reath, p 619

<sup>185</sup> Reath, p 615

<sup>186</sup> Reath, p 617

certainly presents man's political state of affairs as providing favourable background conditions in a way similar to Reath. This much is supported by Kant's writings, which suggest at times that moral progress is aided by favourable political conditions. For example in *Perpetual Peace* we are told that "the good moral education of a people is to be expected from a good state constitution" (PP: 8:366). However, in Reath's case this results in an amalgamation of the two domains, given by an interpretation of the Highest Good as the end of *ethics* in terms of a particular *socio-political* setup: "the moral law defines a final end, specifically a social goal of this sort".<sup>187</sup> Ethics and Right are thereby combined, through the concept of the Highest Good, into one single moral theory.

Reath acknowledges that his political conception of the Highest Good unifies the two branches of Kant's moral theory, though following Korsgaard, he subordinates Right (man's permissible ends) to ethics (man's duty of moral perfection).<sup>188</sup> However, while he is certainly correct that political society might promote an ethical disposition for Kant, this should not be extended to a reading of Kant's moral theory on which the domains of ethics and Right are integrated into a single moral theory of self-development. Insofar as both are concerned with man's agency and practical principles of action in the empirical world, there will inevitably be some crossover. However, from the arguments presented above, and the clear distinction between ethics and Right based on freedom and incentive, it should now be clear that Kant intended the domains to be discrete, and that interpretations such as Reath's and Korsgaard's, which make the two domains interdependent, are unwarranted. This is not just significant in presenting a reading of the normativity of Right as an

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<sup>187</sup> Reath, p 617

<sup>188</sup> Reath, pp 605/615-16

independent moral domain, but also confirms my conclusion from the previous chapter that if there is a conflict within Kant's moral theory concerning the problem of revolution, then that conflict must be located within the juridical domain, and not, as Korsgaard suggests, the ethical.

### *Conclusion*

I began this chapter with a discussion of the relationship between ethics and Right as the two branches of Kant's moral theory. This is necessary if we are to establish whether the dilemma proposed in chapter 1, between the procedures and end of justice, is possible on Kant's conception of Right. In defining Kant's *Doctrine of Right* in contrast to that of Virtue, my aim has been two-fold. Firstly, to illuminate the key characteristics of Right; namely, the lack of moral incentive, and the possibility of other-coercion. Secondly, it has been to dispute the amalgamation of ethics and Right into a single moral theory, and to defend Right as a discrete domain of Kant's doctrine of morals. In doing this, I dispute those who treat revolution as a problem of *ethics*, and confirm that it is a political question that is to be situated within the juridical realm. As such, I confirm my claim in the previous chapter that if there does exist a dilemma within Kant's metaphysics of morals with regard to his prohibition of revolution, then it is a dilemma that exists *within* the domain of Right.

However, in explicating the nature of Right as a discrete domain within Kant's doctrine of morals, we were brought up against a problem regarding its moral status. For in defining strict Right in its lack of any moral incentive, it appeared to be thereby excluded from Kant's definition of morality given by the *Groundwork*. If this conclusion held, then Kant's *Doctrine of Right* would not be a doctrine of moral

freedom, and we would therefore be deprived of an appeal to that freedom as the purpose of political society.

Aside from an analysis of the nature of Right, my main objective in this chapter has thus been to block Wood's argument that a strict division of Kant's doctrine of morals leads to the exclusion of Right. In doing this I have argued against the over-extension of the *Groundwork* and second *Critique* notions of morality, which make moral incentive and self-legislation a condition of moral action, by disputing the general nature of these works. I did this through emphasizing the volitional and self-legislative nature of Kant's "ethics of maxims" and its categorical imperative, and argued that the morality of Kant's Doctrine of Right should not be judged in light of their incentive-based morality. This neutralized the problem that an absence of moral motivation posed in the case of duties of Right, for the conception of moral worth which incentive underpins in the *Groundwork* is one that is applicable only to the *Doctrine of Virtue*, and not to that of *Right*.

However, in avoiding the conclusion that Right is excluded from Kant's doctrine of morals, this chapter only makes the negative argument for the morality of Right as a morality of external freedom. If the external laws of Kant's *Doctrine of Right* are to be defended as laws of moral freedom, then we must further investigate Kant's thematization of moral laws as laws of freedom. In particular, we must present a concept of moral freedom that is able to accommodate the external freedom of Right alongside the internal freedom of ethics. This will both support the claim that external laws are laws of moral freedom, as well as helping to explicate the precise nature of external freedom as the freedom of Right.



## Chapter 3

### "Merely" practical accounts of moral freedom

In the previous chapter I defended the possibility of a moral reading of Kant's *Doctrine of Right* grounded in his thematization of moral laws of inner and outer freedom. I argued that the absence of a subjectively given moral incentive and the possibility of external constraint do not exclude Right from Kant's doctrine of morals, as commentators such as Wood have argued. Such interpretations are based on a misreading of the *Groundwork* as a general grounding for morality, where in fact it provides a ground for ethics only. In this chapter I now begin the positive case for the morality of Right as a principle of external (outer) freedom. In doing so, Kant's concept of moral freedom must be construed more broadly than the purely ethical concept of autonomy given by the *Groundwork*, in order that it provide a ground for both the domains of ethics and of justice. This follows from the argument of the previous chapter, and my discussion of the distinction between ethics and Right, as based on internal and external freedom. If it is to provide the ground of Kant's moral theory, which also includes the external freedom of Right, then moral freedom cannot be equated with internal freedom, i.e. autonomy.

I begin with an outline of the broader debate on practical freedom within the Kantian literature, concerning its relation to transcendental freedom and Kant's metaphysics. This provides an overview of the nature of practical freedom, as well as laying out the context within which debates regarding moral freedom operate. Specifically, the relationship between practical and transcendental freedom underlies my critique of both Korsgaard's and Henry Allison's readings in this

chapter.<sup>189</sup> I then move to Korsgaard's account of moral freedom, which she characterizes as virtue. While this is symptomatic of her more general prioritization of ethics, this "ethicisation" of moral freedom is exacerbated by the purely practical nature of her account, which denies any metaphysical commitments within Kant's moral theory. I reject her account on this basis, as well as offering some interpretative reasons for moving beyond such a restricted reading of Kant.

In seeking to expand Kant's concept of practical freedom beyond the ethical concept of autonomy, I consider Allison's account, which defends a broader notion grounded in the concept of spontaneity as man's power of free choice. However, although Allison's reading could potentially accommodate the external freedom of Right, his interpretation relies on an account of rational agency that undermines a core element of Kant's moral theory, viz. the possibility of autonomous action. As in Korsgaard's case, this is a consequence of Allison's non-metaphysical commitments, and the reliance of his interpretation on his so-called Incorporation Thesis. Thus, while Allison's broadening of the concept of practical freedom is promising, it is undermined by his desire to avoid a metaphysical ground for freedom. It is for this reason that I reject Allison's account, arguing that we must turn to metaphysically grounded accounts in chapter 4.

### *1) Kant's two concepts of freedom*

In order to provide an account of practical freedom as the ground of Kant's moral theory, we must begin by taking a step further back into his metaphysics and his theory of freedom. This theory gives us two concepts – the practical and the

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<sup>189</sup> Allison, H. E., *Kant's Theory of Freedom*. Cambridge: Cambridge University Press, 1990

transcendental. Mapping out the relationship between the two is essential to understanding commentators' analyses of Kant's metaethics, and hence of practical freedom as the ground of moral agency. This is evident in the two accounts that I look at in this chapter, those of Korsgaard and Allison, both of which are motivated by a desire to avoid any appeal to the metaphysical concept of transcendental freedom. Instead, they seek to provide an account of moral freedom which exists entirely in the practical domain, independently of any metaphysical underpinnings. I argue that this undermines the plausibility of those accounts, though for contrasting reasons. In Korsgaard's case, her purely practical account of moral freedom as autonomy results in slide into the kind of determinism that Kant rejects in both the first and second *Critiques*. Conversely, Allison presents a concept of practical freedom sufficiently broad to include external freedom under its scope, grounding this concept on a *conceptual* (rather than *metaphysical*) dependence on transcendental freedom. This avoids Korsgaard's apparent slide into determinism, but has the effect of precluding the possibility of autonomous action. Both accounts therefore highlight the importance of a metaphysical concept of freedom in underpinning Kant's moral theory.

The distinction between transcendental and practical freedom appears in several of Kant's critical works, though most prominently in the first *Critique*. Here transcendental freedom is characterised as spontaneity, as having the power to begin a state (A448/B476). Practical freedom is described as "the will's independence of coercion through sensuous impulses" (A534/B562). So while transcendental freedom is the freedom from *any* determining stimulus, practical freedom is the *freedom from sensuous stimuli only*:

Stimuli are causes which impel the power of choice so far as the object affects our senses. This driving power of the power of choice can either necessitate, or by itself it can also only impel...[W]ith human beings the stimuli do not have necessitating power, but rather only impelling. Accordingly, the human power of choice is not brute, but rather free. This is the power of free choice, so far as is it is defined psychologically or practically. However, that power of choice which is not necessitated or impelled at all by any stimuli, but rather is determined by motives, by motive grounds of the understanding, is the intellectual or transcendental power of free choice (ML 28:255).

Practical freedom is therefore a concept that relates to human agency, to the human power of choice, whereas transcendental freedom is purely metaphysical.<sup>190</sup> It is on this basis that Allison characterises the distinction between practical freedom and transcendental freedom as one between human and divine freedom.<sup>191</sup> In contrast to a pathologically affected will, a transcendently free will is one that is not affected in any way by sensuous impulses. It is a causal will that cannot be determined by any external determining factors (A448/B476). As such, it is a merely negative concept, given by the *absence* of determining factors.

This is not the case for a practically free will, however. As Timmerman points out, Kant does not contrast practical freedom with determination per se; rather, it is to be contrasted with *the wrong kind* of determination.<sup>192</sup> So while the negative definition tells us what the will is *not* determined by – by sensuous impulses – the positive definition tells us what the will *is* determined by: the moral law (CprR, 5:28-9).<sup>193</sup> In providing a positive account of practical freedom, Kant's concern is to show that the

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<sup>190</sup> Wood, A., *Self and Nature in Kant's Philosophy*. Ithaca: Cornell University Press, 1984, p 76

<sup>191</sup> Allison, 1990, pp 59-60

<sup>192</sup> Timmermann, J., *Kant's Groundwork of a Metaphysics of Morals: A Commentary*. Cambridge: Cambridge University Press, 2008, p 122

<sup>193</sup> Wood, 1984, p 77

rational human will has the power to bring about certain *actions* or *events*. In order to be conceived as such a causality, then it must be determined by some laws (G 4:446). Were this not the case, it would, as Korsgaard puts it, be random, “conceived as acting and choosing for no reason”:<sup>194</sup> the idea of a free will “would be an absurdity” (G 4:446).

Kant makes the move from the negative concept of practical freedom to a positive concept in the third section of the *Groundwork*. Here he concludes that moral freedom can be nothing other than that of a *self*-determining will:

Natural necessity was a heteronomy of efficient causes, since every effect was possible only in accordance with the law that something else determines the efficient cause to causality; what, then, can freedom of the will be other than autonomy, that is, the will’s property of being a law to itself? (G 4:446-7)

This provides Kant with a positive concept in the form of the will’s self-legislation in accordance with pure practical reason,<sup>195</sup> supported by the following first *Critique* passage where Kant discusses different determining influences on the will:

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<sup>194</sup> Korsgaard, C., “Morality as Freedom” in *Creating the Kingdom of Ends*. Cambridge, Cambridge University Press, 2000, p 163

<sup>195</sup> Note that Kant does not mean self-determining in the sense that the *agent* determines their *will*; i.e. that they determine their will to their subjective ends. Rather it is the will itself that is self-determining through pure practical reason. This is ambiguous in some commentator’s accounts, for example in Allison’s quoted below, in which he talks of practical freedom as the capacity to determine *oneself*. Here the self-determination of the agent is implied, rather than that of the will.

For the human will is not determined by that alone which stimulates, that is, immediately affects the senses; we have the power to overcome the impressions on our faculty of sensuous desire, by calling up representations of what, in a more indirect manner, is useful or injurious. But these considerations, as to what is desirable in respect of our whole state, that is, as to what is good and useful, are based on reason. Reason therefore provides laws which are imperatives, that is *objective laws of freedom*, which tell us *what ought to happen* – although perhaps it never does happen – therein differing from *laws of nature*, which relate only to *that which happens* (A802/B830).

The practically free will is one that is determined by the laws of freedom given by pure practical reason; in Allison's words, "the positive capacity to determine oneself to act on rational grounds".<sup>196</sup> Kant later comes to refer to this as autonomy, which is why commentators have come to equate practical freedom with this concept.<sup>197</sup>

I will take issue with this interpretation of Kant's positive conception of practical freedom as autonomy in section two. First, though, I must say something about the relationship between practical and transcendental freedom, as this will be important in understanding the way in which I take issue with such accounts. This relationship is the source of much controversy and debate in the literature on Kant's metaphysics, due to apparently conflicting accounts in the first *Critique*. On the one hand, Kant tells us in the Dialectic that "the practical concept of freedom is based on this *transcendental* idea" (A533/B561), implying that practical freedom is therefore impossible without transcendental freedom:

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<sup>196</sup> Allison, 1990, p 59

<sup>197</sup> see for example Allen Wood, who argues that "practical freedom consists in the *capacity* for autonomous action" (1984, p 79)

Obviously, if all causality in the sensible world were mere nature, every event would be determined by another in time, in accordance with necessary laws. Appearances, in determining the will, would have in the actions of the will their natural effects, and would render the actions necessary. The denial of transcendental freedom must, therefore, involve the elimination of practical freedom. For practical freedom presupposes that although something has not happened, it *ought* to have happened, and that its cause, [as found] in the [field of] appearance, is not, therefore, so determining that it excludes a causality of our will (A534/B562).

Practical freedom, according to this passage, is dependent on transcendental freedom, as without it, our agency cannot exist independently of the causality of nature; our actions are solely the product of natural determination and our will becomes redundant. This gives what is commonly referred to as an incompatibilist interpretation of practical freedom. However this is only one of the accounts that Kant gives. In the Canon, he suggests, by contrast, that practical freedom is completely independent of transcendental freedom, and can be established through experience alone; no metaphysical concept is required (A803/B831). Furthermore, Kant tells us that practical freedom is “sufficient enough for morality” (ML 28:267), apparently a direct contradiction of the passage from the Dialectic where he suggests that without transcendental freedom grounding a will independent from nature, there can be no morality.

This apparent lack of unity in Kant’s thought has given rise to exegetical problems as commentators seek to explain, or reconcile, these contrasting accounts. A number of different approaches have been taken. Karl Ameriks, for example, argues that we can interpret practical freedom as being sufficient for morality, as suggested by the Canon, whilst still maintaining its dependence on transcendental freedom, as per

the Dialectic.<sup>198</sup> This is possible if we understand Kant's sufficiency claim to be referring not to the *nature* of moral freedom, but rather to our *knowledge* of that freedom.<sup>199</sup> That is, because we cannot have a theoretical proof of absolute freedom, due to the limitations of speculative reason (CprR 5:47), we are limited to a proof or warrant that is merely practically sufficient. Thus Ameriks concludes that what Kant "really believes is that transcendental freedom is needed (and provable), but that our proof of this freedom is to be called 'merely practically' sufficient."<sup>200</sup>

Alternatively, Allison seeks to reconcile the two sections by arguing that practical freedom is dependent on transcendental freedom, as per the Dialectic, but that this dependence is only conceptual, not metaphysical. That is, we must appeal to the *idea* of transcendental freedom if we are to conceive of ourselves as practically free, but we need not actually *be* transcendently free.<sup>201</sup> For Allison then, transcendental freedom is conceptually necessary to morality, as per the Dialectic, but in practice, practical freedom is, as the Canon claims, sufficient.<sup>202</sup> I will address Allison's position in more depth in section 3. Again though, it should be noted that in

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<sup>198</sup> Ameriks, K., *Interpreting Kant's Critiques*. Oxford: Oxford University Press, 2003, p 165

<sup>199</sup> Ameriks, p 164

<sup>200</sup> Ameriks, p 165. I return to Kant's proof of transcendental freedom in chapter 4.

<sup>201</sup> Allison, 1990, pp 57-8

<sup>202</sup> Note that in both cases, transcendental freedom is appealed to as an *idea*, or speculative concept used to ground practical freedom; both avoid an appeal to the actuality of transcendental freedom. In this sense, both Ameriks and Allison seek to occupy the ground in between the traditional compatibilist / incompatibilist positions, which tend to fall along the lines of a defence or denial of a proof of transcendental freedom: incompatibilism invokes (and defends) the actuality of transcendental freedom as the ground of practical freedom, whereas compatibilism denies its actuality, and instead defends the compatibility of practical freedom with full determination by the causality of nature. Ameriks straddles this divide by denying a proof of transcendental freedom, and as such aligns himself with compatibilists, but nonetheless argues for the necessity of an appeal to transcendental freedom in grounding practical freedom (2003, pp 164-5). By contrast, Allison takes himself to be defending an incompatibilist conception of freedom, but one which makes no appeal to a metaphysical concept of freedom. As such Ameriks describes Allison's position as a "non-noumenal version of incompatibilism" (Ameriks, 2003, pp 213-220). For further discussion of these issues more generally, see Rosen, M., "Kant's Anti-Determinism" in *Proceedings of the Aristotelian Society, Vol. 89 (1988-1989)* and Wood, A., "Kant's Compatibilism," in A. Wood (ed.) *Self and Nature in Kant's Philosophy*. Ithaca: Cornell University Press, 1984.



addressing the question of the relationship between practical and transcendental freedom, my concern is not with the exegetical problem of reconciling the different parts of the first *Critique*. Nor am I concerned with how we are to navigate around the problem of a lack of any proof for transcendental freedom. Rather, the debate regarding this relationship is relevant in the way that it motivates commentators' accounts of practical freedom, as the ground of Kant's moral theory, and specifically, the effect that a denial of any metaphysical dependence has on those accounts.

## ***2) Korsgaard's purely practical account of moral freedom***

### *2.1 Korsgaard's argument for a purely practical reading of moral freedom*

I turn now to Korsgaard's account of freedom in her article "Morality as Freedom". Here, the purely practical nature of her interpretation is evident from the very start, when she affirms the "radical nature of Kant's separation of theoretical and practical reason, and of their respective domains of explanation and deliberation".<sup>203</sup> Once these domains are separated, Korsgaard argues, we see that Kant is not committed to providing any metaphysical account of moral freedom, but rather to a certain conception of freedom as moral virtue. This characterization of freedom as virtue comes about through her understanding of the function of freedom in Kant's moral theory:

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<sup>203</sup> Korsgaard, 2000, p 160

The role of the idea of freedom and the intelligible world [in Kant's moral theory] is...a practical one. It provides a conception of ourselves which motivates us to obey the moral law.<sup>204</sup>

According to Korsgaard, the concept of freedom is not a metaphysical question for Kant, but rather is necessitated by his moral theory. Specifically, it is required by the fact that, as imperfect beings, we cannot be motivated by the objective necessity of the law alone. Instead, as purposive beings, we must always act for the sake of an end.<sup>205</sup> It is in this sense that the role of practical freedom "provides a conception of ourselves which motivates us to obey the moral law": it allows us to think of ourselves as free, and therefore as beings who are subject to the moral law.<sup>206</sup> This idea of a "higher vocation" motivates us to contribute to the moral idea of the Highest Good in the adoption and pursuit of moral ends, such as our own perfection and our furtherance of the happiness of others.<sup>207</sup> However, though we are motivated to act *according* to the moral law, Korsgaard reminds us that it is not sufficient that we merely act for moral ends; "we must also do so *because* they are moral ends".<sup>208</sup> Freedom is the determination of the will by non-sensible grounds. Hence if we are to act morally then we must act *for the sake* of the law. It is for this reason that Korsgaard refers to the free pursuit of moral ends as "a kind of internal action", and adopts the term "freedom as virtue".<sup>209</sup> In doing so, she equates practical freedom with the concepts of self-legislation and autonomy, and marks it out as an ethical concept.

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<sup>204</sup> Korsgaard, 2000, pp 174-5

<sup>205</sup> Korsgaard, 2000, pp 176-7

<sup>206</sup> O'Neill refers to this as the "practical indispensability of viewing ourselves as free". O'Neill, O., *Constructions of Reason*. Cambridge: Cambridge University Press, 1989, p 55

<sup>207</sup> Korsgaard, 2000, p 179

<sup>208</sup> Korsgaard, 2000, pp 169 / 178-9

<sup>209</sup> Korsgaard, 2000, p 179

Korsgaard adopts this account as a result of two underlying commitments. Firstly, there is her “ethicisation” of Kant’s moral theory, which I have discussed in the previous two chapters. Within this broader interpretation of morality, she will naturally be led to an account of freedom that is biased towards the ethical branch of Kant’s moral theory. Secondly, there is her commitment to providing a purely practical, non-metaphysical account of morality, which makes no appeal to the concept of transcendental freedom. According to Korsgaard, establishing theoretical freedom makes no difference to our moral agency. What is important for morally free action is not a “theoretical assumption necessary to decision”, but rather the practical standpoint from which we make our decisions.<sup>210</sup> To be free is to view ourselves as moral agents making morally relevant choices:

The standpoint from which you adopt the belief in freedom is that of the deliberating agent...Thus it is primarily your own freedom that you are licensed to believe in...It is true that you are supposed to regard others as free, and to treat them accordingly. But the necessity of doing so comes from the moral law, which commands the attribution of freedom to persons, and not from theoretical reasoning about how their wills actually function.<sup>211</sup>

Korsgaard takes this from the *Groundwork* characterization as acting “under the idea of freedom” (G 4:448). For Korsgaard this means that being practically free is to simply *think* of ourselves as such.<sup>212</sup> From our consciousness of our capacity for reason and hence our status as rational beings, we are necessarily led to the idea of our freedom and our moral agency (G 4:453). This, Kant argues, is sufficient for moral action, regardless of the actuality of our freedom: “For even if the latter is left unsettled, still the same laws hold for a being that cannot act otherwise than under

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<sup>210</sup> Korsgaard, 2000, p 163

<sup>211</sup> Korsgaard, 2000, p 174

<sup>212</sup> Korsgaard, 2000, p 162

the idea of its own freedom as would be in a being that was actually free" (G 4:448n). Hence, Korsgaard concludes, no theoretical conception of freedom is required for agency. To be practically free is a matter of our internal attitude and the way in which we think of ourselves; it is to simply act *as if* we were free.<sup>213</sup>

## 2.2) Transcendental idealism, determinism, and acting as if we are free

As noted above, Korsgaard's identification of practical freedom with the ethical concept of self-legislation unavoidably narrows its relevance to Kant's *Doctrine of Virtue*. This is deliberate on Korsgaard's part, and is acknowledged in her identification of "Kantian ethical philosophy" as the subject of debate.<sup>214</sup> She explicitly identifies practical freedom as a problem of *moral motivation*: freedom depends on our being able to act according to the moral law for the sake of our freedom.<sup>215</sup> Hence practical freedom is understood as an internal matter. Proving the theoretical existence of freedom independent of our agency is simply not required by morality.

Korsgaard's reading is not without textual support. As I will discuss in the next chapter, she is correct to draw out the importance of our consciousness of the moral law. We are also told explicitly in the *Groundwork* that a free will is a will under moral laws, and that autonomy of the will serves as the supreme principle of morality (G4:440/447). This is repeated in the second *Critique* (CprR, 5:33/9). As

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<sup>213</sup> Korsgaard, 2000, p 176

<sup>214</sup> Korsgaard, 2000, p 159

<sup>215</sup> Korsgaard, 2000, p 176. Note that in this, Korsgaard's argument suggests both that we assume our freedom for the sake of morality, and that we act morally for the sake of our freedom. Insofar as Korsgaard ultimately adopts a compatibilist position on which we need only act "as if we were free", it seems she assumes that morality takes priority. This is confirmed by the title of the article itself, "Morality as Freedom".

discussed in chapter 2, Kant clearly equates practical freedom with autonomy in these works, going on to claim that this concept of autonomy provides the grounding principle for *morality in general*. However, I have argued against such a narrowing of Kant's moral theory based solely on these works. As such, an account such as Korsgaard's that conflates practical freedom and the *Groundwork* definition of autonomy is skewed and incomplete.

The second problem Korsgaard faces is her failure to situate her account within Kant's wider theory of freedom. As noted above, this narrow reading of practical freedom is in part due to her ethicisation of morality, and her prioritization of the *Groundwork* and second *Critique* over Kant's other critical works. But it is also motivated by her desire to avoid making any metaphysical commitments. However, in failing to take account of the first *Critique* account of agency, and the relationship it posits between practical and transcendental freedom, Korsgaard encounters serious interpretative problems. The most pressing of these is how a purely practical account can deal with Kant's anti-determinism:

Obviously, if all causality in the sensible world were mere nature, every event would be determined by another in time, in accordance with necessary laws. Appearances, in determining the will, would have in the actions of the will their natural effects, and would render the actions necessary (A534/B562).

Kant's argument here for the necessity of transcendental freedom turns on the claim that without it, that is, without any spontaneous first cause, all events would be natural effects, determined by the laws of nature (A536/B564). Consequently, all actions would be rendered products of previous events in time, and therefore causally necessitated. Kant rejects this as a possibility, giving a clear indication that he does not view full determination by natural causes as being compatible with

freedom.<sup>216</sup> This anti-determinism is later confirmed in the second *Critique*, where Kant argues that the idea of a being that exists solely as one determined in time means that “freedom would have to be rejected as a null and impossible concept” (CprR 5:95). In order to avoid such a conclusion, we must therefore ascribe causality in accordance with the laws of nature only to man’s *appearance*, and “*ascribe freedom to the same being as a thing in itself*”. Only through an appeal to transcendental freedom can the “mutually repellent” concepts of freedom and natural causality be reconciled (CprR 5:95).

Kant’s anti-determinism is also consistent with the claims of the third antinomy, where Kant argues that natural causality is not the only type of causality, and that there must be a spontaneous free cause that is independent of the natural chain of cause and effect. If this were not the case, then we would be left with a self-contradictory concept of nature (A446/B474). For without a spontaneous beginning, everything would take place according to nature’s causal chain. There could then be only relative beginnings, and “no completeness of the series on the side of the causes that arise the one from the other” (A446/B474).<sup>217</sup> That is, there would be no first cause, and therefore no beginning to the chain: we would be left with an infinite series of causes.<sup>218</sup> Although, as Allison points out, this might appear only to establish the negative argument that natural causality is not the *only* causality, he

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<sup>216</sup> Wood, 1984, p 73. Note that this returns us to the debate discussed in section 1, regarding the apparent conflict between the Dialectic (quoted above) and Canon accounts of freedom. In contradiction to the position I take here, the latter is often taken to suggest a compatibilist (determinist) account of freedom. However, given Kant’s re-statement of the Dialectic position in both the second *Critique* and the *Groundwork*, I take him to be offering some kind of anti-determinist account. As such, while I do not go into the precise nature of that account in this thesis, I do commit to the general nature of his anti-determinism as outlined here. I discuss this more below in relation to his transcendental idealism.

<sup>217</sup> Allison, 1990, p 15

<sup>218</sup> Beck, L.W., *A Commentary on Kant’s Critique of Practical Reason*. Chicago and London: The University of Chicago Press, 1960, p 184

suggests that Kant takes there to be no more than two types of causality in all.<sup>219</sup> Thus a negative argument against natural causality amounts to a positive argument for the existence of some kind of dynamical causality, that is, freedom as spontaneity.

Kant's arguments against determinism are grounded in his metaphysics, and Korsgaard may simply deny that they have any relevance when it comes to the position that she takes on moral freedom. A strict division between the practical and theoretical domains means that from a practical perspective, it simply does not matter how we answer the metaphysical question regarding the possibility of a spontaneous causality. Our solution to the problem of determinism has no relevance to whether we are practically free. All that is required for free action in the practical domain is that we act *as if* we are free.

However, Korsgaard's reading is unsatisfactory in two respects. Firstly, her argument that the metaphysical and practical domains are "radically separate" is unsound. Kant clearly ties the two together in his analysis of freedom in the first *Critique*. Here he argues that practical freedom presupposes a distinction between what *has* happened and what *ought* to have happened, which is a distinction that would be impossible to maintain on a deterministic metaphysics that makes no appeal to theoretical freedom:

practical freedom presupposes that although something has not happened, it *ought* to have happened, and that its cause, [as found] in the [field of] appearance, is not, therefore, so determining that it excludes a causality of our will (A534/B562).

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<sup>219</sup> Allison, 1990, p 15

It is only with the idea of a first beginning that practical freedom is conceivable to us (A448/B476-A450/B478). A concept of moral freedom that has no appeal to the spontaneity of transcendental freedom would result in all our actions being part of the natural chain of cause and effect. We would not, as morality requires, be able to determine events from within ourselves according to our own legislative reason.<sup>220</sup> Such a conclusion would therefore leave no room for freedom, and hence would undermine the possibility of moral agency grounded in that freedom: “without this freedom (in the [transcendental] and proper sense), which alone is practical a priori, no moral law is possible and no imputation in accordance with it” (CprR 5:97).

It is clear from this that one of Kant’s main motivations in appealing to the concept of *transcendental* freedom is to secure the possibility of morality as a *practical* concern. This link between transcendental freedom and free agency is identified by Allison as early as the third antinomy, where Kant discusses the “psychological conception” of freedom, which we later come to know as practical freedom, the freedom of human agency. This, Allison argues, suggests that “intertwined with the official cosmological conflict is an antinomy of agency, which concerns the conditions under which an action may be attributed to an agent”.<sup>221</sup> This is significant, as this tripartite concern with transcendental freedom, agency and morality, mentioned above, indicates that the connection between transcendental and practical freedom goes two ways: not only does Kant’s moral theory require a relationship between the two, but his metaphysics also suggests such a link. The link between transcendental and practical freedom should therefore not be thought of as an afterthought on Kant’s part designed to “save” morality. For as Peter

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<sup>220</sup> Wood, 1984, p 77

<sup>221</sup> Allison, 1990, p 25



Strawson observes, while Kant thought his transcendental idealism had merit in making room for faith in human freedom and justice, he did not use the idea of morality to *justify* that transcendental idealism.<sup>222</sup> Rather, the connection between the practical and theoretical domains is built into Kant's philosophy from the first *Critique* onwards.

Korsgaard's claim that the practical and theoretical domains can be entirely divorced is therefore implausible. Kant's moral theory is grounded in his non-determinist metaphysics: if we are to retain the possibility of morality then we must assume theoretical freedom on practical grounds. This brings me to the second way in which Korsgaard's interpretation is disputable, i.e. its slide into a kind of fatalism. In order to appreciate this, it is necessary to look more closely at Kant's particular solution to the problem of determinism, in the form of his transcendental idealism.

According to Kant's transcendental idealism we belong to both the sensible world, where our will is determined by the laws of nature, and to a possible intelligible world, in relation to which we necessarily think of ourselves as determined by reason (G 4:452). This means that we regard a single event as being both *free* and *determined*:

the effect may be regarded as free in respect of its intelligible cause, and at the same time in respect of appearances as resulting from them according to the necessity of nature (A537/B565).

In taking these two different perspectives, we do not literally imagine two alternative "worlds", one in which the event is free and one in which it is determined. As Michael Rosen points out, this would provide a rather empty

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<sup>222</sup> Strawson, P., *The Bounds of Sense*. London: Methuen & Co. Ltd., 1966, p 241

concept of freedom, which would be of no use to us regarding questions of morality and responsibility.<sup>223</sup> It would also commit Kant to the kind of realist metaphysics that he explicitly denies (G 4:458).<sup>224</sup> Rather, transcendental idealism tells us that we must take two different *points of view* with regard to a single occurrence, giving us “two distinct ways in which the objects of human experience may be ‘considered’ in philosophical reflection”.<sup>225</sup> Neither perspective has transcendent reality, but both are equally ineliminable in allowing us to conceptualise our free agency in the empirical world of natural causality.<sup>226</sup> As free agents acting in the sensible world under moral obligation, “we regard ourselves as belonging to the world of sense and yet at the same time to the world of understanding” (G 4:453).<sup>227</sup>

The two perspectives that transcendental idealism offers thus allow for the possibility of free (moral) action in a causally determined world. It is this that underpins Kant’s anti-determinism, and provides him with a solution to the third antinomy: the world is both causally determined, and a place where practically free action can take place. Crucially, these two points of view allow for the idea that an

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<sup>223</sup> Rosen, M., 1989, p 128. Just because we can conceive of an alternative, transcendental world in which an action free (and therefore blameworthy), this does not mean that the action performed in this world, the empirical world, is similarly free, and therefore similarly culpable.

<sup>224</sup> O’Neill, 1989, p 69

<sup>225</sup> Allison, 1990, pp 3-4

<sup>226</sup> O’Neill, 1989, p 60

<sup>227</sup> These issues are contentious on several fronts. I do not go into the details of different interpretations of Kant’s transcendental idealism here, and debates concerning the precise way that it reconciles freedom and necessity. My intention here is simply to note the idea of freedom alongside that of necessity on Kant’s transcendental idealism. For further discussion of differing views on the relationship between the sensible and intelligible worlds, and Kant’s theoretical philosophy and morality, see O’Neill, 1989; pp 51-65; Ameriks, 2003, esp. pp 161-192; Strawson, 1966, pp esp. pp 235-273; and Allison, 1990, pp 3-4 & 71-82. A full-length account of Allison’s interpretation of Kant’s transcendental idealism is given in Allison, H., *Kant’s Transcendental Idealism*. New Haven & London: Yale University Press, 1983.

action *could* have been otherwise,<sup>228</sup> making it possible for us to take a normative standpoint with regard to human action. Yet this possibility is missing from Korsgaard's account. According to her reading, we are practically free even if we *know* ourselves to be fully determined in a mechanistic sense (by a robot). To be free is to simply *think* of ourselves as such, even when we *know* we are not: "the point is not that you must *believe* that you are free, but that you must choose *as if* you were free".<sup>229</sup> Korsgaard's merely practical account of moral freedom thus appears inconsistent with Kant's anti-determinism, a result of her refusal to acknowledge the dependence of the practical domain on the idea of a possible intelligible realm.

Korsgaard takes this idea of acting as if we were free from the *Groundwork* idea that to act morally is to act "under the idea of freedom" (G 4:448). Drawing from Kant's claim that "every being who cannot act except *under the idea of freedom* is by this alone - from a practical point of view - really free" (G 4:448), she argues that freedom in a practical respect simply requires that we *think* of ourselves as free. This practical aspect does not require any appeal to theoretical freedom; hence we may still be considered free in the case of the robot experiment:

Kant's answer to the question of whether it matters if we are in fact (theoretically) free *is* that it does not matter.<sup>230</sup>

It is in this that she is wrong. For while Kant argues that a *proof* of theoretical freedom does not matter to our practical freedom, he makes it clear that it does so in its *possibility*. So while practical freedom does not require appeal to an *actual* concept

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<sup>228</sup> Rosen, M., p 132

<sup>229</sup> Korsgaard, 2000, p 162

<sup>230</sup> Korsgaard, 2000, p 176

of transcendental freedom, it does require an *assumption* of that freedom.<sup>231</sup> This is the main thrust of the arguments in the first and second *Critiques* discussed above, and the conclusion of Kant's transcendental idealism. While we may not *know* ourselves to be theoretically free, if we are to even *conceive* of ourselves as practically free—to act *as if* we are free—then we must make appeal to Kant's transcendental idealism and the idea of transcendental freedom.

Korsgaard is therefore wrong to claim that the question of theoretical freedom does not matter at all to Kant's practical philosophy. For in abandoning it, we are, Kant tells us, unable to act under the idea of freedom in any morally meaningful sense. Instead, we are simply like the "confirmed fatalist" who, despite his fatalism, "must still, as soon as he has to do with wisdom and duty, always act *as if he were free*" (RS 8:13). Once we realise this, the slide back into determinism seems inevitable for Korsgaard. She tries to avoid this through reference to the *practical standpoint* that we take in acting as if we were free. Crucially however, when we take this standpoint on Korsgaard's account, we do not think of ourselves as free in the sense that the *Groundwork's* normative standpoint requires; that is, as a free agent independent of a causally determined world. Rather, we think of ourselves as free in the way the confirmed fatalism thinks of himself as free: because it is required by norms and practices. On Korsgaard's account, we do so in order to avoid sabotaging our engagement with the thought processes required by the determining robot:

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<sup>231</sup> This is Ameriks' point, discussed in section 1, when he argues for an account of practical freedom on which we take the *assumption* of transcendental freedom to have practical warrant.

the important point here is that efforts to second guess the device cannot help you decide what to do. They can only prevent you from making any decision. In order to *do* anything, you must simply ignore the fact that you are programmed, and decide what to do—just as if you were free.<sup>232</sup>

Korsgaard's practical standpoint is therefore not the practical standpoint of the *Groundwork*, on which we think of ourselves as free agents, independent of the mechanism of nature. Rather, thinking of ourselves as free according to Korsgaard's account is to *recognise* that we are fully determined, but to *ignore* that fact in our thought processes in order that we are able to continue with our day-to-day practices. It is the practical standpoint not of a morally free agent, but of Kant's confirmed fatalist.

Korsgaard's purely practical account therefore leads her to present a reading of moral freedom which is explicitly denied by Kant. This is due to her failure to understand the deeper connection between the practical and theoretical elements on Kant's transcendental idealism. On this two-aspect view, Kant makes provision for freedom within a causally determined world, thereby allowing us to think of ourselves as free in a morally relevant sense, as required by the normative standpoint in the *Groundwork*. It is on these grounds that we may object to Korsgaard's purely practical account, both in the wider context of Kant's transcendental idealism, and with specific reference to his moral theory. Firstly, in her characterization of freedom as virtue, she narrows practical freedom to the domain of Virtue, making it inapplicable to the *Doctrine of Right*. This is inconsistent with the inclusive reading of Kant's metaphysics of morals that I argued for in the previous chapter. Secondly, I have objected to her account in its avoidance of

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<sup>232</sup> Korsgaard, 2000, p 163

making any metaphysical commitments. This purely practical account not only exacerbates her ethicisation of Kant's moral theory, by making practical freedom a matter that is purely internal to the agent in the way that they view themselves; it also yields an account that slides into a kind of fatalism. This is interpretatively inconsistent with Kant's anti-determinism in both the first and second *Critiques*, and undermines the possibility of genuine moral agency as Kant characterizes it.

### ***3) Practical freedom as spontaneity in Henry Allison's "merely practical" account***

I turn now to Henry Allison's account of practical freedom, which provides an attractive alternative when considering the problems which Korsgaard's account faces. Firstly, Allison's concern with freedom is to provide a basis for Kant's theory of rational agency, rather than for his moral theory exclusively.<sup>233</sup> As such he builds his account primarily out of the first *Critique*, rather than the moral works of the *Groundwork* and second *Critique*. This separates the concepts of moral freedom and autonomy, which were collapsed by Korsgaard's account, and allows Allison to extend the concept of practical freedom beyond the confines of the ethical domain.<sup>234</sup> Secondly, Allison acknowledges the link between transcendental and practical freedom as per the Dialectic of the first *Critique*, and hence avoids the interpretative problems which Korsgaard faces regarding the relationship between Kant's practical philosophy and his transcendental idealism. The latter is secondary to my concern regarding the nature of practical freedom as a ground for morality

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<sup>233</sup> Allison, 1990, pp 29/35

<sup>234</sup> Note that his concern in doing this is not to provide a concept of practical freedom that can include external freedom under its scope, as is my intention. Rather, his aim is broader, in providing a concept that extends not just beyond Kant's ethical theory, but beyond his moral theory entirely, to a theory of rational agency that includes, but is not limited to, moral agency.

and specifically for Kant's *Doctrine of Right*, but, as we saw in Korsgaard's case, it is integral to providing a plausible account on Kant's wider theory of freedom.

Given that Allison's account is primarily motivated by this latter interpretative concern, I begin with his account of the relationship between practical and transcendental freedom and his discussion of Kant's anti-determinism. It is within the context of this argument that he offers a theory of rational agency grounded in the broader concept of practical freedom as a capacity for spontaneous free choice according to practical principles. I offer an outline of his overall position in this first section, followed by a deeper analysis of his account of practical freedom as rational deliberation in the second. I then move on to a critique of this account in section 4, arguing that while it is appealing in navigating us around the problems Korsgaard's account posed, it fails to recommend itself as a ground for Kant's critical moral theory due to the fact that, by Allison's own admission, it precludes the possibility of autonomous action.

3.1) *Allison's "merely practical" account of moral freedom and its relationship to the transcendental concept*

Allison's aim in his analysis of Kant's theory of freedom is to provide an incompatibilist account of freedom as suggested in the *Dialectic*, but one which is dependent on transcendental freedom only in the weakest sense. His intention in providing such a reading is to allow for a genuine account of freedom, while avoiding the interpretative problems that an appeal to the actuality of freedom brings with it. The idea of "genuine freedom" is given by what Allison refers to as an activity requirement of rational agency. In contrast to compatibilist accounts, on

which he argues that free action is simply something that “happens” to an agent, genuine freedom underpins action as something that an agent *does*.<sup>235</sup> This activity is grounded in the idea of transcendental freedom as a spontaneous causality independent of the mechanism of nature. However, in order to avoid confronting the problem of proving the actuality of that freedom, a debate that is central in the compatibilist-incompatibilist dispute,<sup>236</sup> Allison argues that the dependence of practical freedom on transcendental freedom is merely *conceptual*, rather than metaphysical. That is, it simply serves as a *regulative idea* in the way that we think of ourselves as practically free agents.<sup>237</sup>

Allison argues for a regulative role for the transcendental idea on grounds that spontaneity “is a condition of the possibility of taking oneself as a rational agent, that is, as a being for whom reason is practical”.<sup>238</sup> We get this idea of spontaneity from the concept of transcendental freedom, “which provides the content to the otherwise empty thought of an intelligible character”. It is in this respect that rational agency as practical freedom is dependent on the theoretical concept of freedom, in providing us with the idea that we can initiate causal series' as first beginnings. However, Allison argues that its dependence is only *conceptual*, rather than *actual*, as practical freedom does not make appeal to the reality of transcendental freedom. Instead, the idea plays a regulative role in our understanding of ourselves as rational agents:

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<sup>235</sup> Allison, 1990, p 28

<sup>236</sup> See for example Ameriks' discussion pp 166-177

<sup>237</sup> Allison, 1990, p 45

<sup>238</sup> Allison, 1990, p 45



the transcendental idea of freedom might be viewed as performing a modelling or regulative function with respect to the conception of ourselves (or others) as rational agents. Consequently, it foreshadows an essential feature of the Kantian conception of rational agency.<sup>239</sup>

The idea of transcendental freedom plays this regulative function in our self-conception as rational agents by providing “a model of deliberative rationality, which includes, as an ineliminable component, the thought of practical spontaneity”. That is, the idea of beginning a state, or of “self-determination”.<sup>240</sup> It is this idea that constitutes our rational character independent of the causality of nature: a spontaneity of understanding which involves our taking certain imperatives as an appropriate basis for action, and framing certain ends or “ought-to-bes” according to reason. The idea of spontaneity therefore takes us “beyond what is dictated by sensible data” to a conception of rational agency which meets Kant’s activity requirement, and hence an incompatibilist conception of freedom.<sup>241</sup>

Allison’s interpretation of practical freedom as rational deliberation is therefore dependent on the transcendental concept in its appeal to the idea of beginning a state or starting a series; of determining a sequence of events free from the mechanisms of nature. However, aside from this shared idea, these two concepts of freedom as spontaneity—the one transcendental, the other practical—are distinct. For while transcendental freedom is defined negatively as the freedom from any influence in the noumenal world, the spontaneity of practical freedom is defined by Allison as a positive conception of freedom as self-determination in the phenomenal world. In his appeal to transcendental freedom, Allison simply lifts the idea of

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<sup>239</sup> Allison, 1990, p 27

<sup>240</sup> Allison, 1990, p 45

<sup>241</sup> Allison, 1990, pp 38-41

spontaneity from the theoretical concept, and reconceives it as a positive concept of practical freedom on which we are self-determining according to practical principles or imperatives.

Transcendental freedom therefore provides the conceptual framework for the concept of practical freedom as spontaneity, but does not itself provide the metaphysical grounding for that concept. Instead, it provides a merely regulative idea. In arguing this, Allison seeks to acknowledge the idea of transcendental freedom in Kant's philosophy, while avoiding questions of the actuality of freedom as a metaphysical concept. Insofar as the idea of spontaneity as self-determination is a necessary condition of our practical agency, and of the activity requirement that makes imputability possible, Allison argues that the metaphysical reality of freedom is irrelevant.

Kant is there claiming [in the Dialectic] merely that it is necessary to appeal to the transcendental idea of freedom in order to conceive ourselves as rational (practically free) agents, not that we must actually be free in the transcendental sense in order to be free in the practical sense.<sup>242</sup>

While practical freedom requires the *idea* of a first cause, in allowing for the possibility of free action in a causally determined world, "from the practical standpoint, where the concern is exclusively with what one ought to do and with reason as the source of this "ought", speculative questions about the transcendental status of our practically free acts simply do not arise".<sup>243</sup> Allison acknowledges that this means "it is epistemically possible that our apparent practical spontaneity is ultimately tropistic", raising the possibility of agnosticism with regard to rational

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<sup>242</sup> Allison, 1990, p 57

<sup>243</sup> Allison, 1990, p 64.

agency.<sup>244</sup> However, insofar as we think of ourselves as rational agents, we may appeal to the notion of spontaneity as a necessary condition of that agency, without concern for its metaphysical underpinnings. As such, he presents a "merely" practical account of free agency, on which our freedom is grounded in the sensible, rather than the intelligible world.<sup>245</sup>

In his claim to a "merely" practical account of moral agency, there are certain parallels to be drawn with Korsgaard's account. We see this especially in Allison's discussion of what it is to take oneself as a rational agent, which echoes Korsgaard's idea that we are free insofar as with *think* of ourselves as such. Additionally, they both make claims to the irrelevance of an intelligible world to our practical freedom in the sensible realm. However, the crucial difference between these two accounts is that, in thinking of ourselves as free, Korsgaard argues that the transcendental idea of freedom is *entirely* irrelevant, even in its idea. It is in this that she and Allison differ. For while he agrees with Korsgaard that the *metaphysical* concept of transcendental freedom is irrelevant to practical freedom, it is the *actuality* of that freedom, grounded in the noumenal world, that he argues is superfluous. The *idea* of transcendental freedom as a regulative concept, however, is indispensable to the practical perspective on Allison's account.

### 3.2) "Mere" practical freedom as a genuine causality: Allison's Incorporation Thesis

This background to Allison's interpretation is important in understanding his reading of practical freedom, and its grounding in the sensible world. However, if

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<sup>244</sup> Allison, 1990, pp 63/93

<sup>245</sup> Allison, 1990, p 58

this account of "mere" practical freedom is to be plausible, then he must provide a ground for the idea of positive spontaneity as a genuine causality. This causality must be independent of the mechanism of nature if it is to provide a genuine expression of agency in the way that Allison characterizes it; but in laying claim to this independence, it cannot appeal to a metaphysical grounding. Allison's solution to this is his Incorporation Thesis, which he offers as a non-metaphysical ground for practically free, spontaneous action. However, as we will come to see, this thesis is highly problematic. Specifically, Allison's desire to avoid any metaphysical commitments leads to an account of rational agency that is inconsistent with Kant's later critical moral theory, in precluding the possibility of autonomous agency. As such, it cannot serve my purposes as a ground for Kant's later metaphysics of morals and his *Doctrine of Right*.

Allison's defence of "mere practical freedom" as a genuinely incompatibilist form of freedom focuses on the contrast in the Canon between practical freedom as the determination of the will by reason, and transcendental freedom as an independent spontaneity (A803/B831). The central point for Allison is Kant's claim that practical freedom is a causality of *reason*. This, Allison argues, implies that Kant is providing an incompatibilist account of practical freedom; that is, one on which free action is not simply something that "happens" to an agent subject to the causality of nature, but rather one on which genuine freedom underpins action as something that an agent *does*. For we could not possibly attribute the status of a causality of reason to a *compatibilist* account, a type of freedom described by Kant as "nothing better than the freedom of a turnspit" (CprR 5:97). Allison acknowledges, however, that it is difficult to see how this causality of reason, in the form of practical reason, can be a genuine causality unless construed as the metaphysical concept of transcendental

freedom.<sup>246</sup> This is precisely the point that Kant makes in the second *Critique*, where he criticizes compatibilist theories of freedom as a “subterfuge” (CprR 5:96-7). Allison’s strategy is therefore to try to identify a *substitute* for the spontaneity of the metaphysical concept of transcendental freedom as the ground for practical freedom: a “genuine causality of reason that falls short of full-blown transcendental freedom”.<sup>247</sup> As the basis for Allison's merely *practical* account of rational agency, this causality must be grounded in the *sensible* world; but as spontaneous agency, the influence of the sensible world must be “not so determining’ as to exclude a causality of the will”.<sup>248</sup>

If his argument is to work, Allison must therefore tread a fine line between the *influence* of the sensible world on man’s will, as contrasted to its *determination*: he must show the former without sliding into the latter. Allison describes such a causality as one that entails a *dependence* of reason on the sensible world, but which dependence is something other than *causal*. That is, the sensible world must be considered an influence on man’s will in his rational deliberation, but not to the extent that the will is brought into the natural chain of cause and effect. Were this the case then it would lead us into a compatibilist interpretation of a kind Allison is keen to avoid. This *can* be avoided though, Allison argues, if we understand the will as being dependent on the sensible world in that it “[requires] some kind of sensible stimulus to trigger its agency”, giving us what Allison terms a “non-causal dependence”.<sup>249</sup>

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<sup>246</sup> Allison, 1990, pp 64-5

<sup>247</sup> Allison, 1990, p 64

<sup>248</sup> Allison, 1990, p 65

<sup>249</sup> Allison, 1990, p 65

Seen in this light, the distinctive feature of practical freedom is that it involves independence of determination by any particular desire or inclination but not (necessarily) independence of determination by desire or inclination *überhaupt*.<sup>250</sup>

According to this “non-causal dependence” the sensible world *triggers* our maxims of action, but does not *determine* them in a mechanistic sense. As such, the sensible world constitutes “a restricting condition on, but not a causal determinant of, our agency since it would not necessitate us to act in any particular manner”. This allows us “a picture of agency in which the decision to act plays a causal role (it starts a new series) while itself, as an expression of spontaneity, standing outside the causal series”. Practical freedom, though dependent on the sensible world, must also contain a “genuine, albeit limited” spontaneity, in the capacity to respond to sensible stimuli by *deciding* to act on them.<sup>251</sup>

Allison characterises this “decision to act” as a genuine expression of spontaneity using his Incorporation Thesis. According to this thesis, incentive plays a determining role in human action, but “only insofar as the individual has *incorporated* it into his maxim”.<sup>252</sup> It is in this way that an agent expresses his practical spontaneity in a positive sense, in choosing to act on the basis of sensible

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<sup>250</sup> Allison, 1990, p 65

<sup>251</sup> Allison, 1990, p 26. This is very similar to Paul Guyer's position, on which he argues that, although the will must be capable of being determined by the mere legislative form of its own maxims, this does not mean that a maxim cannot be the product of inclinations (2000, p 135). Indeed, given the purposiveness of human nature, the trigger of inclination is required: “all complete actions must seek to realize some end or other originally suggested by inclination” (2005, p 120). The morality of these ends is then given by their regulation by an impartial practical principle: “although the matter of the good [the object of the will] is given empirically...this matter is not replaced but determined by pure reason, precisely by being regulated by an *a priori* formal concept, namely that of universality (2000, p 105). So on Guyer's account of practical freedom, we are prompted to action by inclination, but must apply a practical rule determined by reason, in the form of the moral imperative, in order to regulate those inclinations according to the moral law. I discuss Guyer's account of practical freedom in more detail in the following chapter. (Guyer, P., *Kant on Freedom, Law and Happiness*. Cambridge: Cambridge University Press, 2000 & Guyer, P., *Kant's System of Nature of Freedom: Selected Essays*. Oxford: Oxford University Press, 2005)

<sup>252</sup> Allison, 1990, p 40 emphasis added

stimuli. This choice, or rational deliberation, is governed by practical principles, in the form of moral or prudential imperatives, which "[specify] which course of action is 'right' or 'permissible' in a given situation for an agent".<sup>253</sup> So given the right "imperative", be it moral or prudential, an inclination can have a determining influence on the agent's actions insofar as it is incorporated into their maxim of action. The inclination does not *itself* constitute a reason for acting, but can do "with reference to a rule or principle of action, which dictates that we ought to pursue the satisfaction of that inclination or desire".<sup>254</sup>

Rational agency for Allison is thus characterised as "subsuming the inclination or desire under practical rules or principles".<sup>255</sup> Inclination *triggers* maxims, and our practical spontaneity inheres in our *adoption* of those maxims. Allison defends this role for inclination through an appeal to a passage in the Dialectic where Kant describes empirical "cause" (inclination) as "not so determining that it excludes a causality of our will" (A534/B562):

Behind this seemingly paradoxical locution is just the thought that the sensible inclination, which from the point of view of the action's (and the agent's) empirical character is viewed straightforwardly as cause, is, from the standpoint of this model, seen as of itself insufficient to determine the will...The missing ingredient is the spontaneity of the agent, the act of taking as or self-determination.<sup>256</sup>

So while the inclination alone might be sufficient to determine action, as per a compatibilist account, it is only in conjunction with the deliberate choice of the agent to act on that inclination that it has a causal influence on *free* action:

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<sup>253</sup> Allison, 1990, p 38

<sup>254</sup> Allison, 1990, p 40

<sup>255</sup> Allison, 1990, p 39

<sup>256</sup> Allison, 1990, p 39

to the extent to which such actions are taken as genuine expressions of agency, and therefore, as imputable, they are thought to involve an act of spontaneity on the part of the agent, through which the inclination or desire is deemed or taken as an appropriate basis of action.<sup>257</sup>

It is for this reason that Allison refers to practical freedom as a *hybrid* notion: it is the *judgement* that a *desire* forms a reason to act. Expressions of our agency are made in the sensible world, in response to the sensible triggers of desire and inclination, but our practical freedom lies in our spontaneous decision to adopt those inclinations as reasons to act. Thus while motivated by the sensible world, our claim to practical freedom is conceived as a causal notion of agency which exists outside of that temporal series; that is, to self-determination according to practical principles of reason.<sup>258</sup> This notion of agency that exists outside the temporal series further ties Allison's concept of practical spontaneity to the metaphysical concept of transcendental freedom as a regulative idea, though again, without making any claims to the actuality of that freedom.

### 3.3 *The inclusive nature of Allison's account of practical freedom as spontaneity*

In providing this account of practical freedom as spontaneity Allison's main aim is to navigate the apparent inconsistencies within Kant's own thought in the first *Critique*, and specifically, the dispute over the relationship between practical and transcendental freedom and compatibilist versus incompatibilist readings. In providing a "merely practical" reading of an incompatibilist conception of freedom, his aim is to reconcile the apparently inconsistent Canon and Dialectic accounts of freedom. His reading is attractive for my purposes, however, in providing an

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<sup>257</sup> Allison, 1990, p 39

<sup>258</sup> Allison, 1990, p 26



account of practical freedom which goes beyond the *Groundwork* conception of free will. He makes this explicit in his aim to offer an account of rational agency "that includes, but is not limited to moral agency [as autonomy]".<sup>259</sup> This prisms apart the concept of practical freedom from that of autonomy, promising a broader account which can include external freedom under its scope.

In particular, we see this broader notion of practical freedom in Allison's analysis of rational agency, where he highlights Kant's distinction between pragmatic and moral laws, and notes that Kant counts both as objective laws of freedom (A802/B830):

These passages make it clear that in the *Critique of Pure Reason*, if not in his later works in moral philosophy, Kant regards the capacity to act on the basis of imperatives in general (not merely the categorical imperative) as the defining characteristic of free agency. They also suggest that the spontaneity presumably required to act on the basis of an ought (whether moral or prudential) is the source of Kant's dissatisfaction with the compatibilist account of agency.<sup>260</sup>

Allison's reference to Kant's later works here most likely refers to the *Groundwork* and second *Critique*, where rational agency is tied to the moral law and acting under its principle, the categorical imperative. It is this version of rational agency that Korsgaard takes as the basis of her account of practical freedom, and which, as we saw, biases her towards a purely ethical reading. Allison's account, by contrast, is built out of the first *Critique*, and argues that practical reasoning is to deliberate about what one ought to do, whether that "ought" is a moral one dictated by the categorical imperative, or a prudential one given by a hypothetical imperative. This then opens the door for us to include the external freedom of Right under the

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<sup>259</sup> Allison, 1990, p 29

<sup>260</sup> Allison, 1990, p 36

concept of practical freedom, provisional on us being able to provide an account of juridical decision-making which meets the requirements of practical reasoning.

It should be noted, though, that even if the above is possible on Allison's reading, the inclusion of external freedom is not an intended consequence. Indeed, he explicitly notes that he does not include the "outer" freedom of Kant's political philosophy in his analysis of freedom and rational agency.<sup>261</sup> In broadening the concept of practical freedom beyond that of Kant's ethics, Allison does not, therefore, intend to include the external freedom of Right under its scope. Rather, his aim is to extend rational agency beyond the moral domain as *ethics*, to include rational deliberation with regard to non-moral decision-making in the form of hypothetical imperatives, and in doing so, to protect the imputability of non-moral and immoral acts. Of course, his failure to engage with Right does not prevent us from co-opting his inclusive account of practical freedom in order to provide a ground for external freedom. However, it should not be presented as a straightforward result of Allison's interpretation.

A weightier problem with Allison's account, however, is its dependence on his Incorporation Thesis. As we have seen, this is introduced in order to provide an incompatibilist reading of practical freedom whilst avoiding an appeal to a metaphysical conception of transcendental freedom and the resultant epistemic problems with proving the reality of that freedom. Allison seeks to navigate around these problems by providing an account of practical spontaneity grounded in the sensible world, as the act of incorporating inclinations into our maxims of action. However, in trying to construct such an account, Allison creates interpretative

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<sup>261</sup> Allison, 1990, p 1

problems concerning the distinction between autonomy and heteronomy. This, by his own admission, puts his account of practical freedom in "blatant contradiction" with Kant's account of morality in the *Groundwork* and second *Critique*. As such, it is an insufficient ground for Kant's later critical moral theory.<sup>262</sup> It is to this criticism that I now turn in the final section.

#### ***4) Critiquing Allison's account: the insufficiency of his Incorporation Thesis as a ground for Kant's critical moral theory***

##### *4.1) Autonomy, heteronomy, and empirical grounds of the will*

The problem with Allison's account is that, in presenting a "merely practical" account of moral freedom in response to debates concerning the status of transcendental freedom, he grounds rational agency in the sensible world. This agency is grounded in his Incorporation Thesis and its account of maxim adoption as being *triggered* or *motivated* by inclinations or desires. This means that on Allison's account of rational agency, the adoption of the maxim *presupposes* the incentive. It is this grounding of rational agency in our sensuous nature that makes Allison's account "merely practical freedom". As Allison acknowledges however, this then seems to preclude the possibility of an agent acting from duty alone; that is, from respect for the law.<sup>263</sup> As such, his account of rational agency grounded in the first *Critique* is "ineluctably heteronomous" according to Kant's account of morality as

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<sup>262</sup> Allison, 1990, p 98. Note that in criticising Allison's account of practical freedom on grounds of an inconsistency with the *Groundwork*, I do not contradict my argument in chapter 2 that practical freedom should not be equated with Kant's account of freedom in this work. Rather, my claim there was that moral freedom *includes*, but should not be *limited* to the *Groundwork* concept of autonomy. Allison's account achieves the latter, by providing a more inclusive account of free agency than the *Groundwork*'s. But in doing so, he *excludes* autonomy. In effect then, he commits the inverse error or Korsgaard.

<sup>263</sup> Allison, 1990, p 89

laid out in the *Groundwork*, and is consequently inconsistent with Kant's mature moral theory.<sup>264</sup>

The problem with heteronomy lies in the fact that on Allison's account, maxim adoption necessarily makes reference to inclination. That is, while rational agency is given by our capacity to act on maxims according to moral or prudential imperatives, those maxims are triggered in the first instance by sensuous needs. Thus, as Allison acknowledges, our motivation to act will always be sensibly grounded: "the incentives for obeying these imperatives would ultimately be traceable to our sensuous nature".<sup>265</sup> Yet this account of materially grounded maxims is in contradiction of Kant's mature account of moral agency. As Kant puts it in the second *Critique*:

All practical principles that presuppose an *object* (matter) of the faculty of desire as the determining ground of the will are, without exception, empirical and can furnish no practical laws. By 'the matter of the faculty of desire' I understand an object whose reality is desired. Now, when desire for this object precedes the practical rule and is the condition of its becoming a principle, then I say (*first*) that this principle is in that case always empirical (CprR 5:21).

This passage suggests that if an inclination or a desire *precedes* our adoption of a maxim, then acting on that maxim will only yield heteronomy. That is, "[t]he will in that case does not give itself the law; instead the object, by means of its relation to the will, gives the law to it" (G 4:441). Indeed, there are a number of passages which suggest that the presence of inclination *at any stage* in our practical deliberation undermines the possibility of morally autonomous action. For example, we are told in the *Groundwork* that "an action from duty is to put aside entirely the influence of

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<sup>264</sup> Allison, 1990, p 66

<sup>265</sup> Allison, 1990, p 65

inclination and with it every object of the will", with Kant concluding that moral worth (autonomy) requires that we "[deprive] the will of every impulse" (G 4:400-1).

The problem with Allison's account of rational agency, then, is that all maxims are material. It cannot accommodate the idea of a formal, a priori maxim. He notes this distinction in his discussion of Beck's account of material maxims as "mere maxims":

By a "mere maxim" Beck apparently means what Kant sometimes refers to as empirical, a posteriori, or material maxims and contrasts with a priori, formal, maxims. The former includes all those adopted on the basis of an empirical interest, that is, an interest based on inclination, which, since it reflects the motivational state of the agent, is valid for the agent. Kant's concern, as Beck quite rightly notes, is to show that not all maxims are of that nature, that imperfectly rational beings such as ourselves can also act on the basis of a purely formal principle, namely, the moral law or categorical imperative.<sup>266</sup>

In responding to Beck, Allison is correct that Kant's mature moral theory does not require our maxims themselves to have the status of objective practical principles in order to yield autonomous action. I discussed this distinction between subjective and objective practical principles in the previous chapter: as principles of *action*, maxims will always be subjective. That is, they will always reflect an underlying interest of the agent, which provides the reason for adopting the maxim.<sup>267</sup> However, if an action is to be *autonomous*, that is, performed from respect for the law, then that interest must be "a 'pure' moral interest".<sup>268</sup> That is, in adopting the maxim, the agent must be motivated by the idea of the moral law in the *form* of the maxim, and not by its material content. It is this that is ruled out on Allison's

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<sup>266</sup> Allison, 1990, p 88

<sup>267</sup> Allison, 1990, p 90

<sup>268</sup> Allison, 1990 p 89

account of rational agency. For on this "merely practical" reading, our rational agency inheres in our adoption of a maxim *in response to an inclination*: the object must precede the practical rule. This unequivocally grounds all our maxims of action in the sensible world, and therefore rules out the possibility of a priori, formal maxims as a ground for autonomous action.

Allison himself foresees this problem, suggesting that his notion of noncausal dependence is "incompatible with Kant's mature moral theory, since it entails that one could never act from pure respect for the law".<sup>269</sup> The inevitable presence of inclination in our practical deliberation means that we can never be determined purely by the idea of the law. This, Allison acknowledges, not only leads to exegetical problems in reconciling his first *Critique* account with the *Groundwork*, but also raises the problem of how we are to attribute imputability to rational actions, when such actions are considered heteronomous, and thus not free.<sup>270</sup> His concern is that the *Groundwork* account of moral agency threatens the possibility of making *any* claim to rational free action on his "ineluctably heteronomous" account of practical freedom, suggesting instead that all actions that are materially grounded are simply "mere bits of behaviour" in the causal chain of nature.<sup>271</sup> If this were the case, then not only would autonomous action be ruled out on Allison's Incorporation Thesis; we would lose the possibility of any kind of free action at all. It is to Allison's resolution of this problem that I now turn in the final section, for this elucidates the interpretative problems with his account in reconciling his theory of rational agency

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<sup>269</sup> Allison, 1990, p 65

<sup>270</sup> This is a concern that he shares with Beck, from whom he takes his lead in developing his account of practical freedom as spontaneity. I discuss Beck's account in detail in the following chapter, including his problematization of the imputability of evil actions. (Beck, L.W., "Five Concepts of Freedom in Kant" in J.T.J. Szrednicki (ed.), *Stephan Körner – Philosophical Analysis and Reconstruction*. Dordrecht: Martinus Nijhoff Publishers, 1987)

<sup>271</sup> Allison, 1990, p 95

with the *Groundwork*, undermining its plausibility as a ground for Kant's critical moral theory.

#### 4.2) *The distinction between free heteronomous and autonomous action*

In seeking to overcome this threat of heteronomy, Allison suggests that we find a way of distinguishing between autonomy and heteronomy that, contrary to what the *Groundwork* implies, still allows for heteronomous actions to be *free*, while nonetheless maintaining a distinction between the two concepts as per the *Groundwork* account of moral worth.<sup>272</sup> He proposes that we do this by relaxing the *Groundwork's* requirement that a practically free will is "a law to itself", "independently of every property belonging to the objects of volition" (G 4:440). This, as discussed above, will then allow us to prise apart the concept of practical freedom from that of autonomy, assumed by many commentators to be equivalent concepts:

On this reading [of practical freedom as autonomy] the will is free only insofar as it is motivated by respect for the law. In all other instances, that is, in all inclination-based agency, the will is not only heteronomous, but causally determined.<sup>273</sup>

Contrary to this reading of the practical freedom, Allison defends an interpretation of independence from the sensible world which does not require the *complete* absence of any empirical influence for an agent to be free. Rather, a practically free will may be empirically *influenced* without being thought of as being mechanistically *determined*. His argument is that Kant conflates these two types of actions under the heading of heteronomy, due to the presence of sensuous influence. Only in the latter

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<sup>272</sup> Allison, 1990, p 96

<sup>273</sup> Allison, 1990, p 95

case, however, is the agent unfree, and their actions morally unimputable. The former case falls under the heading of free, morally imputable actions, alongside, though not coterminous with, autonomous actions.

In explicating Allison's defence of heteronomously free actions, I begin with the distinction that he draws between different kinds of empirically influenced actions. In arguing for this distinction, Allison takes Kant's definition of heteronomy, discussed above, as his starting point.

The will in that case does not give itself the law; instead the object, by means of its relation to the will, gives the law to it" (G 4:441).

The "object" here is something that the agent regards as being good, and which causes the agent to act "by an inclination or desire for the realization of that state of affairs".<sup>274</sup> This, it is then assumed, *causes* them to form a maxim of action, suggesting a picture of a mechanistically determined will of the kind traditionally assumed on compatibilist accounts of practical freedom. The assumption being made is that the presence of *any* empirical influence leads to a fatalistic picture of human agency, hence precluding the possibility of spontaneous action.

Allison's response to this is that the presence of empirical influence does not mean that we must think of actions as "mere bits of behaviour causally conditioned by stimuli".<sup>275</sup> Instead, there is a way in which we may still think of materially grounded actions as "genuine intentional actions based on maxims". Though he does not elaborate on this idea in his discussion of heteronomy and autonomy, it seems that the key to this position, as discussed in section 3, must lie in his

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<sup>274</sup> Allison, 1990, p 97

<sup>275</sup> Allison, 1990, p 97



Incorporation Thesis. That is, in the idea that inclinations *trigger* maxims, by moving an agent to adopt them, but that in doing so, they do not *determine* the choice of the agent. Instead, the agent *decides* to act on the trigger, by incorporating that inclination into their maxim. As discussed above, it is in this that our practical freedom inheres, in our spontaneous act of incorporation according to practical principles, and which allows us to designate heteronomous actions as empirically influenced but nonetheless as practically free.

What is problematic about this part of Allison's argument, however, is that it makes appeal to his account of rational agency from the first part of his study of freedom, and uses it to explicate a part of Kant's later moral theory, in the *Groundwork's* distinction between autonomy and heteronomy. In order to appreciate why this is problematic, we only need to look at the way that Allison, in defending the freedom of heteronomous acts, seeks to nonetheless maintain a distinction between those acts and autonomous ones. In the case of free heteronomous acts, the agent's sensuous needs provide the motivation or reason to act. By contrast,

a will with the property of autonomy is just one to which this limitation does not apply...It [has] a motivational independence, that is, a capacity for self-determination independently of, and even contrary to, these needs. Positively expressed, a will with the property of autonomy is one for which there are (or can be) reasons to act that are logically independent of the agent's needs as sensuous beings.<sup>276</sup>

The appeal to motivational independence refers here to the idea that an agent act from pure moral interest; that is, from respect for the law, independent of any material interest given by the object of their choice. It is in this idea of motivation

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<sup>276</sup> Allison, 1990, p 97

that Allison argues the distinction between free heteronomous acts and autonomous acts exists according to the *Groundwork* account of morality. Yet as observed above, Allison, by his own admission, has no recourse to this idea of motivational independence on his Incorporation Thesis; it is ruled out by the inevitably material nature of maxims of actions.

Allison's appeal to his Incorporation Thesis in reference to the *Groundwork* distinction between autonomy and heteronomy therefore rescues the imputability of heteronomous acts, but rules out the possibility of autonomous acts. This conclusion is not surprising, given my discussion above on the "ineluctable heteronomy" of Allison's first *Critique* account: he himself acknowledges this consequence. What is puzzling though is why Allison problematizes the *Groundwork* distinction between heteronomy and autonomy *at all*. For in the first half of his book, concerned with freedom and rational agency, he acknowledges the unavoidably heteronomous nature of his merely practical account according to the *Groundwork's* distinction. However, he argues that this conclusion is unproblematic for his account. For in developing his reading of rational agency in the first section of the book, he takes Kant's *semi-critical* moral theory around the time of the first *Critique* as the foundation for his interpretation. On this account of morality, he argues, there is no problem with his appeal to inclinations in maxim adoption. For in this period, Kant "does not yet draw a sharp distinction between the incentive to be moral and the desire for happiness".<sup>277</sup> Therefore while morality requires practical freedom as rational deliberation according to practical principles, it does not, he argues, require anything *more* than this. That is, while we must have a capacity to adopt maxims according to imperatives, we are not required to do this from respect for the law, as

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<sup>277</sup> Allison, 1990, pp 66-67

the *Groundwork* account later suggests. Rather, on the version of morality presented in the first *Critique*, “even morally worthy action turns out to be motivated by the prospects of future reward (in proportion to one’s worthiness to be happy) rather than pure respect for the law as such”.<sup>278</sup>

While Allison acknowledges exegetical difficulties in reconciling his first *Critique* interpretation with the *Groundwork*, he thus rejects this as a reason for rejecting his account of rational agency. For on his understanding of Kant's moral theory, these two periods in Kant's thought are not to be reconciled. Rather, he takes Kant's introduction of autonomy to mark a distinct break from his semi-critical moral theory, and with it, a significant change in the way that he conceived moral agency. As such, an account of rational agency grounded in the first *Critique* seems to be offered as an *alternative* to that in the *Groundwork*, not one that must be reconciled with it.

Understanding Allison's account of rational agency in this way is the best way to make sense of his "merely practical" interpretation, and its blatant inconsistency with Kant's critical moral theory. It is for this reason, though, that his later engagement with the *Groundwork's* autonomy-heteronomy distinction is puzzling. On the one hand, we could understand his discussion as an explication of Kant's *mature* moral theory, distinct from his semi-critical period as discussed by Allison in the first half of his book. In doing this, we simply assume that Allison's account of freedom mirrors the break he identifies in Kant's own moral theory: the first half of his book discusses the semi-critical account of "mere practical freedom", and the second half discusses the mature account of autonomy as acting from pure moral

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<sup>278</sup> *ibid*

interest.<sup>279</sup> However, his appeal to the Incorporation Thesis in his defence of free heteronomous action prevents us from making such an assumption. Instead, this appeal indicates that Allison thinks we can bring the first part of his analysis to bear on the second; that is, that we can bring his "merely practical" account of rational agency to bear on the *Groundwork's* mature moral theory and his distinction between autonomy and heteronomy.

I do not take these criticisms of Allison's account to be decisive. However, they illuminate a dilemma which he appears to be faced with. If, on the one hand, he wants to avoid exegetical problems in reconciling Kant's semi-critical and critical philosophy, caused by the problem of materially grounded maxims, then he must maintain his first *Critique* account as an *alternative* to the *Groundwork's*. In its sensible grounding, it cannot be taken to be a precursor that can be brought to bear on the later work. For in doing this, Allison precludes the possibility of autonomous action as acting from respect for the law. If, on the other hand, he wants to maintain the relevance of the first *Critique* account to Kant's later moral works, then he must give up his "merely practical" account of rational agency. For as he himself acknowledges, this account, grounded in his Incorporation Thesis, is insufficient to ground the *Groundwork* account of autonomy as a will free from all determining causes of the sensible world. For that, we must presuppose a transcendental (metaphysical) concept of freedom.<sup>280</sup>

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<sup>279</sup> Allison, 1990, p 99. Note that Allison acknowledges the dependence of Kant's concept of autonomy on a non-sensible concept of freedom, as per the *Groundwork III* argument, further suggesting a split with the first half of the book and its "merely practical" account of practical freedom.

<sup>280</sup> Allison, 1990, p 99

What is ironic about Allison's position on rational agency is that he offers it as a solution to the interpretative problems surrounding the first *Critique* and the relationship between transcendental and practical freedom. But in doing so, he wades into equally problematic discussions surrounding the *Groundwork* and the second *Critique*, and the relationship between incentive and the moral law. In effect then, he creates as many problems as he avoids. As in Korsgaard's case, this is born of his desire to avoid making any metaphysical commitments to a concept of transcendental freedom, instead developing his Incorporation Thesis on which the causality of rational agency is grounded in the adoption of maxims. In making this case for a non-empirical, non-metaphysical causality though, he wades into unnecessarily complicated discussions of free and unfree heteronomous action, autonomy and moral worth, which threaten the consistency of Kant's theory of freedom far more so than the original problem with which he started. As such, Allison sacrifices what is promising about his account, in the idea of practical freedom as spontaneity, to a desire to avoid making metaphysical commitments.

### *Conclusion*

It has been my aim in this chapter to investigate the possibility of a concept of practical freedom that extends beyond the *Groundwork's* concept of autonomy as free will. My intention in doing so is to broaden the concept of moral freedom sufficiently in order to include the external freedom of Right under its scope. This, as discussed in the previous chapter, is integral to providing a positive account of the morality of Right as external lawgiving. Only if external freedom is shown to be a form of moral freedom can the laws of Right be defended as moral laws.

I began by providing an overview of the wider debate surrounding Kant's theory of freedom and the relationship of practical freedom to the transcendental concept. This provides important context for the two interpretations of practical freedom that I have considered in this chapter, those of Korsgaard and Allison, for both are motivated by a desire to avoid any appeal to a metaphysical concept of freedom in underpinning man's agency in the practical domain. It is, in turn, this refusal to make any metaphysical commitments that undermines both accounts. In Korsgaard's case, it causes her to collapse the concepts of freedom and autonomy, which is inconsistent with the inclusive account of morality for which I argued in chapter 2. It also leads her into further interpretative problems in her denial of the deeper connection between the practical and theoretical domains on Kant's transcendental idealism, which results in a slide into the kind of determinism that Kant explicitly rejects.

I therefore rejected Korsgaard's narrow account of practical freedom as autonomy, and turned to Allison's merely practical account of rational deliberation. This, I argued, has appeal in acknowledging the dependence of practical freedom on the transcendental concept as a "regulative idea", as well as broadening the concept beyond the ethical one of autonomy. However, in his attempt to defend a concept of practical freedom that is only conceptually dependent on transcendental freedom, Allison created the inverse problem to Korsgaard: that is, instead of excluding the external freedom of Right, he ends up sacrificing the internal freedom of ethics. This is caused by his "merely practical" account of rational agency, and its grounding in his Incorporation Thesis. On this thesis, all maxims of action presuppose an incentive, and as such, rule out the possibility of acting from "pure interest", that is, from respect for the law.

What is promising about Allison's argument, however, is his expansion of the concept of practical freedom in the idea of spontaneous action according to practical principles. However, if we are to ground this freedom as a genuine causality in the practical domain, then we must, I now argue, ground it in a nonsensible concept of freedom; that is, in the *intelligible* idea of transcendental freedom. It is this that I now carry forward into the next chapter, where I assess accounts of practical freedom that are grounded in the metaphysical concept of freedom.

## Chapter 4

### Practical freedom as acting on principle

Following on from my critique of non-metaphysical accounts of practical freedom in the previous chapter, I argue now for a metaphysically grounded reading of practical freedom as the restriction of man's spontaneous power of choice according to principles of universal law. I begin with Lewis Beck's reading, which forms the basis of Allison's account of practical freedom, but which avoids the problems of Allison's Incorporation Thesis in grounding man's causality in the metaphysical concept of transcendental freedom. Following on from my critique of Korsgaard, and my support of Allison's broader reading of practical freedom as spontaneity, I focus in particular on Beck's attempt to prise apart the concept of *moral freedom* from the ethical concept of *autonomy*. However, while Beck goes some way to achieving this, he remains tethered, in the end, to Kant's ethical theory. Beck's endeavour to fashion a positive concept of moral freedom conceived as determination by pure practical reason ultimately leads him to revert back to an ethical reading of practical freedom as *motivation* by pure practical reason, on which reason is the incentive to act. Beck replicates the problem that we encountered with Korsgaard's account in the previous chapter, and his attempt to provide a broader concept of practical freedom as spontaneity therefore fails.

In section 2 I turn to Paul Guyer's interpretation of practical freedom, which is promising on two counts. Firstly, he argues for a reading of moral freedom as acting on principle, which includes both the intrapersonal principle of ethics and the interpersonal principle of Right. His account therefore promises to incorporate the



external freedom of Right, while offering a distinction between the two domains on grounds of distinct moral principles. Secondly, he acknowledges, like Beck, the importance of the transcendental idea of freedom in grounding Kant's moral theory, likewise avoiding the problems of the previous chapter. However, while Guyer's account of Kant's moral theory is attractive in its explicit support of the morality of Right, and in the suggestion of a more general account of practical freedom as acting on principle, the plausibility of his interpretation is brought into question by the individualistic, empiricist nature of acting on principle that it yields.

Alternatively then, I retain the idea of acting on principle, but argue for a formal, i.e. non-empiricist, reading based on Bernd Ludwig's account in section 3.<sup>281</sup> On this interpretation, acting on principle is understood as law-governedness: it is an agent's capacity to act according to universal law. Pure practical reason thereby serves as the *determining ground* of choice for one's will; however, it need not serve as the *incentive* for one's choice. Ludwig's account therefore offers an interpretation of practical freedom as a spontaneous will governed by principles of pure practical reason. We are thus able to incorporate both the intrapersonal principle of ethics, and the interpersonal principle of Right under the idea of freedom as law-governedness as common ground of both moral domains.

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<sup>281</sup> Ludwig, B., "Whence Public right? The Roles of Theoretical and Practical Reasoning in Kant's *Doctrine of Right*" in in Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays*. Oxford: Oxford University Press, 2004

*1) Freedom as spontaneity and the imputability of evil acts: Beck's account of practical freedom*

*1.1) The problem of moral evil and practical freedom as autonomy*

Beck's concern with Kant's theory of freedom is with the problem of moral evil. His argument is of interest to me because of his attempt to widen the concept of moral agency beyond that of *autonomous* agency. Such a move is necessary if we are to designate evil (non-autonomous) actions as free, and hence imputable. As such, the *Religion's* problem of moral evil further illuminates the *incomplete* nature of the *Groundwork* concept of freedom as self-legislation, as argued in chapter 2. Beck's argument therefore suggests that if we are to take a coherent account of moral agency from Kant's practical philosophy, one on which we can designate evil acts as morally free, and hence morally imputable, then his theory of freedom must be widened beyond the concept of autonomy. While Beck does not engage directly with the morality of Right, his account promises to broaden the scope of practical freedom in order that we can incorporate external freedom under its scope.

Beck begins his discussion of moral freedom in "Five Concepts of Freedom" with the first *Critique* idea of practical freedom as independence from sensuous influence (A534/B562). This gives the negative concept of moral freedom, grounded in the concept of transcendental freedom as spontaneity. In contrast to Allison's conceptual approach to the relationship between transcendental and practical freedom, which I argued fails in undermining Kant's critical moral theory, Beck therefore commits to the metaphysical route, arguing that moral freedom

presupposes the actuality of transcendental freedom.<sup>282</sup> In doing so he retains appeal to a genuine causality as the ground of practical freedom as spontaneity and avoids the need for anything like Allison's unsuccessful Incorporation Thesis.

Beck then provides an analysis of the positive concept as "the effectiveness of the legislation of pure practical reason and the ability to undertake actions in accordance with and because of (out of respect for) this law".<sup>283</sup> He elucidates this positive concept of practical freedom using Kant's distinction between *Wille* and *Willkür* in relation to human willing.<sup>284</sup> The first, *Wille*, refers to an autonomous will free from external influence (MM 6:213).<sup>285</sup> By contrast, *Willkür* does admit sensuous influence as a determining ground. As man's power of choice, it is the "ability to bring about its object by one's action", whether that object is determined by the idea of the law, or by man's desires and inclinations (MM 6:213). As the ability to undertake actions in accordance with pure practical reason, an interpretation of positive moral freedom as autonomy expresses a particular *relationship* between *Wille* and *Willkür*; that is, the influence of an agent's rational will (as pure practical reason) as the determining ground of their power of choice. In Beck's words, *Wille* legislates through "its independent authorship of law independent of motives and incentives of the empirical world," and it is then "by *Willkür* that an action in accordance with, or opposed to, this law is undertaken."<sup>286</sup> It is "through submission to [*Wille*] that [*Willkür*] supplements its negative freedom with a positive

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<sup>282</sup> Beck, L.W., "Five Concepts of Freedom in Kant" in J.T.J. Szrednicki (ed.), *Stephan Körner – Philosophical Analysis and Reconstruction*. Dordrecht: Martinus Nijhoff Publishers, 1987, p 36

<sup>283</sup> Beck, 1987, p 36

<sup>284</sup> Beck, 1987, p 37 ; 1960, pp 176-7 / 197)

<sup>285</sup> "The faculty of desire whose inner determining ground, hence even what pleases it, lies within the subject's reason is called the will [*Wille*]" (MM 6:213)

<sup>286</sup> Beck, 1987, p 37

freedom".<sup>287</sup> Practical freedom exists in our capacity for spontaneous choice in taking up maxims of action as legislated by pure practical reason.

At this point we might observe some obvious similarities between this account and Korsgaard's. Not only does Beck refer to the positive concept of practical freedom as autonomy, but he also makes explicit reference to the requirement that an agent take up maxims of action legislated by pure practical reason from respect for the law:

The argument for moral freedom had as premise the consciousness of the moral law...A free action and an action done out of respect for the law are the same. An unmoral (legal) or immoral action is not done because of the law (even if, as legal, it conforms to the law), but is done on account of subjective, individual, empirical impulses.<sup>288</sup>

The reference to acting 'out of respect for the law' clearly ties the concept to the ethical condition of acting from moral incentive, or from the motive of duty. This idea of moral consciousness also echoes Korsgaard's account of freedom as virtue; of free action as an internal act of self-determination under the moral law. Like Beck, she stresses the requirement that we not only *act* for moral ends, but do so *because* they are moral ends: moral action requires that we act *for the sake* of the law. This requirement, as Beck himself acknowledges, means that legal actions are "to be entered to the credit of the mechanism of nature".<sup>289</sup> As such, legal actions are excluded from the category of free actions, along with unmoral and immoral actions. "Genuine moral action" is understood as only those actions performed out

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<sup>287</sup> Beck, L.W., *A Commentary on Kant's Critique of Practical Reason*. Chicago and London: The University of Chicago Press, 1960, p 180

<sup>288</sup> Beck, 1987, pp 37-8

<sup>289</sup> Beck, 1987, p 38

of respect for the law,<sup>290</sup> and with that, positive moral freedom is once again narrowed to the ethical concept of autonomy.

1.2) *Making evil acts imputable: expanding the concept of freedom beyond autonomy*

However, while beginning along the same lines as Korsgaard, Beck resists the equation of practical freedom with the ethical concept of autonomy alone, arguing that “Kant does not use this concept of freedom exclusively in his treatment of morality at all”.<sup>291</sup> Contrary to the common equation of moral freedom with autonomy Beck argues for a broader conception of freedom as spontaneity, found in the third section of the *Groundwork*, and Kant’s account of rational agency and decision making more generally.<sup>292</sup> As I argued with regard to Allison’s account in the previous chapter, it is this broader conception that promises an account of practical freedom as a ground for both the internal freedom of ethics and the external freedom of Right, though in Beck’s case he seeks it in Kant’s moral philosophy, in contrast to Allison who grounds it in the first *Critique*.

Beck’s case for a broader conception of moral freedom is based on Kant’s argument in *Religion* that in order to protect the imputability of evil acts, subjective grounds of action cannot be taken as a barrier to free action (R 6:29).<sup>293</sup> This stands in contradiction of the claim that legal, non-autonomous and immoral actions are to be “entered to the credit of the mechanism of nature”, and hence gives rise to an aporia (R 6:31): those who argue that freedom is to be equated with autonomy must accept

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<sup>290</sup> Beck, 1987, p 37

<sup>291</sup> Beck, 1987, p 38

<sup>292</sup> Beck, 1987, pp 38-40

<sup>293</sup> Beck, 1960, p 204

that “either there is no moral evil, all evil being natural and therefore not imputable to human responsibility, or [that] goodness of will is not equivalent to moral freedom”.<sup>294</sup>

Beck’s solution to this aporia is the latter; that is, to argue that moral freedom is not confined to the ethical concept of autonomy:

to do justice to the ethical phenomenon [of moral action], one must have a concept of freedom which permits the imputation of unmoral and immoral actions. The criteriological or analytical connection between freedom and morality (positive moral value [as autonomy]) must be loosened.<sup>295</sup>

Were we not to designate subjectively motivated actions as free actions, then there would be no morally evil acts: “the use or abuse of the human being’s power of choice with respect to the moral law could not be imputed to him, nor could the good or evil in him be called ‘moral’” (R 6:21). And without a concept of moral evil against which to contrast moral goodness, the concept of moral action is left empty.<sup>296</sup> It is this that Beck refers to in the idea of doing the idea of the ethical phenomenon justice, and which forms the basis for his dispute of the equation of moral freedom with the *Groundwork* concept of autonomy.

Beck seeks to ‘loosen’ the connection between freedom and autonomy by appealing to the *Religion* argument that moral action does not require moral incentive. Contrary to the interpretation on which a free will is a good will motivated by the idea of the law, the *Religion* denies that the freedom of an action lies in the incentive underlying the person’s action:

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<sup>294</sup> Beck, 1987, p 38; 1960, p 203

<sup>295</sup> Beck, 1987, p 38

<sup>296</sup> Beck, 1960, p 204

the ground of evil cannot lie in any object *determining* the power of choice through inclination, not in any natural impulses, but only in a rule that the power of choice itself produces for the exercise of its freedom, i.e., in a maxim (R 6:21)

On this argument practical freedom lies not in the *incentive* that determines a person's principles of action, as per the *Groundwork* argument. Rather, freedom lies in the capacity to act according to principles of pure practical reason, regardless of incentive. As Kant puts it, freedom lies "in the possibility of the deviation of the maxims from the moral law" (R 6:29); that is, in the choice exercised in one's "adoption of [either] good or evil (unlawful) maxims", regardless of the underlying motivation for doing so (R 6:21). Consequently, even if the action is performed in *contradiction* of the moral law, then it is *immoral* (or evil), but it is still *free* in the *capacity* to act under principles of pure practical reason.<sup>297</sup>

Beck therefore suggests that on the *Religion's* conception of freedom, the spontaneity of *Willkür* is sufficient for moral imputability. This gives us a conception of practical freedom as spontaneity: the agent's ability to initiate a new causal series through their power of choice (*Willkür*) in their selection of which maxims they take up.<sup>298</sup> It is in this way that Beck argues for a distinction between practical freedom and autonomy: acting out of respect for the law is not a necessary condition of practical freedom. However, as he points out, this concept of freedom as spontaneity is still insufficient to provide a *positive* idea of moral freedom.<sup>299</sup> As noted above, freedom of choice as *Willkür* is a merely negative concept: it is the independence of determination by sensuous influence (necessitation by nature) (MM 6:213). For freedom as spontaneity to provide a *positive* conception of freedom, that power of

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<sup>297</sup> Beck, 1960, p 203-4; 1987, p 38

<sup>298</sup> Beck, 1960, p 197; 1987, pp 37-40

<sup>299</sup> Beck, 1987, p 38

choice must not only be independent of mechanistic determination by the law of nature, it must also be subject to some other law which *is* determining (G 4:448). Otherwise we would be left with what O'Neill refers to as "mere, sheer choice", which would not yield moral *action*, but rather moral *arbitrariness*.<sup>300</sup>

In order to provide a concept of practical freedom as spontaneity, we must therefore show that *Willkür* can be considered a genuine causality with regard to its objects; that it is not lawless, but rather acts according to some law or principle:

Since the concept of causality brings with it that of laws in accordance with which, by something that we call a cause, something else, namely an effect, must be posited, so freedom, although it is not a property of the will in accordance with natural laws, is not for that reason lawless but must instead be a causality in accordance with immutable laws but of a special kind; for otherwise a free will would be an absurdity (G 4:446).

As Beck puts it, if we are to provide a positive account of practical freedom as spontaneity then we must ask "what limits [*Willkür*] and renders it lawful?"<sup>301</sup> And as we will now see, it is in his answer to this question that Beck's position unravels. For he argues that it is man's rational will that renders his spontaneous choice lawful. Only a spontaneous will (*Willkür*) that takes the law (*Wille*) as its determining ground to action is practically free. Consequently, moral freedom is once again narrowed to the ethical concept of autonomy, meaning that not only is the imputability of non-autonomous actions lost, but so too is the possibility of a broader concept of practical freedom grounded in spontaneity.

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<sup>300</sup> O'Neill, *Bounds of Justice*. Cambridge: Cambridge University Press, 2003, pp 38-9

<sup>301</sup> Beck, 1960, p 196



### 1.3) *The hierarchy of Wille and Willkür and Beck's slide back into ethics*

Given Beck's reliance on the *Wille-Willkür* distinction, we might think that he is presenting a dual conception of the will. For on his account it appears that there exist two distinct faculties of will that interact in order to produce free agency. On the one hand our autonomous will governed by pure practical reason, and on the other our power of choice, which may or may not be determined by the moral law given by the autonomous will. So *Wille*, as pure practical reason, legislates the moral law, and *Willkür* acts according to that legislation, depending on whether it is moral or not. Beck denies this reading when he writes that "there is only one [faculty of the will], but it has prima facie two kinds of freedom, [and] one of them will eventually be shown to be the perfection or logical form of the other".<sup>302</sup> There is only one human will; it is its freedom that is expressed in two different ways, the one an imperfect imitation of the other. However, while this avoids a two-faculty theory of the *will*, it yields a single concept of freedom with a curiously hierarchical character. This results from Beck's argument that the will has *two* kinds of freedom, that of *Wille* and *Willkür*, but that the former is said to be the "perfection of logical form" of the latter.

To see how Beck comes to this claim we must return to the argument for the imputability of evil acts. As a reminder, these acts must be considered free in a morally relevant sense in order to be morally imputable; that is, they must be practically free in the spontaneous exercise of one's power of choice. This freedom is exercised by *Willkür*, and is, Beck wants to argue, sufficient for moral

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<sup>302</sup> Beck, 1960, p 180

imputability.<sup>303</sup> This is the conclusion of his discussion of evil acts from the *Religion*: autonomy is not a necessary condition of free agency. However, Beck also argues that moral freedom in the “genuine” sense is when one’s power of choice (*Willkür*) is determined by pure practical reason (*Wille*): “genuine” moral freedom is that of autonomy. This suggests that in comparison to free evil actions, ethical actions are additionally free insofar as they are performed out of respect for the law:

Hence a free will, i.e. spontaneous, *Willkür*, when it is good, is determined by a free, i.e., autonomous, *Wille*, or pure practical reason, which gives it a law. It can obey only this law without jeopardy to its freedom. Indeed, it *gains* in freedom, by now being an autonomous as well as spontaneous will.<sup>304</sup>

This passage suggest that the freedom of *Willkür* as spontaneous power of choice can be supplemented by the freedom of *Wille*, and is in this way increased (“it gains in freedom”). Indeed, Beck goes on:

*Willkür* is fully spontaneous only when its action is governed by a rule given by pure practical reason, which is its legislative office.<sup>305</sup>

In such cases *Willkür* achieves its idealized nature as *Wille* through determination by pure practical reason. As Beck puts it, “the former function (*Wille*) binds the latter (*Willkür*); the former is the pure form of the latter”.<sup>306</sup> It is on these grounds that Beck argues that “there is only [one faculty of the will], but it has two kinds of freedom”, avoiding the charge of dualism, but creating a hierarchy of freedom on which only the exercise of one’s power of choice from respect for the law is viewed as fully free.<sup>307</sup>

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<sup>303</sup> Beck, 1960, p 204

<sup>304</sup> Beck, 1960, p 180. My emphasis

<sup>305</sup> Beck, 1960, p 180

<sup>306</sup> Beck, 1960, p 199

<sup>307</sup> Beck, 1960, p 180

This betrays a view on which freedom comes "by degrees" for Beck, on which we are only *genuinely* free if we are autonomous (or fully rational). Indeed, Beck suggests at times that it is only in cases in which we are autonomous that the will is fully free; that is, in cases where *Willkür* is governed by *Wille*:

[The human will] cannot be spontaneous without being autonomous, unless it is to the lawless and, accordingly, useless to moral as well as incompatible with science. Second, reasoning in the opposite direction, it can be spontaneous because, under autonomy, it ought to be. If the awareness of our duty placed impossible demands on us, as it would if our *Willkür* were not potentially free, then the thought of duty would be illusory.<sup>308</sup>

Beck is led towards his argument that the will cannot be fully free without being autonomous by his need for a positive conception of freedom. In asking "what limits freedom and renders it lawful?" Beck rightfully observes that Kant repeatedly identifies pure practical reason as providing the law that determines *Willkür* as an efficient cause to causality (MM 6:213; CPR A569/B597; CprR 5:26).<sup>309</sup> Beck then casts this in terms of the relationship between *Wille* and *Willkür*: "Through submission to [*Wille*], *Willkür* supplements its negative freedom with a positive freedom which comes from submission to its own idealized nature as a purely rational will".<sup>310</sup> As such, the will becomes "free in itself"; *Willkür* "participates" in the autonomy of *Wille* "to the extent that its negative freedom is exercised in adherence to the law of pure practical reason".<sup>311</sup> It appears then that on Beck's positive conception of freedom, a fully spontaneous *Willkür* is one determined by pure practical reason; it is an autonomous will.<sup>312</sup>

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<sup>308</sup> Beck, 1960, p 200

<sup>309</sup> Beck, 1960, p 196

<sup>310</sup> Beck, 1960, p 180

<sup>311</sup> Beck, 1960, p 180

<sup>312</sup> Beck, 1960, p 180 / 199

In finalizing a positive conception of practical freedom, Beck therefore slides back into an ethical reading on which free acts are autonomous acts. The cause of this is not Beck's claim that moral freedom is constituted by the limitation of man's spontaneous power of choice according to pure practical reason per se. This, as discussed above, is what renders the will lawful, and hence free. Rather, Beck's error is in the ethically biased way in which he understands this determination by reason; that is, as the intrapersonal idea of self-constraint according to reason. We see this bias in the following description of autonomy as positive moral freedom:

freedom in the positive sense [is] the effectiveness of the legislation of pure practical reason and the ability to undertake actions in accordance with and because of (out of respect for) this law.<sup>313</sup>

This description of positive freedom ties it to the ethical idea of moral incentive; of acting out of respect for the law. In this sense, pure practical reason determines man's power of choice in that it is the *incentive* to action: the action is performed not only in accordance with the law, but out of respect for the law. This reveals an implicit conflation in Beck's reading between the idea of a determining ground and an incentive. His account assumes that if reason [*Wille*] is to be the determining ground of spontaneous free choice [*Willkür*], then it must serve as the *incentive* for that choice. Determination by pure practical reason is equated with acting from duty; with acting from respect for the law. This conflates law-governed action according to pure practical reason with autonomous action as a particular type of such action: free action and autonomous action are collapsed into one concept.

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<sup>313</sup> Beck, 1987, p 36

Despite his ostensible rejection of the *Groundwork* conception of freedom as autonomy, Beck therefore remains tethered to an incentive-based conception of practical freedom. This is the result of the common tendency of commentators to prioritise the *Groundwork* account of freedom and moral agency, and Beck's failure to look beyond this to the *Metaphysics of Morals* and the first *Critique*, where practical freedom is not given by *incentive* to action, but rather by the broader position of *determining grounds* to action. What is puzzling about Beck's failure to identify this broader conception of practical freedom in Kant's critical philosophy, instead remaining tethered to the *Groundwork*, is that his account is motivated by the problem of evil posed in *Religion*. And the distinction between incentive and determining ground is precisely Kant's point there: incentive to action is not the morally relevant criterion when judging imputability, for subjective grounds of action still yield "deeds of freedom" (R 6:21). There must, therefore, be another sense in which pure practical freedom serves as the determining ground of man's free power of choice that is not given by the idea of moral incentive, but rather as some other limitation on moral action held in common by both autonomous and non-autonomous acts.

Beck's analysis, like Allison's, is promising in seeking to offer an account of practical freedom as spontaneity. Beck provides us with a negative conception of practical freedom as spontaneity, grounded in the transcendental concept of freedom. Yet he fails in his characterization of the positive conception as law-governedness. In order to complete this account of practical freedom then, we must show how this spontaneous choice is lawful, but do so in a way that does not narrow it back down to autonomy. Following Paul Guyer and Bernd Ludwig, I argue in the remainder of this chapter that spontaneous free choice is law-governed in its subjection to

universal principles of pure practical reason. This makes pure practical reason the *determining ground* of action, but without making appeal to reason as the *incentive* to action. Avoiding this appeal means that practical freedom is not equated with the self-legislation of ethics, but can also include the other-constraint of Right. It is thus sufficiently broad to include external freedom under its scope, confirming Kant's *Doctrine of Right* to be part of his doctrine of morals as a doctrine of freedom.

## 2) Paul Guyer's interpretation of practical freedom as acting on principle

### 2.1) Guyer's concept of autonomy as the foundation of positive moral freedom

Paul Guyer's analysis of practical freedom recommends itself on two counts. Firstly, he defends the place of Right in Kant's doctrine of morals, on the grounds that moral laws are laws of freedom. This is an advance on Beck's account, which might have been directed away from its focus on moral incentive had he considered the other-legislating concept of external freedom contained in Kant's *Doctrine of Right*. Guyer, by contrast, does engage directly with Right. From this, we should expect an account of moral freedom that can incorporate the external freedom of Right. Secondly, in response to the problems discussed above with reference to Beck, he offers an account of free agency as *determination* by reason but without reference to *incentive*. Instead, his account of moral freedom as acting on principle suggests a reading on which objective practical principles *may* serve as the incentive to act, but need not necessarily to do so in order to be determining. In the case of ethics, to act according to the intrapersonal principle of the categorical imperative does require self-legislation (acting from respect for the law); whereas in the case of Right,

morality simply requires that we act in accordance with the universal principle of Right, which is other-legislating, and hence requires no moral incentive.

Guyer offers his most explicit defence of the morality of Right in his article “Kant’s Deductions of the Principles of Right”.<sup>314</sup> Here he defends its moral status on the grounds that the principle of Right is a principle of freedom:

The foundational assumption of Kantian morality is that human freedom has unconditional value, and both the Categorical Imperative and the universal principle of right flow directly from this fundamental normative claim: The Categorical Imperative tells us what form our maxims must take if they are always to be compatible with the fundamental value of freedom, and the universal principle of right tells us what form our actions must take if they are to be compatible with the universal value of freedom, regardless of our maxims and motivations.<sup>315</sup>

In support of his assumption in favour of the morality of Right, Guyer stresses both the *form* of the law, shared in common by the categorical imperative and the universal principle of Right, as well as their shared *object*, in the concept of freedom. Guyer’s principle concern in the article in question is not with the idea of freedom as the ground of virtue and Right alike. Rather, he focuses on the systematic question of analyticity.<sup>316</sup> This is in response to Allen Wood and Markus Willaschek, who object to the morality of Right on the grounds that its universal principle is analytic, and cannot be deduced from the categorical imperative, which is synthetic, an issue which, as mentioned in chapter 2, I shall not go into within the confines of this thesis. Instead, my concern is with understanding the concept of freedom that

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<sup>314</sup> Guyer, P., “Kant’s Deductions of the Principles of Right” in Mark Timmons (ed.), *Kant’s Metaphysics of Morals: Interpretative Essays*. Oxford: Oxford University Press, 2004

<sup>315</sup> Guyer, P., *Kant’s System of Nature of Freedom: Selected Essays*. Oxford: Oxford University Press, 2005, p 26

<sup>316</sup> Guyer, 2005, pp 24-5 / 46-7. It is for this reason that I refer to Guyer’s “assumption” in favour of the morality of Right, as he does not defend the grounds on which Right is to be understood as a moral principle.

Guyer takes to be “the foundational assumption of Kantian morality”; that is, with the concept of moral freedom that Guyer proposes as acting on principle.

Given his commitment to the morality of Right, what is surprising about Guyer’s account of positive moral freedom is that he, like Beck, conceives it as autonomy.<sup>317</sup> However, contrary to the common reading of autonomy as the intrapersonal freedom of self-constraint according to reason, Guyer conceives it in a broader sense as a "bipartite account of freedom in choice and action".<sup>318</sup> In this way, he implies a broadening of the concept beyond the ethical conception of self-legislation to one that also incorporates the other-legislation of external freedom. We see this extension to interpersonal freedom in the following passage:

Kant sees autonomy, or self-governance by universal law, as the condition that is necessary to achieve and maintain freedom in two ordinary and, as it turns out, related senses—namely, the independence of the choices and actions of a person not only from domination by other persons, but also from domination by his own inclinations.<sup>319</sup>

Guyer’s inclusion of freedom from domination by others indicates a reading of "autonomy" that is broader than the intrapersonal freedom of ethics. Moral freedom is not just an internal matter of the relation between one’s power of choice and one’s rational will as governed by pure practical reason. It is also a matter of interpersonal freedom in one’s choices and actions in one’s interactions with others in the external world.<sup>320</sup>

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<sup>317</sup> Guyer, 2005, pp 116-117

<sup>318</sup> Guyer, 2005, p 117

<sup>319</sup> Guyer, 2005, p 116

<sup>320</sup> Note that Guyer is ambiguous on this point; that is, on whether he sees his account as accommodating both the internal freedom of ethics and the external freedom of Right. Indeed, his equation of practical freedom with the concept of autonomy, albeit a broader concept than usually assumed, suggests that he ultimately views interpersonal freedom as



Guyer, like Beck, grounds his account of practical freedom in the transcendental concept of freedom as spontaneity; that is, in the negative concept of “the will’s independence of coercion through sensuous impulse” (CPR A533-4/B561-2).<sup>321</sup> He then goes on to suggest a positive interpretation as the will’s determination by principles of pure practical reason. More specifically, this determination by reason is to be understood as the “subjection of our inclinations to a self-given but universal law”.<sup>322</sup> This returns us to the previous chapter’s discussion of inclinations triggering maxims, and the subsequent adoption of those maxims according to practical principles. On Guyer’s account, moral agents select maxims according to a priori principles of reason; that is, according to the Categorical Imperative and the universal principle of Right. Inclinations provide the end of the agent’s action, but “*which* inclinations are to be gratified must be regulated by reason”.<sup>323</sup> Only those that are “consistent” with the categorical imperative or the universal principle of Right are sanctioned by the laws of pure practical reason. It is in this way that the pursuit of our subjective ends is regulated.

There are clear parallels with Allison’s account in this regard. However, in advancing this account of free agency, Guyer, unlike Allison, argues that we must be capable of self-legislating according to the pure form of the moral law in the pursuit of these ends. That is, for actions to be “consistent” with the Categorical

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the freedom of ethics acted out in the *external* domain. I discuss this in my criticism below. However, insofar as Guyer suggests a reading of practical freedom as acting on intra- or interpersonal principles, coupled with his support of a moral reading of Right, it suggests a promising strategy in providing a characterization of practical freedom that can accommodate the external freedom of Right.

<sup>321</sup> Guyer, 2005, p 121

<sup>322</sup> Guyer, 2005, p 120

<sup>323</sup> Guyer, 2005, pp 135-6

Imperative, the agents maxim of action may be triggered by inclination, but they must be motivated to act by pure moral interest. So while maxim formation is materially grounded in an agent's ends, their will, grounded in the intelligible concept of transcendental freedom, is capable of being determined by the mere legislative form of the law. It is in this way that Guyer makes a departure from Allison's materially grounded account of rational agency, which by contrast sacrifices the possibility of acting on a priori, formal maxims.<sup>324</sup>

On Guyer's account, moral freedom is therefore a person's ability to select and pursue their own ends according to principles of pure practical reason.<sup>325</sup> However, while he calls this "autonomy", he resists a Beckian slide into an ethical interpretation according to which that universal law must be the self-given *incentive* to action. Though, as discussed above, he maintains the possibility of self-legislation of the moral law, moral freedom is conceived in what appears to be a broader sense, as the regulation of our choice by principles of pure practical reason. These principles are applied to our inclinations in the setting and pursuing of individual ends.<sup>326</sup>

[In a condition of moral freedom] each person will work to satisfy some of his own inclinations and some of those of others, subject to the impartial principle of intra- and interpersonal consistency or compatibility among inclinations.<sup>327</sup>

These "impartial principles of intra- and interpersonal consistency or compatibility" are given by the categorical imperative and the universal principle of Right, which

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<sup>324</sup> For a more detailed discussion of Guyer's account of moral motivation see Guyer 2000, pp 135-9 & 2005, pp 115-126. I do not discuss it further here, as my interest in critiquing Guyer's account of moral freedom in this chapter is with its individualistic nature, yielded by his teleological interpretation of Kant's moral theory.

<sup>325</sup> Guyer, 2005, p 118

<sup>326</sup> Guyer, 2005, p 119

<sup>327</sup> Guyer, 2005 p 121

give us the rules of action for the spontaneous will in the domains of ethics and Right respectively:

the Categorical Imperative tells us what form our maxims must take if they are to be compatible with the universal value of freedom, and the universal principle of right tells us what form our actions must take if they are to be compatible with the universal value of freedom, regardless of our maxims and motivations.<sup>328</sup>

On Guyer's interpretation our negative freedom as spontaneity is positively determined by these two principles of reason. Our pursuit of individual ends is regulated by their subjection to the categorical imperative and the universal principle of Right in determining whether they are capable of giving a universal law. This remains faithful to Kant's claim that it is reason that sets limits on negative freedom, but without (necessarily) having to make appeal to reason as the incentive to action.

### *2.2) Moving beyond Guyer's interpretation*

Guyer's position is attractive in the explicit attempt he makes to build a positive conception of moral freedom grounded in the two principles of morality as principles of pure practical reason. This incorporates both ethics and Right under the heading of moral freedom, whilst maintaining a distinction between the two domains on the basis of whether man's power of choice is exercised according to either the Categorical Imperative or to the universal principle of Right; that is, whether the moral law is *self*-legislated, or *other*-legislated. Crucially, he also maintains the distinction between reason as the objective determining ground, in the idea of moral freedom as acting on principle, and reason itself as incentive to

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<sup>328</sup> Guyer, 2005, p 201

action, in the idea of autonomy as acting from respect for the law. Guyer's account therefore recommends itself in its thematization of moral laws as laws of freedom, and in its idea of practical freedom as acting on principle, which offers an account that includes both the internal freedom of ethics and the external freedom of Right under its scope.

Unfortunately, however, the way in which Guyer conceives of acting on principle fails to sufficiently distinguish between the domains of ethics and Right. This, *despite* his distinction between the intra- and interpersonal principles of moral agency. Specifically, his characterization of moral freedom as the regulation of *individual* ends according to principles of pure practical reason implies a self-regarding interpretation of external freedom. Moral freedom is a matter of choosing one's *own* ends, whether with regard to one's internal motivations, or one's external actions. This in turn suggests a characterization of the interpersonal element—external freedom—as the realization of private ends but in a political context:

the avoidance of domination by one's inclinations and the avoidance of domination by other persons are not two independent goals after all. Allowing oneself to be dominated by the inclinations of others depends upon allowing oneself to be dominated by one's own inclination to be dominated by others, and the principle that will allow one to avoid being dominated by this inclination also requires one to avoid domination by the principle of others.<sup>329</sup>

This concept of interpersonal freedom as avoidance of domination by others is not relational. Rather, one's freedom in political society is a matter of freedom from domination by one's *own* inclinations with specific regard to the way one *interacts* with others: "Allowing oneself to be dominated by the inclinations of others

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<sup>329</sup> Guyer, 2005, pp 120-1

depends upon allowing oneself to be dominated by one's own inclination to be dominated by others". The interpersonal freedom of the juridical domain is therefore the intrapersonal freedom of ethics *transplanted* to an interpersonal level. It is a matter of realizing one's individual ends given one's particular external circumstances. Despite his claim to a *bipartite* conception of freedom in choice and action that includes both intra- and interpersonal concepts of freedom, Guyer therefore offers an individualistic concept of external freedom as an *extension* of the internal freedom of ethics into the juridical domain.

The self-regarding nature of Guyer's account is, in part, a symptom of the teleological character of his account, evident in his characterization of a condition of autonomy as "the necessary condition for the realization of freedom from domination by both one's own inclinations and those of others, in the choice and pursuit of ends".<sup>330</sup> Indeed, he argues that it is in the pursuit of individual ends and the achievement of happiness that the value of freedom lies:<sup>331</sup>

our deepest satisfaction lies in the promotion of life, which, in turn, consists in the maximally unhindered activity of all our powers and capacities.<sup>332</sup>

There is, he argues, "a special satisfaction in making our own choices, free from the interference of others":<sup>333</sup>

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<sup>330</sup> Guyer, 2005, p 121. See also Guyer, 2000, pp 129-133 for a discussion of the teleological nature of his interpretation of Kant's theory of freedom.

<sup>331</sup> Guyer, 2005, p 130

<sup>332</sup> Guyer, 2005, p 129

<sup>333</sup> Guyer, 2005, p 128

what the full enjoyment of our freedom requires is that we subject both our own inclinations and those of others to the regulation of reason in a way that, while respecting the freedom of all, leads to the pursuit of the satisfaction of an intersubjectively compatible set of inclinations, representing the union of the free choices of all who are involved.<sup>334</sup>

Guyer therefore presents a teleological account of practical freedom grounded in the pursuit of individual ends. Its relevance here is its contribution to the *individualistic* nature of his interpretation of external freedom within political society, as a private morality extended to the public domain. However, I critique this teleological character in detail in the following chapter, on the grounds that it yields a substantive account of freedom that is inconsistent with the formal nature of Kant's moral theory grounded in a priori presuppositions.<sup>335</sup>

Instead, my concern here is with the individualistic nature of Guyer's account in its affiliation with Rawlsian accounts of acting on principle, and the consequently empiricist character of the interpretation that he offers. Specifically, I am referring here to the idea of external freedom as the realization of *private* ends in a *political* context, which is indicative of a Rawlsian influence.<sup>336</sup> This is most explicit in Guyer's conception of acting on principle as the regulation of maxim selection according to the sanction of Kant's two moral principles: we apply principles of pure practical reason to our inclinations in order to determine whether our maxims are consistent with the moral law. This is akin to Rawls' account of the CI-

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<sup>334</sup> Guyer, 2005, p 129

<sup>335</sup> It should be noted that, while I go on to critique Guyer's account of *external* freedom on grounds of its teleological nature in the following chapter, his account is also highly controversial with reference to Kant's ethics, insofar as it turns the categorical imperative into a law instrumental to the value of freedom, rather than constitutive of it. For a further discussion of this, see Timmermann, J., 2008.

<sup>336</sup> I discussed this aspect of Rawlsian interpretations of Kant in chapter 2, with particular reference to the interpretations of Andrews Reath and Christine Korsgaard

procedure, on which individuals apply the categorical imperative to their own particular circumstances in determining whether an action is morally permissible.<sup>337</sup> This procedural account yields an empiricist interpretation of Kant's universal moral principle as a decision-making procedure; a "test" against which we can judge the morality of maxims in "the normal conditions of human life".<sup>338</sup>

Guyer's interpretation of acting on principle as the application of universal principles to empirical impulses (inclinations) thus leads him into a reading of moral freedom akin to that of Rawls' "reasonable empiricism".<sup>339</sup> Motivated by a seeming desire to move away from an account of moral freedom narrowed to the ethical freedom of self-*legislation*, he offers an account of that freedom as self-*regulation*. This, as discussed previously, has promise in seeking to prise apart the concepts of practical freedom and autonomy. Yet in turning to the idea of self-regulation, Guyer makes a similar move to Rawls, in shifting from a first-personal practical perspective, to a third-personal theoretical perspective. On this third-personal account, moral freedom is not a matter of our consciousness of the moral law (CprR 5:30); it is a matter of testing our maxims according to procedures in the pursuit of individual ends.

Guyer's failure to thematize the idea of moral consciousness may be because, as Ludwig notes, it is often conflated with the idea of *determination* by consciousness of the law; that is, acting from respect for the law.<sup>340</sup> In his desire to move away from

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<sup>337</sup> See Rawls, J., *Lectures on the History of Moral Philosophy*. Harvard: Harvard University Press, 2003, p 167

<sup>338</sup> Rawls, 2003, pp 167/173.

<sup>339</sup> For a discussion of Rawls' reasonable empiricism, and empiricist views of reason, action and freedom, see O'Neill, 2003, pp 65-80

<sup>340</sup> Ludwig, 2004, pp 168-9

the ethical conception of freedom as self-legislation, Guyer may therefore mistakenly believe that he must also depart from the idea of moral consciousness. Yet as I discuss in the final section, this is not the case. Indeed, not only is this departure unnecessary; it is highly problematic. For in contrast to Beck, who "ethicizes" external freedom, Guyer's third-personal account appears to "externalize" autonomy. That is, contrary to the *Groundwork* account of our consciousness of the law, he makes it a matter of the conformity of our *choices* and *actions* with principles of moral agency. In doing so, he leaves behind the internal idea of self-legislation in the case of ethics, reverting instead to a third-personal perspective.

It is on these grounds that I move beyond Guyer's account of practical freedom as acting on principle, and turn instead to an alternative account based on a reading by Berndt Ludwig, who in contrast to Guyer, does thematize the idea of consciousness of the moral law. In remaining with the idea of practical freedom as acting on principle, I retain the advantages of Guyer's account, firstly in its broader interpretation which incorporates external freedom under its scope; and secondly in its clear distinction between ethics and Right given by Kant's two distinct principles of morality. However, in abstracting a similar though more formal argument for practical freedom as acting on principle grounded in man's consciousness of the moral law as a causal agent, I avoid the empiricist and individualistic nature of Guyer's account.



### 3) *Finalising a picture of practical freedom as acting on principle*

#### 3.1) *Bernd Ludwig and the concept of the causa libera*

In his article "Whence Public Right" Berndt Ludwig is concerned primarily with external freedom and the right to coerce. As such, his discussion engages first and foremost with the justifiability of the forceful restriction of an agent's freedom in a condition of Right, not with debates surrounding practical freedom in general. Consequently, we have to arrive at his theory of moral freedom through his account of agency. This aligns his approach with Guyer's and Korsgaard's, insofar as all three of them approach the question of moral freedom through a discussion of the specific requirements and concerns of Kant's practical philosophy. This contrasts with Allison and Beck, both of whom provide a discussion of practical freedom within the context of the metaphysics of Kantian freedom in general.

However, although Ludwig's interpretation is motivated by practical concerns regarding political coercion and moral agency, he provides an account that is systematically connected with Kant's theoretical philosophy. Specifically, while Ludwig takes the perspective of practical reasoning, he does not offer a substantive account of the "value" or "ends" of free agency like that of Guyer. Rather, he offers a formal account of practical freedom as acting on principle, grounded in the idea of our consciousness of the moral law as causal agents (*causa liberae*). In doing so, he follows Beck in grounding moral freedom in the idea of an intelligible cause. This offers the ground for an account of practical freedom as man's spontaneous capacity to act according to moral principles, broadening the concept beyond the ethical idea

of autonomy, and maintaining the first-personal perspective of Kant's practical philosophy. This is reminiscent of Allison's account discussed in the previous chapter, though avoids the problems caused by his sensibly grounded Incorporation Thesis, appealing instead to a metaphysical ground for spontaneity. Building on Beck's account of negative practical freedom grounded in the transcendental concept of spontaneity, Ludwig's analysis of positive freedom therefore confirms the metaphysical presuppositions of practical freedom, providing a metaethical ground for Kant's moral theory which includes the *Doctrine of Right* under its scope.

Ludwig's discussion of moral agency comes in the context of a concern over whether a person can opt out of the obligations of Right, or as he calls it, the rules of the *Rechtslehre* game. People are subject to the rules of this game insofar as they are moral agents. It is therefore with the concept of personhood or "moral personality" that Ludwig is concerned, as the ground of obligations of Right. This moral personality is defined by Kant as imputability, which in turn is understood as "the judgement by which someone is regarded as the author (*causa libera*) of an action" (MM 6:223/227).<sup>341</sup> It is on these grounds that Ludwig claims "Kant at least thought that nearly everything required for the foundation of a theory of obligation (*Verbindlichkeit*) can be derived by *analysis* of the concept of a *causa libera* in the framework of transcendental idealism – together with man's consciousness of being such a *causa libera*".<sup>342</sup> Ludwig therefore offers an account of moral agency as authorship of our actions (being a *causa libera*), which Kant tells us is "nothing other than the freedom of a rational being under moral laws" (MM 6:223).

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<sup>341</sup> Ludwig, 2004, p 166

<sup>342</sup> Ludwig, 2004, p 166

It is the precise nature of this freedom that I am concerned with lifting from Ludwig's account. More specifically, I want to consider the way in which these moral laws determine our power of choice, in yielding a positive moral conception of freedom as "acting on principle". As is familiar from Beck's account, Ludwig's discussion of freedom begins with the concept of negative freedom as spontaneity grounded in the transcendental concept of freedom. In providing an analysis of moral agency as *causa libera*, Ludwig begins with Kant's second *Critique* claim that "if freedom is predicated of us, it transports us into an intelligible order of things" (CprR 5:42). For a free cause to be a cause at all it "presupposes an *intelligible world* with its own 'causal' law that is independent of the causal laws of nature".<sup>343</sup> As with Beck, Ludwig supports this appeal to a metaphysical concept of freedom with reference to the second *Critique* argument according to which our freedom as moral agents presupposes a capacity to act independently of the causality of nature (CprR 5:95-7).<sup>344</sup> That is, it presupposes transcendental freedom as a ground for our agency, giving what Beck refers to as the negative concept of practical freedom as spontaneity.

Ludwig explicates his positive conception of practical freedom in his claim that "[b]eing free and being the object of a 'law of freedom' are one and the same thing".<sup>345</sup> That is, man's actions as a *causa libera* must not only be free from necessitation by nature, but must also be subject to laws according to which that causality is exercised. This argument is most familiar from *Groundwork III*, as

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<sup>343</sup> Ludwig, 2004, p 167

<sup>344</sup> Ludwig makes it clear that he intends a metaphysical appeal, rather than the kind of conceptual appeal that Allison makes, when he writes "We cannot take Kant's statements that a cause presupposes a law and that being a *causa libera* implies being restrained by this law 'in the Idea' for granted. They are – true or false – *metaphysical* claims and, as the history of philosophy shows, open to controversy" (2004, p 170)

<sup>345</sup> Ludwig, 2004, p 167

discussed above in section 1. However, Ludwig argues that the connection between the concepts of causality and law in the *Groundwork* is not just a concern of Kant's moral theory, but rather is grounded in Kant's theoretical philosophy:

Kant was not the first thinker to link the concept of a cause to the concept of law, but he was the first to make specific use of it in the theory of human agency. The most prominent formula expressing the conceptual connection of cause and law is the statement of the Second Analogy in the first edition of the *Critique of Pure Reason*:... 'Everything that happens, that is begins to be, presupposes something upon which it follows according to a rule' (A189). To be a cause and to produce something according to a rule are, for Kant, equivalent.<sup>346</sup>

As with any kind of causality, being a *causa libera* is therefore nothing else but being ruled by law. Being a *free* cause (an author of one's actions) and being the object of a *law of freedom* are one and the same thing.<sup>347</sup> This is Kant's claim in the *Groundwork* when he argues that a free will "must...be a causality in accordance with immutable laws of a special kind" (G 4:446). These immutable laws are given by pure practical reason as a universal principle of morality, hence "a free will and a will under moral laws are one and the same" (G 4:447).

The concept of a *causa libera* as being ruled by law thus gives us a concept of positive moral freedom as "acting on principle".<sup>348</sup> This is familiar from Beck's analysis, and his observation that a positive conception of freedom requires the subjection of man's power of choice to laws of pure practical reason. To advance beyond Beck, however, we still require an account of what it is for one's spontaneous power of choice to be determined by reason. Ludwig understands this as acting on principle:

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<sup>346</sup> Ludwig, 2004, p 166

<sup>347</sup> Ludwig, 2004, p 167

<sup>348</sup> Ludwig, 2004, p 167

that is, to act in accordance with the moral law in its legislative form.<sup>349</sup> This, he argues, is consistent with Kant's claim in the second *Critique* that

It is the legislative form, then, contained in the maxim, which can alone constitute a principle of determination of the [free] will (CprR 5:29).

As discussed in previous chapters, a maxim's legislative form is given by the universalization criterion. It is "the conformity of actions as such with universal law, which alone is to serve the will as its principle" (G 4:402). This principle takes on an imperatival form for human beings because our power of choice is only imperfectly determined by reason:

the relation of objective laws to a will that is not thoroughly good is represented as the determination of the will of a rational being through grounds of reason, indeed, but grounds to which this will is not by its nature necessarily obedient (G 4:413).

Hence the objective principle of morality as universalization is called a "command (of reason), and the formula of the command is an *imperative*" (G 4:413). Acting on principle is therefore understood as acting according to imperatival law as a universal principle of reason.

In drawing a distinction between the two moral domains of ethics and Right, this universal principle of reason then takes a different form in the case of each.<sup>350</sup> In the case of ethics, universal law requires that we act according to the categorical imperative, "act only in accordance with that maxim through which you can at the

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<sup>349</sup> Ludwig, 2004, p 168

<sup>350</sup> I have left aside the issue of how these two principles relate to each other and to Kant's supreme moral principle. As discussed in chapter 2, there is some controversy surrounding this issue, in particular with regard to the deduction of the universal principle of Right. Ludwig suggests that this principle is derived from the fundamental law of pure practical reason as Kant's "main normative principle", though does not offer support for the claim (Ludwig, p 159). Guyer takes a similar position, arguing that the UPR is deduced from the categorical imperative as the supreme moral principle, and defending this based on a reinterpretation of the analyticity of the Universal Principle of Right that allows for its deduction from the synthetic supreme moral principle (Guyer, 2004, esp. pp 26-32).

same time will that it becomes a universal law" (G 4:421). In the case of Right, we are bound by its universal principle: "so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law" (MM 6:231). The key difference between the two principles is that while the categorical imperative contains a willing requirement – "which you can at the same time *will*" – the principle of Right only requires that we *act* externally in a way that is universalisable; that is, that our exercise of our free power of choice is consistent with others exercising their power to an equal extent. So while internal freedom (autonomy) requires that we *will* the moral law through our self-legislation, external freedom merely requires that we *act in accordance* with the moral law.

As discussed above and in chapter 2, it is therefore the distinction between self-legislation and other-legislation in accordance with moral law that provides the distinction between internal and external freedom. So while the categorical imperative requires that the will determine *itself* through the idea (universal form) of law, the universal principle of Right "does not at all expect, far less demand, that I *myself should* limit my freedom to those conditions just for the sake of this obligation" (MM 6:231). In thus distinguishing between internal and external freedom, Ludwig's interpretation makes it clear that it is the principle of *universality* in general that serves as the determining principle of man's power of choice, rather than the self-legislation of that principle that is particular to the internal freedom of ethics. As such, he provides an account of practical freedom which incorporates, but is not limited to, the ethical concept of autonomy. Acting from principle – universal law – can be self-legislated, as in ethics, but need not be, as in Right.

### 3.2) A final account of practical freedom as a capacity to act on principle

I have sketched Ludwig's account of practical freedom as acting on principle. However, we still require an account of what it means to act according to the legislative form of the moral law. Returning to Guyer's interpretation, he characterizes it as an agent's regulation of their subjective ends according to principles of pure practical reason:

[In a condition of moral freedom] each person will work to satisfy some of his own inclinations and some of those of others, subject to the impartial principle of intra- and interpersonal consistency or compatibility among inclinations.<sup>351</sup>

Guyer's individualistic teleology yields a self-regarding and empiricist account of practical freedom that is unwarranted on Kant's doctrine of morals.<sup>352</sup> Ludwig, by contrast, offers a wholly formal account of acting on principle, as our consciousness of our subjection to moral law and our recognition of ourselves as being obliged to act according to universal law. This maintains the formality of moral freedom as a concept of law-governedness: it is not in our pursuit of individual ends that we are free, but rather in our subjection to universal moral principles in our acknowledgement and consciousness of our capacity to act in accordance with the moral law. We therefore have an account of a moral will that is *determined* by reason under universal law, but that need not necessarily legislate that law to *itself*. Determination by reason is not to be equated with incentive to act. As such, the distinction between ethics and Right as *self-* versus *other-*legislation is upheld, and with it, we avoid the slide back into autonomy that Beck's interpretation suffered.

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<sup>351</sup> Guyer, 2005 p 121

<sup>352</sup> I discuss this in more detail in the following chapter.

Reinforcing this, Ludwig makes it clear that an appeal to our *consciousness* of our subjection to moral law should not be taken to imply the ethical requirement that we act *from respect* for the law, as it did in Beck's case. As Ludwig points out, acting from duty is not a requirement that is applicable to Right.<sup>353</sup> Yet Kant makes it quite clear that *consciousness* of the moral law is:

Right in the narrow sense...is indeed based on everyone's consciousness of obligation in accordance with a law (MM 6:232).

As such, our consciousness of our subjection to the moral law is not to be taken to imply the ethical requirement that we make the law our *incentive* to act. Rather, the moral consciousness that underpins our moral freedom is our acknowledgement of our capacity to act as moral agents, whether that is in accordance with the moral law or not. This, as I will discuss below, makes the moral law the *determining ground* of our choice, but does not require that we make it the *subjective motivation* for that choice.

Practical freedom as law-governedness also does not require that we *actually* act according to the moral law. Rather, agents must simply acknowledge that they are *capable* of doing so. This is consistent with the *Religion* argument discussed in section 1, where Kant argues that it is "in the possibility of the deviation of the maxims from the moral law" that freedom lies (R 6:29). That is, it is our capacity for the application of moral principles to our maxims, rather than our action in accordance with them, which constitutes our practical freedom. As Ludwig puts it:

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<sup>353</sup> Ludwig, 2004, pp 168-9



In order to acquire the status of [free] beings who enjoy the *privilege* of being treated as persons, human beings must 'admit' that they actually *are capable* of 'acting on principle', and that they *are obliged* to do so.<sup>354</sup>

Tying the concept of moral freedom to our *capacity* to act overcomes the problem of moral evil and imputability addressed by Beck's account in the first section. For an action to be practically free, and hence morally imputable, all that is required is a consciousness of an *ability* to act according to moral principles; not that we actually do. This means that actions that are wrong, i.e. that are not performed according to principle, are nonetheless free, and hence imputable. Likewise, appealing to the *capacity* to act under law, rather than to the *incentive* to do so, avoids the equation of practical freedom with acting *from respect* for the law, allowing us to include legal and amoral acts under its scope.

However, as noted above, this capacity to act according to moral laws yields moral freedom only in combination with our *consciousness* of such a capacity. To be a moral agent, one must not only *be* an efficient cause subject to laws of freedom, capable of acting or not acting in accordance with moral principles; one must also *acknowledge* one's obligation to act according to those laws. Only then are we brought to the idea of our freedom as independent causalities, thereby grounding our moral agency (CprR 5:42; G 4:451):

One would never have ventured to introduce freedom into science [the sensible world] had not the moral law, and with it practical reason, come in and forced this concept upon us (CprR 5:29).

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<sup>354</sup> Ludwig, 2004, p 170

We make our claim to being free agents through our experience of drawing up maxims of action for ourselves, and our subsequent consciousness of being subject to an imperativ moral law:

He judges, therefore, that he can do something because he is aware that he ought to do it and cognizes freedom within him, which, without the moral law, would have remained unknown to him (CprR 5:30).

It is on these ground that Ludwig argues that “Only insofar as man realizes himself as being capable of acting in accordance with a law, can he claim to act *himself*, being a *causa libera*”.<sup>355</sup>

This equation of moral consciousness with law-governedness finds support in the following passage in the second *Critique*, where Kant argues that the *determination* of a law-governed will by pure practical principles is to be equated with our *consciousness* of our subjection to such principles:

[A lawful will] is inseparably connected with, and indeed identical with, consciousness of freedom of the will, whereby the will of a rational being that, as belonging to the sensible world cognizes itself as, like other efficient causes, necessarily subject to laws of causality, yet in the practical is also conscious of itself on another side, namely as a being in itself, conscious of its existence as determinable in an intelligible order of things (CprR 5:42).

Indeed, this is not the only passage in which Kant explicitly equates determination by principles of reason with man’s consciousness of his ability to act on such principles. In an investigation into the law that necessarily determines a free will, Kant argues that

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<sup>355</sup> Ludwig, 2004, p 167

freedom and unconditional practical law reciprocally imply each other. Now I do not ask whether they are in fact different or whether it is not much rather the case that unconditional law is merely the self-consciousness of a pure practical reason, this being identical with the positive concept of freedom (CprR 5:29).

These passages clearly draw a connection between our cognition of our freedom as an efficient cause, and our determination by unconditional laws of pure practical reason as practically free agents. This, to return to the problem identified in Beck's account, means that Ludwig's account of acting on principle as our *cognition* of those principles offers an account of moral agency on which man's free choice is *determined* by reason, but need not be *motivated* by it. The moral law serves as the objective determining ground of morally free action, but need not serve as the subjective incentive for the action. This is required only in the case of ethics, when we act under the categorical imperative. Ludwig therefore remains faithful to Kant's claim that a practically free will is a will subject to the rule of reason, but without sliding back into an account of that freedom as autonomy, as was the case with Beck.

Finally, returning to Guyer's account of acting according to moral principles, we see that while both Ludwig and Guyer understand acting on principle as the limitation of one's subjective principles of action according to universal moral principles, they nonetheless provide rather different accounts of positive moral freedom. For Guyer, the application of universal principles to our maxims of action is grounded in an individualistic account of moral freedom as the pursuit of ends according to third-personal procedures. It was for this reason that I moved beyond his account, instead adopting Ludwig's purely formal account of positive moral freedom grounded in Kant's transcendental idealism and our capacity to act on moral principles. Rather

than understanding this as our pursuit of individual ends under the constraint of moral principles, Ludwig makes an argument for positive moral freedom simply as our *consciousness* of that capacity under the moral law. It is through our awareness and our acknowledgement of our obligation according to the universal principles of morality that we are determined by law, and hence are free in the positive sense. I have not discussed these points of contrast in detail here, but do so in the following chapter. In particular, I criticise the self-regarding and substantive nature of external freedom on Guyer's individualistic account, which is in contrast to the interpersonal and formal account which I defend based on Ludwig's account of practical freedom argued for here.

### *Conclusion*

In response to problems encountered by non-metaphysical conceptions of practical freedom discussed in chapter 3, I began this chapter with Beck's argument for practical freedom as spontaneity, grounded in the metaphysical concept of transcendental freedom. This promised a broader concept of practical freedom that could bring legal actions under its scope, and in doing so, provide a ground for Kant's moral theory that included the external freedom of Right. However, I rejected Beck's reading on the grounds that his argument slides back into an ethical reading of moral freedom as autonomy, due to the fact that he misinterprets determination by pure practical reason—a condition of a *lawful* will—as acting out of respect for the law—a condition of an *autonomous* will. In doing this he conflates reason as the objective determining ground of the will with the moral law as the subjective incentive of the will. Consequently, he makes moral freedom a matter of

acting from duty, and thereby returns us to Korsgaard's position in the previous chapter.

In section 2 I turned to Paul Guyer, who provides an attractive interpretation in his explicit support of the morality of Right and of external laws as laws of freedom. His account thus promises to incorporate both ethics and Right under Kant's doctrine of morals, given by a concept of moral freedom as acting on principle. Specifically, this is understood as the regulation of our subjective ends according to intra- and interpersonal principles of morality, corresponding to the internal and external domains of ethics and Right. However, Guyer's account suffers from two interrelated problems. Firstly, his interpretation of moral freedom as the pursuit of subjective ends yields an individualistic account of practical freedom that is inconsistent with the interpersonal freedom of Right; rather, it is simply the freedom of ethics transplanted to the external domain. Secondly, this yields an epistemic, third-personal account of acting on principle akin to Rawls' "reasonable empiricism", on which we subject individual ends to moral imperatives as decision-making procedures within political society. This is at odds with the first-person practical account of Kant's moral theory, and the importance of our consciousness of the moral law.

However, I argued that Guyer's account is appealing in its idea of practical freedom as acting on principle, for this suggests an account of a lawful will *determined* by the moral law, but which does necessarily not make the moral law the *incentive* for action. It is for this reason that I moved to Bernd Ludwig's *formal* account of practical freedom as acting on principle in section 3. On Ludwig's account, acting on principle is understood not as the pursuit of individual ends regulated by law, but

rather as our acknowledgement of our capacity to act in accordance with principles given by pure practical reason. This does not require that moral agents actually act according to such principles in order to be free. Rather, it is in man's capacity for acting on principle, and specifically, in his acknowledgement of his obligation to do so, that his practical freedom consists. Positive freedom as acting on principle is therefore understood as our consciousness of our subjection to moral law in its imperatival form; that is, of our subjection to the categorical imperative and the universal principle of Right. This provides a concept of practical freedom that makes reason the objective determining ground of the will, while resisting an account on which that reason is determining insofar as it serves as the *incentive* to action, as was the case in Beck's account. As such, it includes both the internal freedom of ethics and the external freedom of Right under its scope, thereby confirming Kant's *Doctrine of Right* to be a part of his metaphysics of morals.

## Chapter 5

### External Freedom and the Morality of Right

Over the previous two chapters I have argued for a conception of practical freedom as the ground of Kant's moral theory. Moral freedom is conceived as our conscious capacity to act on principle, with man's causality grounded in the transcendental concept of freedom as spontaneity. This interpretation of practical freedom allows for the inclusion of external freedom under its scope, in the idea of acting in accordance with the universal principle of Right. It is to an explication of this external freedom to which I now turn. My account of practical freedom as law-governedness provides a concept of external freedom as acting in accordance with the universal principle of Right. However, the precise nature of this freedom remains ambiguous and underdeveloped, by both Kant and by recent commentators.

My aim in this chapter is to offer an analysis of the relation between external freedom and the universal principle of Right, building on the general conception of law-governedness established in previous chapters. Armed with the results of this analysis of external freedom, we can then return to the dilemma proposed in chapter 1, which is thought to arise between external freedom as the purpose of political society, and positive law as a necessary condition of that society. Specifically, the proposed dilemma is that in conditions of perverted justice, the positive law of the state denies the external freedom which that lawgiving takes as its end. The "perversion" thus lies in the idea that the procedures of justice frustrate its purpose, i.e., in their denial of the external freedom the practical realisation of

which is the end of Right. In order to establish whether such a perversion can arise on Kant's *Doctrine of Right*, we must therefore offer an account of external freedom as the end of justice. Only then can we assess whether justice can indeed "turn against itself" in the idea of perverted justice suggests.

I begin with a reminder of the nature of Right and its universal principle in section 1, noting the general agreement among commentators about external freedom as specifying the equal and reciprocal restriction of each person's innate freedom of choice. This gives an initial conception of external freedom as independence or non-interference. However, it leaves the full, positive conception of free choice as acting according to principle open to contention. In section 2 I move on to Paul Guyer's teleological account, according to which external freedom, positively understood, is the pursuit of individual ends. As indicated in the previous chapter, I reject this substantive account on grounds of its inconsistency with the formal nature of Kant's *Doctrine of Right*. I then consider Ripstein's account of external freedom as purposiveness. In general, Ripstein's account is attractive as it maintains the formality of choice. However he compromises the interpersonal aspect of Right in characterizing that choice as self-mastery. This is indicative of a latent substantive value in his interpretation as the pursuit of purposes, and leads to ambiguity in his formal and interpersonal account of external freedom. Therefore while I endorse Ripstein's overall position, in arguing for the formal and relational nature of external freedom as freedom of choice, I reject his account of the nature of that choice, on the basis that he falls victim to the same mistakes as Guyer. Instead, I argue for a positive conception of external freedom as a formal condition of mutual constraint, allowing for, but not defined by, the pursuit of individual projects and ends. Negatively conceived, it is freedom from interference by others; positively



conceived, it is the restriction of one's choice consistent with the equal choice of everyone, which is nothing more than a capacity for free choice according to the universal principle of Right.

*1) The universal principle of Right and man's freedom of choice*

Having defended the morality of Right and its foundation in the concept of practical freedom, I turn now to the precise nature of external freedom within Kant's doctrine of morals. I begin my discussion of external freedom in this section with a reminder of the specific nature of Right and its universal principle as contrasted to that of ethics. As argued in the previous chapter, practical freedom is acting on principle; moral agency is the capacity for free choice according to moral laws as laws of freedom. In the internal domain of ethics, this requires that one act from the categorical imperative, giving the concept of moral freedom as autonomy:

choose only in such a way that the maxims of your choice are also included as universal law in the same volition (G 4:440).

The internal nature of autonomy is a function of its volitional character, as articulated in the willing requirement of the categorical imperative. This is clearest in the formula of the universal law of nature: "act as if the maxim of your action were to become by your will a universal law of nature" (G 4:421). Acting according to the categorical imperative is therefore a form of inner freedom as self-legislation, in the maxims that the will legislates for itself. It is characterised in the will's relation to itself, in the subjection of one's power of choice to one's rational will, making it an *intrapersonal* and hence non-coercible concept of freedom. This was discussed in detail in chapter 2.

Correlatively, moral agency in the external domain of Right requires that one act in conformity with the universal principle of Right:

so act externally so that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law (MM 6:231).

Right, as a condition of universal external freedom, is characterized as “the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom” (MM 6:230). Broadly conceived, a condition of Right is a condition in which each person is granted as much external freedom of choice consistent with the equal freedom of others under a general system of laws.<sup>356</sup> This concept of freedom is commonly explicated by commentators through an appeal to the idea of the innate right to freedom, characterized by Kant as “independence from being constrained by another’s choice, insofar as it can coexist with the freedom of every other in accordance with a universal law” (MM 6:237).<sup>357</sup> These passages suggest a preliminary definition of external freedom as independent choice under universal law, though we have yet to say anything about the nature of that choice as the *free* choice of a moral agent.

This preliminary outline shows the interpersonal nature of external freedom in contrast to the intrapersonal nature of autonomy; that is, we are free insofar as our

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<sup>356</sup> Hill, T., “A Kantian Perspective on Political Violence”, *Journal of Ethics*, Vol. 1, No. 2, (June 1997), p 113

<sup>357</sup> See Ripstein, A., *Force and Freedom*. Harvard: Harvard University Press, 2009, esp. pp 30-56, and Byrd and Hruschka, 2006, p 219-220. As Flikschuh notes, the precise status and function of innate Right in relation to the rest of Kant’s *Doctrine of Right* and its universal principle remains a matter of interpretation (Flikschuh, K., “Innate Right and Acquired Right in Arthur Ripstein’s *Force and Freedom*” in *Jurisprudence*, 1 (2), 2010, p 304). My reference here simply serves to outline the common way in which commentators come to conceive external freedom as *independence* from constraint. I do not, myself, advance an interpretation on which external freedom is grounded in the innate right to freedom. Rather, as argued in subsequent paragraphs, I understand the ground of the universal principle of Right, and hence external freedom, to be the formal concept of Right as given by Kant at §B in the Introduction to the *Doctrine of Right*.

exercise of choice is consistent with others' equal capacity for choice. Kant makes this interpersonal character explicit in *Theory and Practice* when he writes that "The concept of an external right as such proceeds entirely from the concept of freedom in the external relationship of people to one another" (TP 8:289). He then reiterates this in the Introduction to the *Doctrine of Right*:

The concept of right, insofar as it is related to an obligation corresponding to it (i.e. the moral concept of right), has to do, *first*, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other (MM 6:230).

External freedom as the freedom of political society is a matter of *equal* and *mutual* constraint, in order that everyone may enjoy equivalent freedom of choice. All members of political society have their "wild and lawless freedom" reciprocally constrained (MM 6:316), in order that "the action of one can be united with the freedom of the other in accordance with universal law" (MM 6:230). As Korsgaard puts it:

The Universal Principle of Justice tells us to act in a way that is compatible with the freedom of everyone according to a universal law. Everyone is to have equal freedom of action, and the duties of justice are duties to avoid actions which violate that condition.<sup>358</sup>

External freedom is therefore other-regarding, in that it is enjoyed through one's relation to others, rather than to oneself. It is an interpersonal concept of freedom as the equal and mutual constraint of everyone's freedom of choice in accordance with universal law. This, as I will elaborate on in my subsequent discussion, means that the freedom of *each* requires the restriction of the freedom of *all* under universal law.

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<sup>358</sup> Korsgaard, C., "Taking the Law into Our Own Hands: Kant on the Right to Revolution" in A. Reath, B. Herman, & C. Korsgaard (eds.), *Reclaiming the History of Ethics: Essays for John Rawls*. (Cambridge: Cambridge University Press, 1997, p 300. Note that Korsgaard here uses "Universal Principle of Justice" to refer to what is more commonly known as the Universal Principle of Right.

We are externally free only if everyone's actions are constrained by the universal principle of Right; that is, no one is free unless everyone else is.

The external and interpersonal nature of Right also means that Kant's concept of external freedom admits of reciprocal and equal coercion.

Now, since any limitation of freedom of another's choice is called coercion, it follows that a civil constitution is a relation of *free* human beings who (without prejudice to their freedom within the whole of their union with one another ) are nevertheless subject to coercive laws (TP 8:290).

The possibility of such coercion is due to the absence of any willing or incentive requirement in the *Doctrine of Right*, as discussed in chapter 2:

[the universal principle of Right] does not at all expect, far less demand, that I *myself should* limit my freedom to those conditions just for the sake of this obligation; instead, reason says only that freedom *is* limited to those conditions in conformity with the idea of it and that it may also be actively limited by others (MM 6:231).

In contrast to ethics, strict Right is defined by the absence of a moral incentive. So while moral agents must be *conscious* of their obligation in accordance with the law, in thinking of themselves as moral agents, "this consciousness may not and cannot be appealed to as an incentive to determine his choice in accordance with this law" (MM 6:232). An absence of moral incentive in acting on principle in the external domain then means that strict Right admits of "external grounds for determining choice", including, where necessary, coercion:

Strict right rests instead on the principle of its being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal laws (MM 6:232).

It is this that leads to Kant's statement that "if a certain use of freedom is itself a hindrance to freedom in accordance with universal law (i.e., wrong), coercion that is

opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right" (MM 6:231).

The interpersonal and coercive character leads Kant to a definition of external freedom as "independence from being bound by others to more than one can in turn bind them" (MM 6:238). This formulation reflects the reciprocal and mutually binding nature of that freedom. However, insofar as it gives each person a claim against others *not* to do something, it only provides a negative conception of freedom.<sup>359</sup> We still require a positive conception of free choice *according* to some law or principle. As Sharon Byrd and Joachim Hruschka have observed, this issue has actually been given very little explicit attention.<sup>360</sup> Instead, commentators tend to gloss over it, taking the negative conception of freedom as independence from constraint by *another's* choice and reformulating it positively as free action according to one's *own* choice. Arthur Ripstein, for example, refers to the freedom of each person "to use his or her own abilities to set and pursue his or her own purposes, consistent with the freedom of others to use their abilities to set their purposes".<sup>361</sup> Such interpretations imply a positive conception of free choice according to a particular principle or value, but do not make it explicit. Consequently their consistency with Kant's *Doctrine of Right* have not been fully explored.

In fact, once we come to examine the various ways in which free choice is interpreted in a positive sense, we find problems arising on two fronts, already pre-empted in my discussion of practical freedom. Firstly, a conception of external

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<sup>359</sup> Byrd, B.S. & Hruschka, J., "The Natural Law Duty To Recognise Private Property Ownership: Kant's Theory of Property in his *Doctrine of Right*" in *University of Toronto Law Journal* (LVI no. 2, 2006), p 238

<sup>360</sup> Byrd and Hruschka, p 237

<sup>361</sup> Ripstein, A., *Force and Freedom*. Harvard: Harvard University Press, 2009, p 39

freedom characterized as the setting and pursuing of one's own ends conflicts with the formal nature of Kant's *Doctrine of Right*. Guyer offers such a substantive account, grounding external freedom in the pursuit of happiness as the end of morality. I follow Ripstein in criticizing such ends-based accounts on the basis that they compromise the formal and unconditional nature of morality as I have defended it over previous chapters. Secondly, we see a tension between the *interpersonal* nature of external freedom on the one hand, and a characterization of that freedom as a pursuit of *individual* ends on the other. This tension is evident in Ripstein's own account, which stresses the relational nature of external freedom as "a constraint on the conduct of others", and yet characterizes freedom positively as an individual's self-mastery in setting and pursuing their own purposes.<sup>362</sup> This brings ambiguity to the interpersonal nature of Ripstein's account, as well as threatening to compromise the strict division of ethics and Right as defended in chapter 2. I therefore support Ripstein's criticism of substantive readings such as Guyer's, but reject his alternative reading, on the basis that it seeks itself to smuggle in a substantive element in the idea of purposiveness. Instead I argue for the interpretation implicit in Ludwig's account of practical freedom as law-governedness, which gives a formal and interpersonal concept of external freedom as mutual constraint under positive law given in accordance with the universal principle of Right.

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<sup>362</sup> Ripstein, 2009, p 15

## 2) *substantive versus formal interpretations of external freedom*

### 2.1) *Paul Guyer's teleological interpretation of Right*

As mentioned in the previous chapter, Paul Guyer's interpretation of Right and moral freedom is attractive for two reasons. Firstly, he defends the morality of Right on the basis of Kant's thematization of moral laws as laws of freedom. This provides the grounds for a defence of the morality of Right as part of Kant's metaphysics of morals. Secondly, Guyer offers an account of moral freedom as acting on principle. This promises to broaden the concept beyond the ethical idea of autonomy, and provide a normative foundation for morality that can include the external freedom of Right under its scope. This is given as acting according to the principle of Right as an interpersonal principle of pure practical reason. However, while Guyer's general strategy serves my purposes in bringing Kant's *Doctrine of Right* under his moral theory, his account of practical freedom as self-regulation according to universal principles appears to simply transplant the *individual* freedom of ethics into the *interpersonal* domain of Right, as a realization of private morality in the public domain. Further to this, I now criticise his account of this interpersonal freedom on grounds of its teleological nature. Specifically, I argue that it is the substantive nature of Guyer's conception of moral freedom that undermines his interpretation of freedom in political society, compromising both the formal and interpersonal nature of Right. For this reason we must move beyond Guyer's interpretation if we are to provide a cogent account of the morality of Right as a principle of external freedom, consistent with Kant's metaphysics of morals and the *Doctrine of Right*.

As indicated in chapter 4, Guyer argues for a substantive account of practical freedom, grounded in a teleological interpretation of Kant's moral theory. While he concedes that freedom is the foundational value of Kant's moral theory, stressing Kant's characterization of moral laws as laws of freedom, he goes on to offer an account of that value which in turn lies in the idea of happiness:

Kant began by equating the object of morality with the systematization or universalization of *happiness*, and therefore saw the use of reason and thus freedom for the regulation of particular inclinations with this larger end in mind as the basis of moral value.<sup>363</sup>

On this teleological reading, the moral law as a law of freedom is of instrumental value. In its regulation of our immediate inclinations, it serves our longer-term happiness through a "systematic satisfaction of one's own ends and those of others".<sup>364</sup> It is for this reason that Guyer sees the moral law as both a *constraint* on our contingent ends as well as an *expression* of a necessary end, in the form of our happiness:<sup>365</sup>

the instinctive pursuit of the gratification of any particular momentary demand of sense may contradict either the more enduring happiness of the individual or the more universal happiness of all, and that free conduct in accord with the law of reason is designed precisely to avoid their unfortunate outcome and thereby maximize the happiness of both oneself and others.<sup>366</sup>

Through acting on principle we subject our own inclinations and those of others, by means of the universal principle of Right, to the regulation of reason. This constrains our conduct, but also leads to "the pursuit of the satisfaction of an intersubjectively compatible set of inclinations, representing the union of the free choices of all who

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<sup>363</sup> Guyer, P., *Kant on Freedom, Law and Happiness*. Cambridge: Cambridge University Press, 2000, p 98

<sup>364</sup> Guyer, 2000, pp 100-1

<sup>365</sup> Guyer, 2000, p 134 (pp 132-4)

<sup>366</sup> Guyer, 2000, p 102



are involved".<sup>367</sup> Through this subjection to reason, we prevent our immediate desires thwarting our longer-term projects, and are also constrained from similarly thwarting the projects of others.

On Guyer's argument, self-interest and morality therefore coincide. Practical freedom as acting on principle provides a "*systematic distribution of happiness*" through a constraint on our individual ends.<sup>368</sup> "Free conduct" is not simply the regulation of our inclinations according to principles of pure practical reason; rather, it is to act according to such principles in the pursuit of the universal end of happiness:

Morality requires a rule of reason...in order to pursue a universal happiness, in which one's own long-term happiness is not sacrificed to any particular inclination and the happiness of all is not sacrificed to the happiness of any one person, but in which the satisfaction of individual inclinations is permitted to the extent that this is compatible with one's own long-range happiness and the equal satisfaction of others.<sup>369</sup>

As political animals who cannot avoid contact with others, this systematization of happiness is achieved through acting on both intra- and interpersonal moral principles given by pure practical reason. It is through the subordination of our inclinations to these principles of reason that they are guaranteed to be consistent with both our own and others' enduring happiness:

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<sup>367</sup> Guyer, P., *Kant's System of Nature and Freedom: Selected Essays*. Oxford: Oxford University Press, 2005, p 129

<sup>368</sup> Guyer, 2000, p 98

<sup>369</sup> Guyer, 2000, p 103

morality supplies an *a priori* principle for the universalization and systematization of happiness, that is, a principle that dictates that one satisfy only those of one's inclinations which are compatible with satisfaction of a systematic set of one's own preferences and with a system in which others' preferences may be satisfied as well as one's own.<sup>370</sup>

Thus while the principles of universalization are *a priori*, the concept of moral freedom is given by "the systematization or universalization of *happiness*" as the object of morality. This yields a substantive, ends-based reading of moral freedom as acting on principle.<sup>371</sup> It is the pursuit of one's own and others' happiness under a system of laws in order to "maximize the realization of this end both in oneself and in others".<sup>372</sup>

This substantive account of moral freedom as acting on principle conceives of external freedom as governance by an interpersonal principle of cooperation in the joint pursuit of happiness. External freedom is therefore a matter of regulating private interaction within political society:

human beings who live in circumstances in which they cannot avoid contact with others, or in which they even depend on interaction with others—that is, all human beings in the empirical conditions of their actual existence—must figure out how to act in accordance with a principle of cooperation but nondomination.<sup>373</sup>

On Guyer's substantive interpretation of moral freedom, acting according to this principle therefore ensures the pursuit of one's own long-range happiness in one's individual free use of choice, consistently with the equal pursuit of such happiness by others.

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<sup>370</sup> Guyer, 2000, p 106

<sup>371</sup> Guyer, 2000, p 98

<sup>372</sup> Guyer, 2000, p 103

<sup>373</sup> Guyer, 2005, p 128

## 2.2 Critiquing the substantive nature of Guyer's account

Guyer's portrayal of external freedom is initially convincing in its emphasis on cooperation and the prescription that we satisfy "only an interpersonally consistent set of inclinations".<sup>374</sup> As discussed in section 1, the universal principle of Right requires that one restrict one's freedom of choice with reference to the equal freedom of others, implying that external freedom as acting on principle is a matter of one's relation to others. Guyer is therefore correct to stress the relational nature of external freedom. However, Guyer's interpretation is incorrect in its substantive claim about happiness as the end of justice. The appeal to happiness causes problems on two fronts. Firstly, Guyer's teleological interpretation and his identification of happiness as the substantive end of Right is inconsistent with the formal nature of the *Doctrine of Right* and its express abstraction from material ends. Secondly, it yields a self-regarding interpretation of external freedom, and thereby undermines the plausibility of the interpersonal nature of his account.

Beginning with the substantive nature of Guyer's teleological reading, Kant makes it clear in the Introduction to the *Metaphysics of Morals* that Right has to do "only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other" (MM 6:230). He then goes on explicitly to deny a teleological interpretation of moral freedom in this practical relation:

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<sup>374</sup> Guyer, 2005, p 120

in this reciprocal relation of choice no account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants...All that is in question is the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free*, and whether the action of one can be united with the freedom of the other in accordance with a universal law (MM 6:230).

Right is characterized by the “form in the relation of choice”; that is, by the consistency of one’s deeds with the freedom of others under a universal law. As Ludwig notes, this account of freedom makes no mention of the pursuit or realization of individual ends.<sup>375</sup> Indeed, it explicitly denies it: “no account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants” (MM 6:230). This is confirmed by Kant’s claim that “anyone can be free so long as I do not impair his freedom by my *external action*” (MM 6:232). The freedom of Right makes no reference to the pursuit (and achievement) of particular ends; rather, it consists in my relation to others, and my freedom from interference in my external actions, whatever they may be.

The formal nature of external freedom is not only suggested by passages in the *Doctrine of Right*, but also follows from the metaphysically grounded account of practical freedom that I argued for in the previous chapter. Following Ludwig, I argued there that we are practically free in our consciousness of being subject to the principles of morality: being free and being conscious of one’s subjection to a law of freedom are one and the same thing. This yielded an interpretation of practical freedom as acting on principle, grounded in Ludwig’s analysis of moral agency and its metaphysical foundations in Kant’s transcendental idealism:

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<sup>375</sup> Ludwig, B., “Whence Public Right? The Role of Theoretical and Practical Reasoning in Kant’s *Doctrine of Right*” in Mark Timmons (ed.), *Kant’s Metaphysics of Morals: Interpretative Essays*. Oxford: Oxford University Press, 2004, p 171

nearly everything required for the foundation of a theory of obligation (*Verbindlichkeit*) can be derived by *analysis* of the concept of a *causa libera* in the framework of Transcendental idealism – together with man’s consciousness of being such a *causa libera*.<sup>376</sup>

On this account, Kant’s transcendental idealism provides a metaphysical foundation for his moral theory by grounding man’s moral freedom in his intelligible character. Man’s consciousness of his subjection to moral law “transports” him into the intelligible order of things, predicating this transcendental freedom of himself (CprR 5:29-30).<sup>377</sup> Moral agency must be “altogether independent of...the law of causality”, meaning that without transcendental freedom, “no moral law is possible, and no imputation in accordance with it” (CprR 5:97). It is therefore Kant’s two-worlds argument, combined with our consciousness of our subjection to the moral law, that allows us to predicate freedom of ourselves as independent causalities, and hence ground our status as moral agents.<sup>378</sup>

Ludwig’s argument draws attention to the metaphysical foundations of morality, and with it, the relationship between Kant’s moral theory and his theoretical philosophy. I discussed this in chapter 3 in relation to the third antinomy and Kant’s anti-determinism, where I argued that Kant’s tripartite concern with transcendental freedom, agency and morality was not simply an attempt to “save” moral freedom; rather, it indicates a deeper connection between his theoretical and practical philosophy. This connection finds confirmation in the idea of practical freedom as acting on principle, and its metaphysical foundations in the transcendental concept

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<sup>376</sup> Ludwig, 2004, p 166

<sup>377</sup> Ludwig, 2004, p 167

<sup>378</sup> As noted in chapter 3, the precise nature of Kant’s two-worlds argument is contested with regard to the relationship between sensible and intelligible worlds, but these debates are beyond the scope of this thesis.

of man's intelligible character. As per the argument in the Dialectic, this argument grounds moral agency in the intelligible world: practical freedom is dependent on the idea of the transcendental concept. However, our idea of a (possible) intelligible world is likewise dependent on our consciousness of our moral agency (G 4:451; CprR 5:42). Hence it is morality, not speculative reason, which provides warrant for our idea of our independence from nature.

On this account, Kant's theoretical philosophy and his moral theory are mutually dependent, held together by his transcendental idealism and man's consciousness of himself as a moral being. As O'Neill puts it, Kant sees the theoretical and practical perspectives as jointly indispensable.<sup>379</sup> Only beings who take themselves to be moral agents, able to "judge, deliberate, reason and argue" can adopt a theoretical standpoint. Likewise, only beings who can "own and control their action" independently of the causal world can adopt a moral view point. This is of importance in providing a two-way confirmation of the *formal* nature of external freedom in contrast to Guyer's *substantive* account. Firstly, in defending the practical dependence of moral agency on the idea of a possible intelligible world, we ground Kant's moral theory in a *formal* metaphysics. Moral agency is one's spontaneous capacity to act according to moral laws as laws of freedom. It is grounded in one's adherence to universal principles and one's consciousness of one's ability to do so, and is not concerned with the matter of the law, or with ends that one brings about (CprR 5:29). This account of morality grounded in a priori presuppositions runs

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<sup>379</sup> O'Neill, O. *Bounds of Justice*. Cambridge: Cambridge University Press, 2003, p 45. This contrasts with Korsgaard's purely practical account of moral freedom which I disputed in chapter 3, on grounds that she cannot sustain a genuine conception of moral agency without appeal to the transcendental idea of freedom.

contrary to Guyer's teleological interpretation, and contradicts his ends-based account of external freedom as the pursuit of happiness.

Secondly, the formal character of external freedom is dictated by Kant's moral theory. If, as per "the common idea of duty and of moral laws", moral laws are to hold objectively and with absolute necessity, then they must be given a priori by pure practical reason (G 4:389; MM 6:215-7). The moral principles according to which agents act must therefore abstract from all material and empirical considerations:

the sole principle of morality consists in independence from all matter of the law (namely, from a desired object) and at the same time in the determination of choice through the mere form of giving universal law that a maxim must be capable of" (CprR 5:33).

Practical freedom as acting on principle is a matter of the *form* of one's choice; it does not make any reference to the *matter*, or to "the end each has in mind with the object he wants" (MM 6:230). This is necessary in order to protect the universal and unconditional nature of moral laws as laws of freedom, and explicitly speaks against any interpretation of external freedom as the freedom of choice in pursuit of one's ends.<sup>380</sup> The moral law according to which free agents act is an exclusively formal principle.<sup>381</sup>

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<sup>380</sup> Kant also makes this point in *Perpetual Peace*, where he rejects a doctrine of Right based on material ends on grounds of its conditional nature. A formal principle of Right has unconditional necessity; whereas a *Doctrine of Right* that begins with a material principle "necessitates only if the empirical conditions of the proposed end, namely of its being realized, are presupposed" (PP 8:376-7)

<sup>381</sup> Wood, A., "The Final Form of Kant's Practical Philosophy" in Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays*. Oxford: Oxford University Press, 2004, p 12

As such, while the lack of reference to material ends in Kant's *Doctrine of Right* leaves Guyer's teleological interpretation without textual support, my dispute of substantive accounts of external freedom is a deeper one. It is not only a matter of particular textual evidence; rather, it is rooted in Kant's transcendental idealism and the a priori presuppositions of his metaphysics of morals. This a priori and formal nature of Kant's moral principles confirms the unconditional nature of Kant's moral theory, and leads him to explicitly rule out Guyer's interpretation of moral freedom as the pursuit of happiness.

the concept of an external right as such proceeds entirely from the concept of *freedom* in the external relation of people to one another and has nothing at all to do with the end that all of them naturally have (their aim of happiness) and with the prescribing of means for attaining it (TP 8:289).

On these grounds, Guyer must acknowledge that external freedom as acting on principle makes no reference to material ends or purposes, but simply requires that an agent adhere to moral principles in the *form* of their choice.<sup>382</sup> Moral laws as laws of freedom are formal, not substantive.

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<sup>382</sup> We might wonder at the apparently glaring inconsistency of Guyer's account with such passages. However, Guyer himself concedes that his argument for morality as a doctrine of happiness is inconsistent with Kant's *Doctrine of Right* (2000, p 96). Yet this does not trouble him. For contrary to Kant's characterization of morality as freedom in his critical works, Guyer suggests that a more complete reading of Kant's practical philosophy can be given if *happiness* is understood as the end of morality. This is based both on Kant's pre-critical notes and fragments (2000, pp 97-8), and on the second *Critique's* idea of the Highest Good. On the basis of these writings Guyer argues that we must give a central place to happiness if we are to provide a coherent account of Kant's moral philosophy. For "If virtue and happiness had no connection at all, their connection through the idea of worthiness [to be happy] would seem utterly inexplicable" (2000, p 117). This concern with finding a place for happiness explains the inconsistency of Guyer's interpretation with Kant's *Doctrine of Right*, instead yielding an account that is more akin to a moral *anthropology* than a critical moral philosophy.



### 3) *The interpersonal nature of external freedom*

#### 3.1) *Ripstein's formal account of external freedom as independence*

I have criticized Guyer's teleological interpretation of external freedom as acting on principle on grounds of its substantive nature, which is inconsistent with the formal character of Kant's moral theory. This undermines the plausibility of Guyer's interpretation. I move now to the second point of contention that I identified above, regarding the interpersonal nature of external freedom. While this is an aspect that Guyer's account thematizes, its importance is in effect occluded by the substantive nature of Guyer's interpretation. My criticism is based on Arthur Ripstein's analysis of Right, which provides further grounds for rejecting ends-based interpretations of external freedom that make external freedom a conditional matter of one's pursuit of one's ends.

I drew attention to the interpersonal aspect in section 1 as a defining characteristic of external freedom. This is something that Ripstein stresses in his own account, arguing that the freedom of Right is "not a feature of the individual person considered in isolation, but of relations between persons".<sup>383</sup> In contrast to the internal freedom of autonomy, which is an intrapersonal matter of the relationship of one's will to itself, external freedom exists in our interactions with others. As outlined in section 1, this is made clear by Kant both in *Theory and Practice* and the *Doctrine of Right*. It is not a kind of freedom that can be predicated of a particular person in isolation, but rather only exists in one's relations to others.<sup>384</sup>

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<sup>383</sup> Ripstein, 2009, p 15

<sup>384</sup> Ripstein, 2009, p 15

Ripstein is also careful to point out that the relational character of external freedom is not a prudential matter. While it is concerned with restricting individuals' freedom of choice consistent with the equal freedom of others, this is not a matter of mediating conflicts between individuals, or of maximizing the freedom enjoyed by each person in political society in relation to others. Rather, the interpersonal character of external freedom is deontic, contained in the formal concept of Right:

for Kant, both institutions and the authorization to coerce are not merely causal conditions likely to bring about the realization of the right to freedom, or even prudent sacrifices for individuals to make if they are concerned to secure their freedom. Instead, the consistent exercise of the right to freedom by a plurality of persons cannot be conceived apart from the public legal order.<sup>385</sup>

Kant himself makes this explicit in *Perpetual Peace*:

Thus it is, for example, a principle of moral politics that a people is to unite itself into a state in accordance with freedom and equality as the sole concepts of rights, and this principle is not based upon prudence but upon duty (PP 8:378).

As discussed in chapter 1, our duty to enter into relations with others under political institutions is grounded in the fact that they are a necessary condition of the possible realization of freedom claims: "they provide the only possible way in which a plurality of persons can interact on terms of equal freedom".<sup>386</sup> We cannot avoid raising claims against each other, and against external objects of choice, in a pre-political condition, but until those claims are formalized and enforceable through universal law, they are non-binding. A full expression of our innate freedom of choice is therefore only possible in political society under the rule of law.

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<sup>385</sup> Ripstein, 2009, p 9

<sup>386</sup> Ripstein, 2009, p 14

These observations lead Ripstein to a critique of ends-based accounts and their failure to properly appreciate the formal and relational nature of Right. Instead, such accounts make the interpersonal aspect of Right an instrumental condition of the successful pursuit of one's purposes. We see this in Guyer's account, for example, on which the purpose of political society is to enhance one's freedom as a means to happiness. This makes external freedom a matter of the pursuit of individual ends, facilitated by the universal principle of Right as a constraint on the behavior of others. Ripstein criticizes arguments of this form on the grounds that they do not properly characterize the interpersonal nature of external freedom:

Kant's account identifies a right with the restriction on the conduct of others "under universal law," that is, consistent with everyone having the same restrictions. Each person's entitlement to be independent of the choice of others constrains the conduct of others because of the importance of that independence, rather than in the service of something else, such as an interest in leading a successful, worthwhile, or fully autonomous life. Those things can be specified without reference to the conduct of others, and constraining the conduct of others is, at most, a useful way of securing them.<sup>387</sup>

By making Right a question of individual purposes, ends-based accounts make cooperation incidental to the realization of Right, rather than an inherent aspect of it. A consequence of this is that you could be externally free *without* reference to the conduct of others,<sup>388</sup> which is in clear contradiction of the interpersonal nature of Right presented by Kant in *Theory and Practice* and the *Doctrine of Right*. On that account, the interpersonal nature of external freedom is inherent in the concept. It is not a conditional feature of our external relations with others; it a defining feature of Right as contrasted to virtue and to the intrapersonal nature of internal freedom.

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<sup>387</sup> Ripstein, 2009, p 34

<sup>388</sup> Ripstein, 2009, p 15

In rejecting ends-based accounts, Ripstein therefore concludes that “Kantian independence [external freedom]...is not a good to be promoted; it is a constraint on the conduct of others, imposed by the fact that each person is entitled to be his or her own master”.<sup>389</sup> External freedom has nothing to do with “a person’s ability to achieve his or her purposes unhindered by others”; rather, it is simply the respective independence of persons in a condition of Right.<sup>390</sup> This underlines the criticism of Guyer’s account that I made in section 2, on the grounds that Kant’s *Doctrine of Right* does not make external freedom a matter of promoting a *substantive end*, but rather is a *formal* matter of one’s *relations to others* under universal law. Ripstein’s critique also provides further reasons for rejecting Guyer’s account, based on the authenticity of its interpersonal character. For while Guyer makes an attempt to build this into his account, he does so only as a prudential element, instrumental to, but not inherent in the concept of external freedom.

### 3.2) Ripstein’s account of external freedom as self-mastery

In response to these criticisms, we might be tempted to simply align ourselves with Ripstein, who by contrast stresses the formal and relational nature of external freedom as the end of Right. In offering an account of external freedom, Ripstein begins with the innate right to freedom as independence from constraint by another’s choice.<sup>391</sup> He characterizes external freedom as “a right to act independently of others, consistently with the entitlement of others to do the

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<sup>389</sup> Ripstein, 2009, p 15

<sup>390</sup> Ripstein, 2009, pp 32-3

<sup>391</sup> I noted this appeal to innate right as the ground of external freedom in section 1 in contrast to my own interpretation which locates it in the formal concept of Right as articulated by Kant in §B of the *Doctrine of Right* (MM 6:230).

same".<sup>392</sup> It is the idea that "one person must not be subject to the choice of another".<sup>393</sup> This negative concept as freedom from *others' choice* is then explicated by Ripstein as the freedom to act according to one's *own choice*:

you are independent if your body is subject to your choice rather than anyone else's, so that you, alone or in voluntary cooperation with others, are entitled to decide what purposes you will pursue.<sup>394</sup>

An ability to set and pursue ends is, Ripstein argues, the *corollary* of the concept of freedom as the right not to be interfered with by others: "the idea that you are your own master is equivalent to the idea that no other person is your master".<sup>395</sup> In this way, the innate right to external freedom as independence from being constrained by another's choice becomes a matter of pursuing your own purposes. External freedom is therefore conceived as the "capacity to set purposes without having them set by others".<sup>396</sup> Negatively characterized it is freedom from interference by others; positively it is self-mastery, in the capacity to choose our purposes along with the means that we use to pursue them.<sup>397</sup>

However, Ripstein's interpretation encounters difficulties on two related fronts, both already raised with regards to Guyer. First, the interpersonal, contrastive nature of external freedom is threatened by his positive conception of free choice as self-mastery. In this, Ripstein implicitly shifts from a *relational* to an *individual* freedom conception. This occurs through his characterization of external freedom as purposiveness, which is specified non-relationally as the capacity to set and pursue

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<sup>392</sup> Ripstein, 2009, p 35

<sup>393</sup> Ripstein, 2009, p 36

<sup>394</sup> Ripstein, 2009, p 14

<sup>395</sup> Ripstein, 2009, p 108

<sup>396</sup> Ripstein, 2009, p 16

<sup>397</sup> Ripstein, 2009, pp 33-4

one's chosen ends.<sup>398</sup> In smuggling in this substantive element, Ripstein sacrifices not only the contrastive nature of external freedom, but its formal character as well. It is this that forms the second problem. Ripstein therefore replicates the problems encountered on Guyer's account.

Ripstein's account of external freedom as self-mastery begins with an explicit affirmation of its relational character. As the corollary of independence from *others*, external freedom as purposiveness is said to maintain the "social and interpersonal dimension" given by the interpersonal character of Right:<sup>399</sup>

to be your own master is to have no *other* master. It is not a claim about your relation to yourself, only about your relation to others. The right to equal freedom, then, is just the right that no person be the master of another.<sup>400</sup>

It is through the emphasis on freedom from interference that Ripstein aims to maintain the interpersonal character of Right while offering an account of external freedom as self-mastery in the pursuit of one's ends.

You are sovereign as against others not because you get to decide about the things that matter to you most, but because *nobody else* gets to tell you what purposes to pursue.<sup>401</sup>

As a "right to act independently of the choice of others", external freedom is a right to pursue one's own purposes *without interference by others*. It is this that makes freedom as self-mastery contrastive, rather than intrapersonal.

The Kantian right to independence...is always an entitlement within a system of reciprocal limits on freedom, and so can only be violated by the conduct of others, and its only point is to prohibit that conduct.<sup>402</sup>

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<sup>398</sup> Flikschuh, 2010, p 300

<sup>399</sup> Ripstein, 2009, p 31

<sup>400</sup> Ripstein, 2009, p 36

<sup>401</sup> Ripstein, 2009, p 34

Independence can only be protected within a system of reciprocal limits under universal law, and can therefore only be interfered with by others. Self-mastery is therefore not to be confused with “some form of special self-relation”, as with the internal and intrapersonal nature of the freedom of Kant’s ethics. Rather, it is understood in “the contrastive sense of not being subordinated to the choice of any *other* particular person”.<sup>403</sup> Insofar as it contains the idea of non-interference by others, self-mastery is taken to be an interpersonal concept.

However, despite his appeal to the idea of non-interference by others, Ripstein cannot avoid a slide into a self-regarding conception of external freedom on which one is free in the pursuit of one’s *own* ends, rather than in one’s *relation* to others. The self-regarding nature of his account is evident in the following description of what it is to be one’s own master:

To be entitled to set and pursue your own purposes is to be entitled to use the means that you have to set and pursue whatever purposes you see fit, restricted only by the entitlement of others to do the same with their means.<sup>404</sup>

Rather than conceiving of external freedom as a contrastive form that exists in one’s *relations* with others, this passage conceives it as a *self-regarding* freedom to set and pursue your own ends. It is the *scope* of that freedom that is given by one’s relations to others. As with Guyer’s account, external freedom is the freedom of an individual to pursue their ends under circumstances in which they live in close quarters with others. The self-regarding nature is seen even more clearly in the following passage:

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<sup>402</sup> Ripstein, 2009, p 34

<sup>403</sup> Ripstein, 2009, p 4

<sup>404</sup> Ripstein, 2009, p 63

a system of equal freedom is one in which each person is free to use his or her own powers, individually or cooperatively, to set his or her own purposes.<sup>405</sup>

Given that we live in circumstances in which we encounter others in our pursuit of ends, the pursuit of our ends will sometimes involve *cooperation* with others. But crucially, we can also imagine this freedom existing in isolation, as an *individual* pursuit of ends. You are free so long as “*you* are the one who decides what ends *you* will use your means to pursue”; “You remain independent if nobody else gets to tell you what purposes to pursue with your means”.<sup>406</sup> So while freedom as self-mastery *may* involve cooperation in relation with others, it is not interpersonal in any inherent sense. Rather, in an account reminiscent of Guyer’s, the interpersonal nature of external freedom is a constraint on our individual freedom of choice, but contingent on our circumstances and our contact with others.

Despite Ripstein’s sustained elaboration of external freedom as a relational concept, his characterization of that freedom as *purposiveness* thus introduces significant ambiguity into his account, yielding two competing interpretative strands. Contrary to a contrastive account, on which freedom inheres in our relation to *others*, self-mastery is a feature of the *individual* considered in isolation, and can be enjoyed independently of any relations with others. As Flikschuh puts it,

the specification of independence as the central quality of innate right and the explication of its centrality in terms of a capacity for purposiveness strongly imply a view of innate right as grounded in a capacity which each has in themselves, i.e. non-relationally.<sup>407</sup>

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<sup>405</sup> Ripstein, 2009, p 33

<sup>406</sup> Ripstein, 2009, p 33. My emphasis

<sup>407</sup> Flikschuh, 2010, p 300



Ripstein's appeal to the idea of purposiveness therefore threatens a slide into a self-regarding account, on which one is free in one's purposiveness expressed in the pursuit of one's ends. It is, contrary to Ripstein's claims, a matter of one's relation to *oneself*, to one's "distinctive aspect" as a person in the ability to set and pursue purposes.<sup>408</sup> The consequence of this is that Ripstein's account contains two competing freedom conceptions: a relational account grounded in the idea of reciprocally coercive rights claims of agents who cannot avoid encounters with each other; and a non-relational account grounded in the capacity for purposiveness in the setting and pursuing of ends.<sup>409</sup> As such, Ripstein's account is ambiguous, and his claim to a contrastive conception of freedom as self-mastery fails to hold.

Not only is the *interpersonal* nature of freedom compromised by Ripstein's introduction of the idea of purposiveness, but its *formal* nature as well. For on an account of freedom as self-mastery, external freedom is not simply a formal capacity for choice in relation to others under universal law; rather, it is conceived as a capacity to be self-determining through the setting and pursuing of one's own ends.<sup>410</sup> This introduces a substantive element given by the "protection of independence",<sup>411</sup> which is, in fact, evident in his own critique of ends-based accounts discussed in the previous section. Once we look at this more closely, we see that Ripstein is not criticizing the introduction of a substantive value to Kant's *Doctrine of Right per se*, but rather, the introduction of the *wrong* substantive value:

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<sup>408</sup> Ripstein, 2009, p 34

<sup>409</sup> Flikschuh, 2010, p 300

<sup>410</sup> Ripstein, 2009, p 40

<sup>411</sup> Ripstein, 2009, p 35

Each person's entitlement to be independent of the choice of others constrains the conduct of others because of *the importance of that independence*, rather than in the service of something else.<sup>412</sup>

His criticism of accounts such as Guyer's is that they make freedom a matter of *something else*; some other end.<sup>413</sup> But on Ripstein's account, external freedom is a question of independence; of realizing an individual's *innate* freedom in the *political* realm. So whereas on Guyer's account, external freedom exists in the pursuit of a *particular* end—happiness—in Ripstein's case it exists in our end-setting itself. It is in our expression of our purposiveness per se that we are free, rather than in its expression with regard to any particular end. In both cases though, external freedom is given by the promotion of a particular value—happiness or purposiveness—making these accounts *substantive*, not formal.

The puzzle is why Ripstein introduces the idea of purposiveness into his account at all, given his explicit affirmation of Kant's concept of Right as formal and interpersonal. Flikschuh suggests that it is the "seeming 'thinness' of relationally construed independence" that leads Ripstein to cache out the concept of external freedom in terms of a capacity for purposiveness. He does this in a move from the idea that no one is your master, to what he takes to be an equivalent idea that you must therefore be your *own* master:

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<sup>412</sup> Ripstein, 2009, p 34. My emphasis.

<sup>413</sup> Note that Ripstein does not himself single out Guyer's account. I refer to it here as it is the example which I have discussed.

To say that everyone has a right to independence from another's power of choice over him may be thought to beg the question as to why everyone has such a right. One ready answer would seem to be that everyone has this right because everyone has the capacity to exercise their own capacity to exercise their own power of choice—to set their own purposes and ends. So purposiveness supplies a positive specification that supplements the negative specification of independence as a claim to non-domination by others.<sup>414</sup>

This suspicion of Flikschuh's is confirmed by Ripstein when he responds that "In talking about purposiveness, I meant to be filling out the idea of choice".<sup>415</sup> He indeed seems to find the idea of a formal and relationally construed independence to be inadequate in providing an account of choice. However, though he accepts that the idea of purposiveness introduces some unclarity to his account, he is not prepared to give up, claiming against Flikschuh that "the normative analysis of innate right that I propose is entirely relational".<sup>416</sup> Purposiveness, he contends, "is not an interest, specifiable apart from right, which rights serve to protect". Rather, "your innate right is your right to set and pursue your own purposes, consistent with the entitlement of others to do the same, *that is*, that your choice be restricted by the choice of others only under universal law".<sup>417</sup>

Here, Ripstein attempts a defence against the charge of a non-relational and substantive account of external freedom through a restatement of the idea of purposiveness (innate right) as the restriction of choice by the choice of others under universal law. In doing so, he suggests a formal and relational conception of freedom that exists simply in the relationship of your choice to others' governed by

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<sup>414</sup> Flikschuh, 2010, p 302

<sup>415</sup> Ripstein, A, "Reply to Flikschuh and Pavlakos" in *Jurisprudence*, Vol. 1 (2), 2010, p 317

<sup>416</sup> Ripstein, 2010, p 317

<sup>417</sup> Ripstein, 2010, p 318. My emphasis

an a priori principle of Right. However, Ripstein's tactic here is a rather crude sleight of hand. For this formal and relational characterization (beginning "that is" in the quotation above) follows on as if he is simply supplying further explication of the idea of purposiveness that came before it. In fact, while the latter is formal and relational, the former, "the right to set and pursue your own purposes, consistent with the entitlement of others to do the same", is substantive and non-relational in the way discussed above.<sup>418</sup> They are two different conceptions of freedom, which he tries to smooth over with the suggestion of reformulation. As such, he fails to defend purposiveness as a relational concept, and instead simply serves to underline the fact that he is attempting to sustain two alternative lines of interpretation in his account of Right.

Ripstein demonstrates further confusion and ambivalence over the role of purposiveness when he goes on to offer an alternative justification of his appeal to the idea, apparently distinct from his argument concerning external freedom. Contrary to his characterization of freedom as the capacity for end setting, he proceeds to defend his appeal to the idea of purposiveness as being simply *illuminating*, rather than constitutive of features of Right:

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<sup>418</sup> This is evident in his reference to an innate entitlement right, which by definition must be possessed by the individual prior to the institution of political society, and is therefore non-relational, rather than contrastive.

I took it to be important to explain the idea of choice [external freedom] in terms of setting and pursuing purposes not because it is the normative basis for right, but in order to highlight an aspect of Kant's political philosophy that is otherwise too easy to overlook. The doctrine of right is, in the first instance, exclusively a doctrine of means, and never a doctrine of ends. Virtue requires the adoption of particular ends; right concerns itself exclusively with the means that people use in setting and pursuing ends.<sup>419</sup>

What is surprising about this passage is his claim that, in his appeal to the idea of purposiveness, he does not take himself to be offering an account of the normative basis of Right; rather, he argues he is simply illuminating certain characteristics of it. Yet this is directly at odds with his claim in *Force and Freedom* that innate right is to be understood as purposiveness, and provides "the basis for any further rights".<sup>420</sup> This shows Ripstein's attempt to defend the place of purposiveness to be confused. As such, he fails to convince us of its status as a relational concept in his characterization of external freedom, further muddying the water with an account of it as a merely illuminating concept.

I therefore conclude that, while Ripstein's approach is to be supported in its attempts to sustain a formal and interpersonal reading of external freedom, if he wants to be consistent in these claims, then he cannot characterize that freedom as purposiveness.<sup>421</sup> Contrary to his claims that this is a contrastive concept, his conception of external freedom is ultimately conceived not in terms of one's relations to *others*, but rather in one's relationship to *oneself*. This is a consequence of an emphasis on the pursuit of *individual* ends, grounded in the value of

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<sup>419</sup> Ripstein, 2010, p 318

<sup>420</sup> Ripstein, 2009, p 31

<sup>421</sup> In this I follow Flikschuh, 2010, pp 297/302

“independence” or self-mastery as the purpose of political society. Despite its initial promise in offering a formal and interpersonal interpretation of Kant’s concept of external freedom, his account contains a self-regarding one grounded in the substantive value of self-mastery or purposiveness. This leads to two competing strands of interpretation in his account: a formal, relational account of external freedom as competing rights claims under universal law; and a substantive, non-relational account of purposiveness in circumstances where we cannot avoid contact with others. As such, Ripstein’s account is ambiguous, and fails to decisively meet his own criteria for a relational account of external freedom under universal law.

#### *4) External freedom as law-governed action in accordance with the universal principle of Right*

In response to these problems in Ripstein’s argument, I propose an interpretation of external freedom as the constraint of man’s innate choice according to universal law. It is, as Byrd and Hruschka characterize it, the dependence of man’s choice on laws of freedom in a legal state.<sup>422</sup> We are externally free *only insofar as our actions are constrained* by the universal principle of Right: the idea of law-governedness is *internal* to the concept of external freedom. This is the positive concept of external freedom implicit in Ludwig’s account of a free man as “he who is restricted by universal law to do what he has a will to do”.<sup>423</sup> As suggested in the previous chapter, a positive concept of external freedom as law-governed action is therefore nothing more than our capacity to act in accordance with universal laws in our

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<sup>422</sup> Byrd and Hruschka, p 238

<sup>423</sup> Ludwig, 2004, p 169-70

relations with others. External freedom is the constraint of our choice according to the universal principle of Right as a formal and interpersonal principle.<sup>424</sup>

While it may seem incoherent to characterize *freedom* as *constraint*, it is in fact nothing more than the positive idea of practical freedom as acting according to principle. As Kant puts it in the *Groundwork*, “a free will and a will under moral laws are one and the same” (G 4:447). Moral freedom is the constraint of one’s power of choice by universal moral principles. As discussed in chapter 4, it is this that avoids what O’Neill calls “mere, sheer choice” as arbitrary willfulness, which would make the idea of genuinely free choice incoherent.<sup>425</sup> On Kant’s theory of moral agency, it is the lawlike *form* of one’s choice that gives it coherence.<sup>426</sup> As Byrd and Hruschka put it: “Pure reason determines our actions by prescribing what Kant calls ‘laws of freedom’ which tell us what our conduct should be. Freedom is thus not ‘lawless’ but, instead, subject to a set of laws different from the laws of nature”.<sup>427</sup> In Ludwig’s words, “Being free and being the object of a ‘law of freedom’

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<sup>424</sup> Note that while agreeing that external freedom is given by the idea of dependence on universal laws of freedom, Byrd and Hruschka do not agree that the Universal Principle of Right is the source of this dependence. Rather, they argue that “The postulate of public law can be called the positive aspect of our right to external freedom because it imposes an obligation [to enter political society]” (p 220). Because this postulate is what obligates us to enter the political condition, they see this as the source of our dependence on laws of freedom in political society, and hence as the determining law in our external freedom. However, their reason for rejecting the UPR as the source of the law lies in the fact that they find no positive characterization of freedom as acting according to laws actually *within* the UPR itself. Rather, “the universal law of right flows from the *negative* aspect of external freedom: it says no more than that everyone has a right to be free from external coercion...To get to the *positive* aspect of external freedom, something more than the universal law of right is needed” (p. 241). It is for this reason that they reject the UPR as the governing law for external freedom, in favour of the postulate of public right, which does contain a positive aspect, in the command to enter political society. However, they are incorrect that the positive idea of law-governedness is not to be found in the UPR; as argued in the previous chapter, it is given by the idea of acting in accordance with universal law.

<sup>425</sup> O’Neill, 2003, pp 38-9

<sup>426</sup> O’Neill, 2003, p 43

<sup>427</sup> Byrd and Hruschka, pp 237-8

are one and the same thing".<sup>428</sup> Thus a rightful condition exists "merely in the limitation of freedom of every other to the condition that is can coexist with my freedom in accordance with universal law" (TP 8:292). It is the equal and reciprocal constraint of each person's claims to freedom in accordance with a principle of Right.

A conception of external freedom as law-governed choice maintains the strictly formal nature of Right which I argued for in section 2. Firstly, as discussed above in 2.2, the principle according to which one acts is not a substantive one; it is a priori and formal. Secondly, external freedom exists in the *ability* to exercise one's choice, rather than in actually doing so. This is something I discussed in the previous chapter with reference to practical freedom as the capacity to act according to principle. Moral agency is given by the *capacity* to act morally; it is not the act itself.<sup>429</sup> This is something which Ripstein himself alludes to in the formal strand of his interpretation, defending "the formal nature of purposiveness and so of freedom".<sup>430</sup> In discussing choice as purposiveness, he argues that "Others owe you no enforceable duty of right to see to it that you receive a benefit, or even that your purposiveness is realized. Right abstracts from both wish and need."<sup>431</sup> Freedom of choice therefore makes no reference to the *actual* pursuit of those ends, or the *realization* of your choice. It is simply the *possibility* of pursuing one's interests and preferences in a condition of Right, where others' interests and preferences may hinder one's such capacity.

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<sup>428</sup> Ludwig, 2004, p 167

<sup>429</sup> O'Neill, 2003, p 44

<sup>430</sup> Ripstein, 2009, p 62

<sup>431</sup> Ripstein, 2009, pp 62-3



An interpretation of external freedom as the restriction of one's choice under law also reflects the interpersonal nature of external freedom. Your choice is exercised freely only in relation to others. This is not simply a negative claim about being able to exercise your choice free from *interference*. Rather, the relational nature of external freedom is given by the restriction placed on one's free choice with reference to others' such freedom. Your choice is regarded as free insofar as your action "can be united with the freedom of the other in accordance with a universal law" (MM 6:230). That is, you exercise your choice in such a way as to ensure the independence of others; and they do likewise with regard to your own independence. A Rightful condition is "a condition of equality of action and reaction of a choice limiting one another in conformity with a universal law of freedom" (TP 8:292). External freedom is therefore the constraint placed on one's innate capacity for free choice by the equal claims to freedom of others. It is this that casts it as the freedom of *political* society, in contrast to the wild, lawless freedom of the state of nature, and which gives the interpersonal aspect as an inherent part of the concept. It is not the "mad freedom" of the state of nature, but rather the "rational freedom" of rule by public, coercive laws (PP 8:354-357).

### *Conclusion*

My aim in this chapter has been is to provide an account of external freedom, in order that we can finally return to the contradiction between positive law and external freedom proposed in chapter 1. Specifically, I have set out to highlight the interpersonal nature of external freedom, in contrast to the intrapersonal freedom of autonomy as the freedom of ethics. I have also defended the formal nature of that freedom as the constraint of one's choice in accordance with the universal principle

of Right. This follows on from my account of practical freedom in chapter 4 as acting on principle.

In clarifying the nature of external freedom, I have focused on the various ways in which commentators characterize free choice; that is, choice according to a certain principle or value. I began with Paul Guyer's account of external freedom as the pursuit of happiness according to a universal interpersonal principle. I rejected this account on the basis of its substantive nature, which I argued is at odds with the a priori presuppositions that ground Kant's moral theory, and with the formal nature of his moral principles. Additionally, Guyer's account fails in the conditionality of the interpersonal nature of external freedom. In response, I turned to Arthur Ripstein, who proposes a formal and interpersonal account of freedom. However, despite his claims in this regard, Ripstein equally succumbs to a self-regarding and substantive account, due to his characterization of free choice as self-mastery, or purposiveness.

In conclusion, I presented an account of external freedom as a condition of mutual constraint, allowing for, but not defined by, the pursuit of individual projects and ends. On this account, external freedom is inherently law-governed; it is action in accordance with universal law, which constrains our choice with reference to others' equivalent choice. On this reading, external freedom is nothing more than acting in accordance with the universal principle of Right as a formal and interpersonal principle.

## Chapter 6

### A re-examination of perverted justice and the case for reform

We are now finally in a position to review the argument for the perversion of justice proposed in chapter 1. This began with the intuitive concern that certain constitutions are so unjust that they cannot be obeyed as a matter of Right. Adopting Korsgaard's characterization of such constitutions as conditions of perverted justice, I suggested that we characterize this concern as one of justice "turning against itself"; that is, conditions under which the procedures of justice (positive law) turn against freedom as its end. On my interpretation of Korsgaard's argument, the proposed dilemma in these conditions exists in the fact that the institutions necessary for justice also make justice impossible, in denying the realization of freedom as the end of political society. Establishing the plausibility of Korsgaard's argument therefore took us to an inquiry into the nature of Kant's moral theory as a theory of freedom, and specifically, the particular kind of freedom that Right takes as its end. Only now can we establish whether Right (justice) can in fact be frustrated by certain political constitutions in the way that the idea of perverted justice suggests.

I began this investigation by examining Kant's characterization of moral laws as laws of freedom, and their specific nature in the juridical domain. My first task was to distinguish between the external laws of Right and the internal laws of ethics. In making this distinction, I defended the moral status of the *Doctrine of Right* against those who equate Kant's moral theory with his ethics, and so exclude Right on the grounds that it does not meet the internal legislation requirement of acting from

duty. This was necessary in order to confirm laws of external freedom as moral laws, thus bringing the problem of revolution under Kant's moral theory. In doing so, I rejected the common equation of moral freedom with the internal freedom of autonomy. Instead, I argued for a broader conception of practical freedom as acting on principle, which includes the external freedom of Right under its scope. This investigation into the nature of practical freedom helped elucidate the concept of external freedom as the end of Right. This, I argued, is nothing more than the constraint of one's choice according to the universal principle of Right. In making this argument I defended a formal and interpersonal conception of external freedom. This will now serve us in establishing whether conditions of perverted justice can arise on Kant's *Doctrine of Right* as a doctrine of freedom.

### ***1) The nature of Right and its contrast to ethics***

In investigating the nature of external freedom as the end of Right, my primary aim has been to resolve the suggestion of a possible dilemma within Kant's *Doctrine of Right*, caused by the procedures of the state turning against its purpose as the realization of a condition of external freedom. Under such circumstances, we would be obliged to obey the law on grounds of freedom, and yet that freedom would be frustrated by our obedience to that law. If such a dilemma were to exist, then this would explain the air of paradox that has plagued Kant's political absolutism and his position on revolution. However, in exploring the possibility of this dilemma within Kant's *Doctrine of Right* as a doctrine of external freedom, I have also made several important claims about the nature of morality and its meta-ethical foundations. I note these before moving on to a final analysis of the idea of perverted justice, as some of these conclusions form an important underlying part of

my critique of Korsgaard's idea, both in its original form, and in my proposed revision of the idea resituated within the domain of Right.

In discussing the nature of external freedom as the end of Right, my point of departure was the strict division between ethical and juridical domains within Kant's *Metaphysics of Morals*. In defending this division, I have denied a common approach taken by commentators with regard to revolution, discussed in the Introduction, which challenges Kant's absolutism with an appeal to his ethics. Korsgaard's argument, in its original form, is an example of this, in its characterization of the problem of revolution as a problem of virtue. Likewise, Thomas Hill argues that revolution is justified in protection of human dignity.<sup>432</sup> These lines of argument rely on the abrogation of juridical duties to those of ethics, in subordinating or dissolving the juridical duty of obedience in light of an ethical one to protect autonomy as the end of Kant's *Doctrine of Virtue*. However, given the strict division between ethics and Right which I have defended in this thesis, an appeal to ethical ideas of autonomy and human dignity within the political domain is unwarranted, and as such provides no grounds for challenging political authority on Kant's moral theory.

In maintaining this strict division between ethics and Right, I have also countered the more general ethicisation of Kant's political philosophy, typical of contemporary Rawlsian interpretations. These interpretations synthesize the two branches of Kant's doctrine of morals into a single moral theory, with the *Doctrine of Right* being read as a sub-division of his *Doctrine of Virtue*. Korsgaard's argument is guilty of

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<sup>432</sup> Hill, T., "A Kantian Perspective on Political Violence", *Journal of Ethics*, Vol. 1, No. 2, (June 1997)

this, in her characterization of the problem of revolution as one which is grounded in the *virtue* of justice, and her subsequent prioritization of that ethical duty over the juridical duty of obedience. Andrews Reath also amalgamates the two domains, making ethics and Right interdependent. These interpretations make both public and private morality an *internal* matter of individual morality, which is inconsistent with the distinction that Kant maintains between ethics and Right on grounds of inner and outer freedom, and also with the *interpersonal* nature of external freedom.

Secondly, I have defended the dependence of Kant's moral theory on his metaphysics, and specifically, on his transcendental idealism. In doing so, I have supported what Henry Allison refers to as Kant's tripartite concern between morality, freedom and agency in his critical philosophy, beginning with the *Third Antinomy* in the first *Critique*. Not only is Kant's moral theory dependent on the transcendental idea of freedom in grounding man's causality independent of the natural world; Kant's transcendental idealism is also dependent on his moral theory and man's consciousness of himself as a moral agent. The practical and theoretical perspectives are jointly indispensable.<sup>433</sup> Specifically, with regard to Kant's concept of practical freedom as the ground of morality, I have argued that it is this connection between the two domains that underpins our practical freedom in the sensible world, grounding our moral agency in the idea of transcendental freedom. In providing an investigation into the basic elements of Kant's *Doctrine of Right* and his theory of freedom, we must therefore look beyond his moral theory alone, and take a broader view of his philosophical system grounded in his anti-determinism and his transcendental idealism.

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<sup>433</sup> O'Neill, O. *Bounds of Justice*. Cambridge: Cambridge University Press, 2003, p 45

Defending the metaphysical grounding of freedom and man's moral character bucks the trend observed by Allen Wood, on which "fewer and fewer moral philosophers find it tolerable to burden morality with an extravagant supernaturalist metaphysics".<sup>434</sup> Indeed, it is this intolerance that has led to the popularity of constructivist accounts like Korsgaard's, which seek to offer a purely practical account of Kant's moral theory, entirely divorced from his metaphysics. However, not only are these metaphysical commitments necessary if we are to appreciate the unique nature of Kant's practical philosophy and his transcendental idealism; they also integral to his particular account of moral agency in a causally determined world. I have argued that in their abandonment of the transcendental idea of freedom, commentators such as Korsgaard and Allison fail to provide a convincing account of the causality of human agency, and are therefore at risk of succumbing to the "turnspit" conception of freedom that Kant rejects. As such, interpretations that deny the metaphysical foundations of Kant's moral theory fail to provide a plausible account of that theory.

Finally, I have argued for a formal interpretation of Kant's moral theory. This will be significant in my final assessment of the possibility of perverted justice, but it also has implications for existing literature on Kant's absolute prohibition of revolution. In addition to my rejection of arguments grounded in Kant's ethics, Kant's formalism rules out lines of argument which introduce substantive elements to challenge this prohibition. I discussed the introduction of substantive ends to Kant's *Doctrine of Right* in chapter 5, with reference to Paul Guyer's interpretation of external freedom. I also mentioned them in my Introduction, with reference to accounts such as Allen Rosen's, which introduce substantive liberal values to Kant's

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<sup>434</sup> Wood, A.W., *Kantian Ethics*. Cambridge: Cambridge University Press, 2008, p 123

political philosophy, such as civil liberty and legal equality. Such accounts are not only inconsistent with Kant's formalism, as defended in chapter 5, but also ignore the distinctive promise of Kant's political theory as an alternative to substantively-laden liberal accounts of justice. In arguing this, I echo Peter Nicholson, who suggests that the merit in Kant's political philosophy lies precisely in its distinctness from dominant liberal accounts, in its moderate and more conservative account of justice and political obligation.

## 2) *Perverted justice and the formal nature of Right*

### 2.1) *A return to Korsgaard's argument*

With these preliminary conclusions in hand, I turn now to the possibility of perverted justice in Kant's *Doctrine of Right*. In assessing the plausibility of Korsgaard's idea, I begin with a recap of her argument as discussed in chapter 1. My aim in doing so is to provide a reminder of the structure of her argument for conditions of perverted justice as I adopt it. I also show how my investigation into the nature of moral freedom and the relationship between ethics and Right provide good grounds for rejecting Korsgaard's argument in its overall strategy in its *original* form, i.e., in her characterization of the problem of *revolution* as a problem of *virtue*. I then go on to assess the case of perverted justice in revised form within the *juridical* domain, as a conflict between positive law, as a necessary condition of Right, and external freedom as its end.

The case for revolution, Korsgaard suggests, arises from conditions of perverted justice. The latter are not cases of *imperfect* rule, but rather cases in which "justice is



turned against itself".<sup>435</sup> Specifically, procedural justice (positive law) turns against its end, identified by Korsgaard as the rights and freedom of humanity. Where "the procedures of justice [are] used *against these very ends*", justice is under attack by the very laws that were created to protect it. We see the legalisation of an act which we think is directly at odds with the idea of justice, and it is for this reason that Korsgaard describes these cases not just as ones of *imperfect* justice, but rather of *perverted* justice. The very rights that the law was created to protect are now under attack by its procedures.

Korsgaard argues that under such conditions, a "tension" arises between the end of justice and the positive law of the state.<sup>436</sup> This tension does not arm the virtuous person with a straightforward justification for revolution. Rather it presents them with a moral dilemma:

Concern for human rights leads the virtuous person to accept the authority of the law, but in such circumstances adherence to the law will lead her to support institutions that systematically violate human rights.<sup>437</sup>

Specifically, the dilemma arises for Korsgaard due to the particular way in which she conceives the relationship between one's duty to obey the law, and one's duty to further the rights and freedom of humanity. In arguing that the end of justice is the preservation of the rights and freedom of everyone, Korsgaard assumes that one's (ethical) *duty to obey the law* (the virtue of justice) amounts to a *duty to protect and promote the rights and freedom*. It is this end of justice that grounds our duty of obedience: the virtuous person "respects the rights of humanity, and for this reason

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<sup>435</sup> Korsgaard, C., "Taking the Law into Our Own Hands: Kant on the Right to Revolution" in A. Reath, B. Herman, & C. Korsgaard (eds.), *Reclaiming the History of Ethics: Essays for John Rawls*. (Cambridge: Cambridge University Press, 1997, pp 317-8

<sup>436</sup> Korsgaard, 1997, p 312

<sup>437</sup> Korsgaard, 1997, pp 318-9

respects the government that enforces those rights".<sup>438</sup> She goes on to say that in conditions of perverted justice, the connection between obeying the law and furthering the rights of humanity *breaks down*. In obeying the law, citizens no longer make the rights and freedom of humanity their end. To the contrary, "adherence to the law will lead [the virtuous revolutionary] to support institutions that systematically violate human rights". The virtuous person is therefore brought to a moral dilemma: in obeying the law, they are complicit in its violation of human rights; yet if they defend human rights against this law, then they fail in their duty of obedience to the sovereign.

It is in this way that Korsgaard argues that an "impasse" or dilemma arises in Kant's moral theory, between one's ethical duty of obedience, and one's ethical duty to humanity, the latter which can no longer be fulfilled through obedience to the law. Korsgaard's proposed solution to this impasse is that the virtuous person revolt:

The person with the virtue of justice, the lover of human rights, unable to turn to the actual laws for their enforcement, has nowhere else to turn. She may come to feel that there is nothing for it but to take human rights under her own protection, and so to take the law into her own hands.<sup>439</sup>

In such circumstances she argues that there exists a "deep" moral responsibility to revolt, in order to protect the end of justice. Conditions of perverted justice present us with circumstances in which we must violate the very thing that we take as our

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<sup>438</sup> Korsgaard, 1997, p 317

<sup>439</sup> Korsgaard, 1997, pp 318-9

object in order to protect it. We must therefore revolt in order to protect the rights and freedom of humanity that justice has as its end.<sup>440</sup>

However, there are two problems with the particular way that Korsgaard constructs conditions of perverted justice, and its consequent dilemma. Firstly, as argued in chapter 1, her argument depends on a sleight of hand concerning the indirectly ethical duty of obedience and the requirement that we *act from respect for the law*. According to Korsgaard, to act from respect for *the law* is to act from respect for the rights and freedom of humanity that *positive law* takes as its end. On this reading, to obey the law from respect for the law is tantamount to obeying the law from respect for the rights of humanity positive law takes as its end. If a government does not respect the rights and freedom of humanity, then we are unable to obey their laws from respect for the law, and we are unable to fulfil the indirectly ethical duty in such constitutions. However, this is not the way in which Kant grounds the indirectly ethical duty of obedience. Rather, that duty exists simply by virtue of the fact that all juridical duties are also indirect ethical duties insofar as they can be performed from moral motivation. Indirect ethical duties simply place a further procedural requirement on us to obey the law *because it is the law*; that is, to act from the motivation of duty (MM 6:390; G 4:400). By contrast, Korsgaard's argument requires that we act from respect for the law in acting from respect for a particular *end* (i.e. the rights of humanity). Her interpretation of the indirectly ethical duty of obedience is therefore *substantive*, and incorrect on Kant's procedural account of indirect ethical duties as acting from duty.

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<sup>440</sup> Korsgaard, 1997, p 320. I criticised this part of her argument in chapter 1, with regard to the relationship it posits between morality and freedom. As noted there, I do not go into detail on this, as my aim in this thesis has simply been with the first part of her argument for conditions of perverted justice, not with her subsequent argument for revolution.

In addition to her misinterpretation of the virtue of justice, there is a second, more fundamental problem with Korsgaard's appeal to ethics which we can now observe. For having noted the strict division of ethics and Right, we see that Korsgaard's overall strategy is unwarranted. I refer here to her appeal to the virtue of justice, through which she seeks to address the problem of revolution as a problem of *ethics*, rather than of *Right*. Through shifting the problem of political obedience into the ethical domain with an appeal to the indirectly ethical duty of obedience, she addresses it not as a problem of political obedience, but as one of autonomy or "self-mastery" in the face of oppressive rule. Revolution is a matter of internal freedom being acted out in the political domain.<sup>441</sup> Her characterization of the problem in this way is symptomatic of her general ethicisation of morality, typical of the Rawlsian tradition of Kant scholarship. This ethicisation is further supported by her narrow interpretation of moral freedom as *autonomy*, as discussed in chapter 3. Korsgaard's characterization of the problem of political obedience is to be rejected on these grounds, in its co-option of Kant's political theory to his ethics, making the problem of revolution one of *virtue*, rather one than of *Right*. If revolution is a problem at all, then it one of *external* freedom in the juridical domain.

## 2.2) Conditions of perverted justice within Kant's Doctrine of Right

Having disputed the ethical nature of Korsgaard's case for revolution, I have nonetheless suggested that her root concern, in the idea of justice turning against itself, is one that we should further investigate. The concern is that states can exist

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<sup>441</sup> Korsgaard writes, "The revolutionary does not *become* strong and free when he picks up his gun. Instead, he proves to us that he has been free all along" (1997, p 323).

that undermine their own purpose, and that there are certain constitutions that cannot, therefore, be obeyed as a matter of justice. Such a line of argument, contained within the confines of Kant's *Doctrine of Right*, is implied in Korsgaard's initial characterization of perverted justice, on which the procedures of justice are used against its end.<sup>442</sup> Were this kind of conflict to occur, in the denial of external freedom, as the end of Right, by positive law, as a necessary condition of Right, then it would indeed give rise to a dilemma. Under such circumstances, we would be obliged to obey the law in our pursuit of Right as a condition of external freedom, and yet the realization of that freedom would be frustrated by our obedience to the law. However, once we come to appreciate how the denial of external freedom is conceived in conditions of perverted justice, and its necessary appeal to a substantive conception of justice, we see that positive law and external freedom cannot, in fact, come into conflict in the way that Korsgaard's idea of perverted justice suggests.

I mentioned the substantive nature of Korsgaard's account above, with reference to her interpretation of the virtue of justice. Considering this now with specific reference to the idea of perverted justice, she invokes a substantive element in the idea that justice *turns against itself*. This is explicit in her suggestion that procedural justice turns against the substantive ideal.<sup>443</sup> However, for a clear understanding of how appeal to a *substantive* element as the end of justice is integral to conditions of perverted justice, we must expose the conditional nature of freedom used in constructing such cases. In doing so, we come to see that the idea of perverted justice, on which the procedures of the state turn against its end, function only due

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<sup>442</sup> Korsgaard, 1997, p 317

<sup>443</sup> Korsgaard, 1997, p 317

to a *substantive* conception of freedom as that end. On a formal conception, no conflict can arise.

In order to construct conditions of perverted justice in the way Korsgaard's account suggests, freedom as the end of Right must, in fact, be conceived as conditional on *two* counts. Firstly, it is dependent on the realization of a *particular end* as freedom. Secondly, the *realization* of that end is dependent on the state legislating in a particular way. This two-fold conditionality is seen in the following passage:

The just person respects the rights of humanity, and for this reason respects the government that enforces those rights, and the juridical condition that makes them possible.<sup>444</sup>

On this construction, freedom is given by the protection and promotion of a particular *end* (the rights of humanity); and the protection and promotion of that end is realized by the state (the government that enforces those rights).<sup>445</sup> Thus on Korsgaard's argument for perverted justice, freedom in the civil condition is not only conditional insofar as it is ends-based; it is also dependent on political society providing the conditions for the realization of that end, through obedience to its laws. I discussed this in chapter 2, in relation to the interdependent nature of ethics and Right on Korsgaard's and Reath's accounts of Kant's moral theory, but the full extent of this dependence now becomes clear in analyzing conditions of perverted justice and the idea of justice "turning on itself".

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<sup>444</sup> Korsgaard, 1997, p 317

<sup>445</sup> Note that in my account of Korsgaard's argument, I refer to passages in which she identifies internal freedom, or autonomy as the end of Right. However, in moving the dilemma to the juridical domain, I take it as given that when I refer to freedom, I am assuming an external concept of freedom, as required by Kant's *Doctrine of Right*. I make this explicit below in my criticism of her position.

The conditional nature of freedom is integral to the construction of conditions of perverted justice due the particular way such conditions construe the relationship between freedom, as the end of Right, and positive law, as a necessary condition a condition of Right. Specifically, Korsgaard's argument suggests that conditions of perverted justice arise when the state legislates in such a way that makes the realization of freedom as the end of political society impossible:

Concern for human rights leads the virtuous person to accept the authority of the law, but in such circumstances adherence to the law will lead her to support institutions that systematically violate human rights.<sup>446</sup>

It is the *second* level of conditionality that therefore gives rise to a conflict in conditions of perverted justice. For not only do unjust states fail to promote the *end* of freedom through their positive legislation; the realization of that freedom depends on us obeying the law. It is here that the dilemma—or the perversion—arises. For in order to realize the end of freedom, we must obey the law; and yet in obeying an unjust state's law, we violate the very end we are trying to pursue.

My reconstruction of Korsgaard's argument for perverted justice thus illuminates two assumptions regarding the nature of external freedom as the end of political society, both of which are integral to setting up a conflict on which the realization of that end is *denied* by positive law. Firstly, it relies on a substantive conception of external freedom as the pursuit of certain *ends*. We saw this substantivism introduced in her reading of the virtue of justice; we now see that it is also built into the idea of perverted justice more generally. Secondly, it makes obedience to the law *instrumental* to freedom, in the realization of that freedom through obedience to the law. Both of these assumptions are, however, unwarranted on Kant's *Doctrine of*

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<sup>446</sup> Korsgaard, 1997, 318

*Right*, and can be disputed by my analysis of external freedom in previous chapters. In doing so, I deny the conditional conception of freedom required to construct conditions of perverted justice within the juridical domain, and as such, the proposed dilemma collapses.

Beginning with the substantive nature of external freedom, I discussed this in chapter 5. I argued there that, contrary to interpretations such as Korsgaard's, external freedom is not conditional on the realization of any particular ends within political society. Rather, it is a formal concept, in the constraint of our choice in accordance with the universal principle of Right. As such, external freedom does not depend on the social realization of a particular end by the state (Guyer). Nor does it depend on the individual being enabled by political society in the realization of their purposiveness or end-setting capacity (Ripstein). Such ends-based readings of freedom are at odds with the formal nature of Kant's moral theory, and are therefore to be rejected. Korsgaard's argument for perverted justice, in its appeal to a substantive end, is thus based on a questionable interpretation of moral freedom.

Secondly, conditions of perverted justice not only make freedom conditional on the realization of certain *ends*; they make the realization of those ends contingent on the *particular constitution* of the state. If we are to realize external freedom as the end of political society, the state must legislate in a particular manner in order to make the realization of certain ends possible. Obedience to the law is therefore *instrumental* to the realization of our freedom: it is our *means* to the realization of a substantive *end*. However, I have argued in chapter 5 that obedience to the law is not simply a means to realizing freedom; it is *constitutive* of it. That is, external freedom simply *is* obedience to the law, in the constraint of our freedom of choice in accordance with



the universal principle of Right. Obedience to the law is therefore not *instrumental* to freedom in the way that cases of perverted justice require, and as such, the second layer of conditionality also collapses.

It should therefore be clear from my analysis of external freedom that it is not possible for justice to become perverted in the way that Korsgaard's argument suggests; that is, in the state's denial of the possibility of external freedom as the end of Right. Her construction of this conflict, situated within the juridical domain, relies on a misinterpretation of external freedom on two counts. Firstly, the idea of "justice turning against itself" relies on appeal to a substantive end of justice which is unavailable on Kant's formal theory of freedom. External freedom is not conditional on the realization of certain ends, and therefore conditions of perverted justice that supposedly frustrate those ends will not arise. Secondly, the dilemma in such circumstances is given rise to by an instrumental view of obedience to the law that is incorrect. As argued in chapter 5, external freedom simply is our constraint under positive law according to the universal principle of Right. Once we appreciate the formal nature of Kant's moral theory, and more specifically, of the concept of external freedom, we therefore see that conditions of perverted justice, and the consequent dilemma, cannot arise on Kant's *Doctrine of Right*.

### *3) The relation of Right to Politics and the actualization of freedom: history, practice and reform in Kant's political philosophy*

I have argued above that it is not possible for the state to fail in its legislation in a way that denies the possibility of external freedom as the end of Right. Such an account relies on a substantive conception of freedom on which its realization as the

purpose of political society is conditional on the state legislating in a particular way. Freedom is conditional on a certain kind of law-making that realizes certain ends through our obedience to the law. Such a conception of freedom is inconsistent with the formal nature of Kant's moral theory as I have defended it, and is therefore unwarranted.

However, while this rules out an objection to Kant's absolute prohibition of revolution on a theoretical level, within his metaphysics of morals, we might still ask whether the state can deny the realization of freedom on a practical level. For as I argued in chapter 1, Kant's *Doctrine of Right* allows us to accept the authority of unjust states while holding them to a higher standard due to two features of his political philosophy. The first is the provision of an independent criterion of justice, thereby upholding the distinction between legitimacy and justice in contrast to Hobbesian positivism. The second is the idea of *reform*, which offers an account of how we can bridge the gap between justice and legitimacy on Kant's *Doctrine of Right*. Kant's theory of reform guarantees gradual and continued progress towards a more just state as the end of Right. However, some commentators have expressed concern that this theory is inadequate, meaning that his *Doctrine of Right* cannot realize in practice what it preaches in theory. This is to express a concern about Kant's political absolutism on a practical level, rather than a theoretical one.

Henrich, for example, expresses this in his concern that, while Kant's a priori moral principles provide a coherent conception of justice as freedom at an abstract level,

he fails to provide a convincing account of its actualization in practice.<sup>447</sup> Specifically, Henrich's concern is that Kant's philosophy of Right cannot realise the freedom that it takes as its end *in practice*. Were this the case, then although there is no dilemma at a theoretical level in Kant's *Doctrine of Right*, we would be faced with an impasse at a practical level, in the application of Kant's theory of Right to the practice of politics. In this final section of the thesis I therefore discuss Kant's political teleology as a theory of reform towards the end of Right. My remarks in this regard are necessarily limited to a sketch of Kant's philosophy of history and its critics, though in what I do say I hope to assuage concerns that Kant's political philosophy fails to provide a practical account of mankind's freedom as the end of his *Doctrine of Right*.

### 3.1) *The impasse between theory and practice: the application of Right to politics*

Henrich's concern regarding the actualization of freedom has its origins in Kant's distinction between legitimacy and justice, and the reformative character of Kant's *Doctrine of Right*. As discussed in chapter 1, the distinction between legitimacy and justice avoids the kind of Hobbesian positivism that Kant finds so appalling, through retaining recourse to an idea of rightful legislation against which sovereign rule can be measured. However, maintaining this distinction means that not all legitimate states will exemplify conditions of Right; that is, not all civil conditions will constitute conditions of external freedom. This is because not all governments will rule according to the universal principle of Right. Therefore while any civil condition is considered *legitimate*, grounded in our a priori duty to enter political

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<sup>447</sup> Henrich, D., "On the Meaning of Rational Action in the State" in R. Beiner and W.J.Booth (eds.), *Kant and Political Philosophy: The Contemporary Legacy*. New Haven and London: Yale University Press, 1993, p 99

society, very few societies will actually be *just*, in their constraint of our freedom of choice according to positive law.<sup>448</sup> As such, if Kant is to provide an account of justice as the actualization of external freedom, he must provide an account of the reformative nature of the political condition. That is, how merely *legitimate* states can be turned into *just* states through peaceful means.

It is for this reason that Henrich refers to Kant's theory of progress as a "necessary complement of theory (and of theory-oriented action) that renounced all right to revolution":<sup>449</sup>

a theory that demands respect for rights and that at the same time abandons all hope of its actualization would indeed have to be named "mere" theory. Therefore Kant attempted to prove, on the basis of the progress of mankind and insight into human interests, that one can anticipate a condition of the world in which right attains supremacy in the inner life of states.<sup>450</sup>

However, a number of commentators have found Kant's political teleology to be lacking. Hans Reiss worries that Kant's philosophy of Right, though espousing the ideal of freedom, will "imprison" mankind within a constitution that affords very little of that freedom. This is not to suggest that progress may *never* happen, but that Kant's "counsel of patience" may result in "centuries of complete intellectual and moral darkness" for mankind.<sup>451</sup> Likewise, Lewis Beck is critical of the inadequacy of Kant's gradualism and theory of reform in the face of extreme abuses of rights:

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<sup>448</sup> Flikschuh, 2008, pp 138-9

<sup>449</sup> Henrich, 1993, pp 100

<sup>450</sup> Henrich, p 99

<sup>451</sup> Reiss, H., "Kant and the Right of Rebellion" in *Journal of the History of Ideas*, Vol. 17, No. 2 (Apr., 1956), p. 189

we are not to overthrow by violence even a tyrannical government which blatantly traduces [the rights of mankind], for to do this would conflict with a duty of perfect obligation [to the sovereign]. We are not, therefore, justified in killing a tyrant in order to preserve the lives of thousands or millions of his subjects. The most I can morally do is to expose the abuses of his power and make proposals for his reform, to disobey him if he commands me to do something immoral and to suffer martyrdom if necessary.<sup>452</sup>

Beck's frustration with Kant's gradualism is not with his progressive view of morality per se.<sup>453</sup> Rather, his objection to Kant's teleology is what he sees to be mankind's impotence in the face of oppressive and tyrannical regimes, and the consequent frustration of mankind's "moral aspirations".<sup>454</sup> It is this that he thinks leads to a conflict of duties between man's duty of obedience and his duty of progress, as discussed in the Introduction.

Commentators such as Reiss and Beck demonstrate a general sympathy to Kant's theory of progress and reform. What they are critical of is its counsel of *patience* over *revolution*; and of *reform* over *regime change* in cases of extreme injustice. Their fear is that this will lead to generations being martyred to an abstract and inflexible theory of Right which in practice fails to realize the value of freedom that it takes as its end. Henrich shares this fear of "immobility" in the face of injustice, suggesting that under extreme conditions of injustice "[Kant] must be ready to encourage millions to face martyrdom" in confining citizens to passive resistance alone, leaving us with "a doctrine that enlivens the consciousness of freedom and right in the citizen only to

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<sup>452</sup> Beck, 1971, p 420

<sup>453</sup> He supports a Hegelian view of evolutionary morality in place of Kant's teleological view.

<sup>454</sup> Beck, L. W., "Kant and the Right of Revolution" in *Journal of the History of Ideas*, Vol. 32, No. 3. (Jul. - Sep., 1971), p 420

imprison him forever, on grounds of right, within a system affording few rights or even worse".<sup>455</sup>

I will return to this criticism of immobility below, arguing that it rests on a misunderstanding of Kant's theory of progress. In particular, it is the result of an impatience for reform, which fails to appreciate the intergenerational nature of Kant's theory of progress, and its provision of reform and enlightenment through freedom of the pen. A failure to put this front and centre in Kant's theory of political reform neglects a central feature of his theory of progress as a practical teleology, and instead leaves us with a picture of impotence and frustration in the face of injustice. This is not the case on Kant's theory of progress. Thus I argue that while demanding, Kant's political teleology provides an adequate theory of reform, and hence provides a solution to the realization of freedom in practice.

However, before I turn to an analysis of the particular nature of Kant's theory of reform as a practical teleology, we must note that some commentators object to its place in Kant's critical philosophy at all. Instead, his appeal to the ideas of history and progress is perceived to be at best a quaint Enlightenment optimism; at worst a naïve and unfounded faith in history. If this interpretation were correct, then it would deny us recourse to a progressive theory of reform within Kant's philosophy of Right, thereby reopening Henrich's impasse between theory and practice in the application of Right to politics.

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<sup>455</sup> Henrich, 1993, pp 106/109-10. Although Henrich here is paraphrasing Gentz's objection to Kant, he takes these objections on as his own in his concerns over the abstract and theoretical nature of Kant's philosophy of Right.

Thomas Hill is one commentator sceptical of the critical nature of Kant's teleological conception of history. While acknowledging the internal coherence of Kant's position on progress and political reform, he argues that it is not defensible, due to the fact that "it rests on an untenable faith in historical progress".<sup>456</sup> Hill's objection is not a lack of *evidence* in support of Kant's position. He acknowledges that Kant's intention is not to provide an account of the empirical history of the world, but rather to offer a philosophical perspective on that development (IUH 8:30).<sup>457</sup> Indeed, Kant specifically rejects appeals to empirical arguments for progress on epistemological grounds, arguing that historical evidence, either for or against mankind's progress, does not preclude the possibility of a reversal in the future (TP 8:308-10). Thus while Kant interprets historical facts from a moral perspective, he does not develop a moral perspective grounded in historical facts.<sup>458</sup>

Hill's objection to Kant's faith in progress is therefore not to its *empirical* grounding; rather it is to what he takes to be a *historical* grounding in the spirit of Kant's time; i.e. in "the Enlightenment's optimistic faith" in progress.<sup>459</sup> James Booth makes a similar complaint, arguing that "all that can be expected from [such a conception of

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<sup>456</sup> Hill, 2002, p 284

<sup>457</sup> Hill, 2002, p 286

<sup>458</sup> We might think that an obvious counterexample to this is Kant's argument in *The Contest of Faculties*, where he appears to present an *empirical* argument, according to which the French Revolution is understood as a "historical sign" of mankind's progress. According to Kant this event "demonstrates a character of the human race as a whole and also (due to its unselfishness) a moral character", and is therefore taken by Kant to indicate a tendency in the human race to constantly improve (CF 7:84-5). However, Kant defends his appeal to the French Revolution not as proof of progress in the event itself, but rather as indicative of mankind's character and tendency to be the author of events towards the good. Such revolutions therefore reveal to us a "guiding thread" in human history, and a "consoling outlook" on which the human species "is finally working itself toward the condition in which all the seeds that nature has planted within it can be fully developed" (IUH 8:30). Kant does not, therefore, infer humanity's progress from the occurrence of revolutions in history; rather, they serve as an "empirical indicator of individuals' consciousness of their duty to seek to contribute to posterity's progress" (Flikschuh, 2007, p 229)

<sup>459</sup> Hill, 1997, p 112

history] is a fiction, a mere romance".<sup>460</sup> These views suggest that Kant's arguments in favour of progress are not a part of his critical philosophy, but simply a product of an "age of sentimentality".<sup>461</sup> On this reading, Kant's essays on history and teleology are thus taken to be "regressions to a pre-critical standpoint",<sup>462</sup> and therefore inapplicable to his critical moral theory, including his *Doctrine of Right*.

However, Hill and Booth are wrong to suggest that Kant's assumption in favour of progress is grounded in romantic or naïvely optimistic notions of the Enlightenment. Certainly one of Kant's motivations for arguing in favour of progress is to provide a positive outlook on the human race. For if we make such an assumption "we could still love the race, at least in its constant approach to the good" (TP 8:307). However, Kant has a deeper, systematic argument for progress that reaches beyond the provision of an optimistic outlook. Far from being out of place in his critical philosophy, I argue that Kant's assumption in favour of progress has the status of a postulate of practical reason.<sup>463</sup> I therefore defend the place of Kant's philosophy of history in his critical philosophy, thereby retaining recourse to his theory of reform in bridging the gap between his *Doctrine of Right* as a theory of freedom and the practical actualization of that freedom in the political domain.

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<sup>460</sup> This view is also put forward by James Booth in *Interpreting the World: Kant's Philosophy of History and Politics*. (Toronto: University of Toronto Press, 1986), p 111

<sup>461</sup> Henrich, 1993, p 99

<sup>462</sup> Allison, H. E., "Teleology and history in Kant: the critical foundations of Kant's philosophy of history" in A.O. Rorty and J. Schmidt. (eds), *Kant's Idea for a Universal History with a Cosmopolitan Aim: A Critical Guide*. Cambridge: Cambridge University Press, 2009, p 28

<sup>463</sup> Flikschuh, K. "Duty, Nature, Right: Kant's Response to Mendelssohn in *Theory and Practice III*" in *Journal of Moral Philosophy*, Vol. 4.2, July 2007



### 3.2 *A possible answer to the sceptics: nature, necessity, and the guarantee of progress*

I have argued above that it is Kant's philosophy of history that provides the key to the practical realization of external freedom, in offering a theory of gradual reform towards a condition of Right as the rule of positive law according to the universal principle of right. Kant's theory of progress therefore bridges the gap between theory and practice, affording a guarantee of the realization of mankind's freedom which Kant's *Doctrine of Right* sets as the end of political society. However, as discussed above, there are concerns that in practice, this philosophy of history is insufficient to guarantee mankind's freedom in the case of extreme injustice. On this argument, peaceful progress towards a condition of justice is not inevitable, and revolution is therefore sometimes necessary in the pursuit of freedom.<sup>464</sup>

One response to the concern that Kant's philosophy of history is "immobile" is an appeal to the idea of historical necessity, and hence the inevitability of such progress towards a condition of Right. As Beck observes, Kant's philosophy of history exhibits certain similarities with a Marxian conception of history, in the idea of the inevitable rise of revolutions.<sup>465</sup> Likewise, Flikschuh identifies a possible development of thought from Kant through to Marx, in "a possible conception of revolutions as historical events brought about not through the intentional actions of

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<sup>464</sup> This is the conclusion reached by Reiss, who argues that in the face of systematic violations of human dignity and freedom, subjects must be permitted to actively seek to overthrow the government (Reiss, pp 190-1). Beck, by contrast, stops short of an argument for the permissibility of revolution, on grounds that Kant's system of rights and duties cannot accommodate it. We are therefore left with a "painful problem" of a conflict of duties within Kant's practical philosophy (Beck, 1971, pp 420-422). In both cases, however, Kant's philosophy of history is taken to be insufficient to guarantee the actualization of freedom, which is the point under discussion here.

<sup>465</sup> Beck, 1971, p 418

particular agents, but through the causal processes of socio-economic forces and factors in unsustainable tension with one another".<sup>466</sup> Were this conception of revolution as historical necessity to hold, then fears of stagnation and "centuries of complete intellectual and moral darkness" would be assuaged. In Henrich's words, the actual course of history offers grounds for hope: "[h]uman nature will not always be confineable within the limits of the law. Thus revolutions arise and republics in their train".<sup>467</sup>

Certainly there is some foundation to these Marxian parallels, in Kant's suggestion that revolution is indicative of a historical process of continual progress. In *Idea for a Universal History* he argues that the nature of unjust states will inevitably lead to their collapse and subsequent replacement with more just states:

due to the flaws contained in them [they] in turn collapsed, though in such a way that a seed of enlightenment always remained which developed further through each revolution and prepared a subsequent, even more greatly improved stage (IUH 8:30).

Such passages have led commentators to consider that Kant's philosophy of history makes revolution an inevitable condition of mankind's continued progress. That is, though Kant's moral philosophy entails the absolute prohibition of revolution, his philosophy of history may nevertheless entail it.<sup>468</sup> The idea of historical necessity is further strengthened by Kant's suggestion that progress will occur by the hand of nature, regardless of humanity's actions or interventions:

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<sup>466</sup> Flikschuh, 2008, p 144

<sup>467</sup> Henrich, 1993, p 109

<sup>468</sup> Nicholson, P., "Kant on the Duty Never to Resist the Sovereign" in *Ethics*, Vol. 86, No. 3 (Apr., 1976), pp 225-6. I mentioned this argument in the Introduction, where I considered common objections to Kant's position on revolution grounded in his philosophy of history.

If we now ask by what means this unending progress toward the better can be maintained and even accelerated, it is soon seen that this immeasurably distant success will depend not so much on what *we* do (e.g. on the education we give the younger generation) and by what methods we should proceed in order to bring it about, but instead upon what human *nature* will do in and with us to *force* us onto a track we would not readily take of our own accord (TP 8:310).

Were Kant's teleology to be one of historical necessity, an inevitable product of nature, then there could be no permanent stasis or halt to progress on such a historical teleology; instead, this progress would be guaranteed by nature.

However, while Marx and Kant certainly share views in common regarding the importance of nature and history to human progress, their accounts of that history, and of revolution's role in it, differ significantly. Contra Marx's account of historical *necessity*, Kant holds *freedom* to be highest criterion of the rightful state. His teleology must therefore avoid the fatalism of an account of historical necessity, in order to leave room for human agency. Thus when Kant offers an interpretation of man's progress on which "nature itself *does* it, whether we will it or not" (PP 8:365), he does not present a picture of mechanistic progress pre-determined by nature. This would preclude a conception of man as having a free will that can in any way effect his progress and development.<sup>469</sup>

Instead, Kant's appeal to nature's guarantee of progress is an appeal to nature's *guiding force*, in the impetus it provides to improve. Through "quarrelsomeness", "competitive vanity", and an "insatiable appetite for property and even for power",

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<sup>469</sup> Apel, K-O, 'Kant's "Toward Perpetual Peace" as Historical Prognosis from the Point of View of Moral Duty' in J. Bohman & M. Lutz-Bachman (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*. (Cambridge, MA: MIT Press, 1997), p. 89

nature induces man to overcome "sloth and passive contentment" in an effort to win out against others and acquire status amongst his fellows (IUH 8:21). This is necessary not because man lacks agency or influence in the practical domain; rather, it is in resolution of a problem of self-interest and coordination which would otherwise hinder the realization of reform:

For only from nature, or rather from *providence* (since supreme wisdom is required for the complete fulfilment of this end), can we expect an outcome that is directed to the whole and from the parts, whereas people in the *schemes* set out only from the parts and may well remain with them, and may be able to reach the whole, as something too great for them, in their ideas but not in their influence, especially since, with their mutually adverse schemes, they would hardly unite for it by their own free resolution (TP 8:310).

Nature therefore guides mankind's progress through the organisation of self-interested, self-destructive tendencies, by "arranging those forces of nature in opposition to one another in such a way that one checks the destructive effect of the other or cancels it" (PP 8:366). It is in this way that nature "affords the guarantee that what man *ought* to in accordance with laws of freedom but does not do, it is assured that we *will* do, without prejudice to this freedom, even by a constraint of nature" (PP 8:365). This, as Flikschuh points out, is not to say that nature takes over mankind's destiny, effecting reform "even where individual agents remain morally unresponsive concerning their inborn duty".<sup>470</sup> Rather, nature provides the motivation and the guidance for mankind to work towards "a higher cause directed to the objective final end of the human race" (PP 8:361-2). Nature is therefore coordinating, but not determining. There is no historical necessity on Kant's conception of progress.

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<sup>470</sup> Flikschuh, 2007, p 234

### 3.3) *The practical nature of Kant's teleology and its critical foundations*

Kant's philosophy of history therefore does not admit of a historical necessity that can guarantee mankind's progress in the face of the kind of extreme oppression that Henrich, Beck and Reiss imagine. Progress, though supported by nature, is a product of human agency; reform is not inevitable. However, though this leaves open the possibility that progress may not occur, this does not warrant the criticism that mankind's freedom as the end of Right may, in practice, be denied. Contrary to Henrich's criticism of immobility, Kant's philosophy of history does provide a sufficient account of the actualization of justice through his practical teleology and theory of freedom of the pen. This disputes the claim that an impasse can arise between theory and practice in Kant's political philosophy.

There are two questions that arise when assessing Kant's practical teleology as a theory of political reform through human agency. Firstly, there is the particular nature of that agency in the civil condition, given by Kant's doctrine of freedom of the pen. Secondly, there is the question of the *practical* nature of Kant's teleology, and its grounding not in empirical arguments, but rather in his critical philosophy.

Beginning with Kant's account of progress and human agency in the political domain, Kant argues that all that is required for the human race to continually advance is the public use of reason through freedom of the pen:

For this enlightenment, however, nothing is required but *freedom*, and indeed the least harmful of anything that could be called freedom: namely, freedom to make *public use* of one's reason in all matters (WIE 8:36).

This public use of reason through free speech and publication helps to bring about reform in two ways. Firstly, it does so through instruction and input from citizens. In the case of defective constitutions, freedom of the pen allows subjects and experts to draw the sovereign's attention to the inadequacies of their institutions, through public comment and criticism (WIE 8:38). This is necessary because "to assume that the head of state could never err or be ignorant of something would be to represent him as favoured with divine inspiration and raised above humanity" (TP 8:304). Alone, the sovereign cannot be expected to identify and affect all the changes that are needed. Thus while reform can only be implemented by the sovereign, "it can be undertaken by him with wisdom only if he is made aware of the inequities and inadequacies of his administration".<sup>471</sup> Freedom of the pen thus provides "the sole palladium of the people's rights", allowing them to highlight injustices and have them corrected in cases where a sovereign has failed to see them, or to act in correction of them (TP 8:305).

Secondly, freedom of the pen brings about enlightenment through the development of our reason through independent thinking. As Kleingeld discusses, Kant thinks that enlightenment comes about through culture, and development in the arts and sciences. Such cultural development helps rid the public of prejudice and superstition, and leads to the development of reason and the expansion of collective knowledge and understanding.<sup>472</sup> It is on these grounds that Kant objects to the institution of ecclesiastical constitutions. For in binding themselves to an "unalterable creed", a people may no longer think for themselves, and thus cannot

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<sup>471</sup> Beck, 1971, p 415

<sup>472</sup> Kleingeld, P. "Kant's changing cosmopolitanism" in A.O. Rorty and J. Schmidt. (eds), *Kant's Idea for a Universal History with a Cosmopolitan Aim: A Critical Guide*. Cambridge: Cambridge University Press, 2009, p 173

“enlarge its cognitions” (WIE 8:39). If they are to become enlightened, then they must be in a position to “[use] their own understanding confidently and well in religious matters, without another’s guidance” (WIE 8:40). This kind of progress is not simply political reform based on practical experience and dissatisfaction; rather it is a deeper development of understanding that underpins enlightenment through the development of reason. Thus it is that only the public use of reason can bring about true progress, in progress of *thought*. It is in this way that Kant imagines that freedom of the pen, as freedom to think, will enable genuine freedom to act, governed by reason.<sup>473</sup>

Freedom of the pen therefore allows for the enlightenment and contribution of individuals as subjects in political society. In complement to this, Kant also presents a theory of sovereign reform through trade. Kant sees commercial interest as a contributor to peaceful political progress in its counteraction of man’s natural inclination to wage war for aggrandizement and glory. A sovereign’s interest in wealth and profit means states will seek to keep peaceful relations, both domestically and internationally (PP 8:368). Man’s natural spirit of commerce also encourages sovereigns to make reforms towards a more rightful state, for infringement of civil freedoms will, Kant argues, cause “negative effects in all industries, primarily in trade, which would also lead to a decrease in the powers of the state in its external relations” (IUH 8:27). This will happen not just through objection from other states, but also through a decline in production. For if a citizen is denied the freedom to pursue his personal welfare, and otherwise express his preferences and opinions openly, this “hinders the vitality of the entire enterprise and thereby diminishes the powers of the whole” (IUH 8:28). In such a situation,

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<sup>473</sup> Kleingeld, p 173

Kant argues, even the most self-interested rulers will move to prevent the decline of external relations, and thus relax restrictions on its people and grant general freedom of religion and thought.

Trade and free speech therefore provide the mechanism for *peaceful* progress. As many commentators have noted, however, Kant's argument for state reform as a joint venture between sovereign and subject rests on his assumption of mutual cooperation.<sup>474</sup> That is, on an assumption that the matters that subjects raise with the sovereign are "matters that [the sovereign] himself would change if he knew about them" (TP: 8:305). Rosen in particular has questioned this assumption, on the grounds that not all sovereigns will rule in a well-meaning manner. Thus even granted the self-interested schemes of expansion driven by trade and commerce, the concern is that they will not take non-republican rulers as far as relinquishing power in pursuit of a republican government.<sup>475</sup> Taken in light of Kant's later observation that "in the usual order of things it is not in the nature of the human being to relinquish his power by choice" (TP: 8:312), this concern has some warrant. It certainly seems to require us to adopt a view on the sovereign-subject relationship as one built on mutual trust and an acknowledgement of their respective public functions and responsibilities.<sup>476</sup> This is a view which, as was originally charged against his philosophy of history, we might take to be overly optimistic. If this were the case, then Kant's guarantee of sovereign reform looks doubtful, and with it the provision of free speech necessary for further enlightenment.

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<sup>474</sup> Flikschuh, 2008, p 140

<sup>475</sup> Rosen, A. D., *Kant's Theory of Justice*. Ithaca, NY: Cornell University Press, 1993, p 126

<sup>476</sup> Flikschuh, 2008, p 140



There are two things we can say in response to this. Firstly, though progress is a product of human agency, a *joint venture* between subject and state, this is not a sufficient condition for reform: nature must also provide the conditions for this progress. Specifically, nature compels man to work towards a common goal through the mechanism of self-interest. Contrary to the implication of Rosen's argument, self-interest does not stand in the way of reform towards a republican constitution; it is in fact what helps bring it about according to Kant. This is because, firstly, Kant thinks that a republican constitution is that which is most in line with the self-interest of individuals, as it provides the greatest amount of peace and freedom (PP 8:350/367). Secondly, as discussed above, Kant argues that nature arranges man's self-interested inclinations such that they cancel each other out (PP 8:366). As Kleingeld points out, in giving this role to self-interest, Kant explicitly denies the view that it hinders progress towards a more just constitution; precisely the opposite is the case: the problem of the state is soluble even for a nation of devils (PP 8:366).<sup>477</sup> Thus in *Perpetual Peace* Kant "explicitly rejects his earlier statement that a good will is necessary for accepting a perfect state constitution": progress is not reliant on the mutual cooperation and good faith of sovereign and subject.<sup>478</sup>

Secondly, as Nicholson points out, the empirical character of a debate concerning human nature rules out the conclusive establishment of an argument either way. Kant's philosophy of history, as a critical endeavour, is simply a matter of finding the best assumption that could be true.<sup>479</sup> Which in this case is that nature is purposive, guaranteeing man's final political end of a republican constitution and a condition of perpetual peace. It is this that makes Kant's teleology *practical*, and first-

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<sup>477</sup> Kleingeld, p 180

<sup>478</sup> Kleingeld, p 180

<sup>479</sup> Nicholson, 1976, p 227

personal, rather than theoretical. We must “add [the idea of progress] in thought, in order to make for ourselves a concept of [its] possibility” (PP 8:362). That is, if we are to furnish ourselves with a conception of history on which our progress, and hence our fulfilment of our duty, is even a possibility, then we must make an assumption in its favour. As Flikschuh puts it, “the permissibility of the assumption of humanity's actual moral progress follows as a corollary of my acknowledgement of my inborn duty”.<sup>480</sup> In echo of Kant's first *Critique* argument, *ought* implies *can*.<sup>481</sup>

The assumption of progress is therefore “dogmatic, and well founded as to its reality” for practical purposes, despite its transcendence for theoretical purposes (PP 8:363). We can have no *knowledge* of such progress, but we have *practical warrant* for our assumption in its favour, in order that the fulfilment of our moral duty of progress remains a possibility. As such, Flikschuh suggests we understand Kant's assumption of progress as a postulate of pure practical reason. We are permitted to assume that humanity is constantly progressing because we are conscious of a moral duty to so progress.<sup>482</sup> Thus, while we have no theoretical grounds for believing in the continued progress of mankind, it is a practically necessary assumption in order that we may act on our duty to contribute towards that progress as given by morality (TP 8:309).

The status of Kant's assumption of progress as a postulate of pure practical reason directs us to its foundation in his critical philosophy. As Kleingeld argues, this foundation is best understood in light of the first *Critique*'s justification of the use of

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<sup>480</sup> Flikschuh, 2007, p 230

<sup>481</sup> Allison, 2009, p 43

<sup>482</sup> Flikschuh, 2007, pp 230-1

regulative ideas for the establishment of a systematic unity of knowledge.<sup>483</sup> In this case, the idea to which we must bring unity is that of nature; that is, of the phenomenal world in which human agency is exercised:

This is what he does in the *Idee*. In order to facilitate the organization of knowledge of this area of the phenomenal world systematically, Kant sets out to formulate a regulative idea.<sup>484</sup>

The "idea" of mankind's history as a history of continued progress is thus understood as a "'guiding principle' for the enterprise of establishing systematic unity" in the sensible world.<sup>485</sup> This is what grounds Kant's practical teleology in his critical philosophy, and specifically, in the first *Critique* account of regulative ideas. As Kant puts it, we add the idea in thought in order to make sense of our history as a species. It provides a solution to the apparent irregularity of human events, providing a unifying principle in the proposed telos of mankind;<sup>486</sup> "a higher cause directed to the objective final end of the human race" (PP 8:361-2). As such, it addresses the possible disunity of the phenomenal world and man's moral duty to progress, offering a conception of history on which our fulfilment of our moral duty given a priori is made possible in the sensible world.

#### *3.4) The plea for patience: Kant's gradualism and the inter-generational nature of reform*

The assumption of progress, grounded in Kant's critical philosophy, assures us of the *possibility* of reform towards a state of Right, through a joint venture undertaken by sovereign and subject, and guided in its end by nature. Kant's teleology therefore

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<sup>483</sup> Kleingeld, 2009, p 175

<sup>484</sup> Kleingeld, p 175

<sup>485</sup> Kleingeld, p 175

<sup>486</sup> Kleingeld, pp 176-7

reconciles freedom and nature with reference to human history and the end of political society, offering an account of how our freedom can be realized in the sensible world.<sup>487</sup> Additionally, the status of Kant's assumption of progress as a postulate of practical reason grounds it in his critical philosophy, thereby refuting those who cast his teleology as a naïve Enlightenment optimism that signals a return to his pre-critical period. The appeal to Kant's philosophy of *history* in understanding his philosophy of *Right* is therefore warranted on Kant's critical framework.

This critical grounding also answers those who wonder why we must believe in the continued progress of mankind's freedom, even in the face of tyranny and oppression.<sup>488</sup> It is not unfounded optimism on Kant's part. Rather, it has practical warrant as a regulative idea. We must add the idea of continuous progress in thought, in order to make such progress possible for mankind (PP 8:362). The assumption of progress therefore has practical validity.

However, even granted the critical foundations of Kant's teleology and his assumption in favour of progress, some commentators remain sceptical about the sufficiency of Kant's philosophy of history as an account of the realization of freedom in the civil condition. Specifically, they suggest that, as the primary mechanism of reform, freedom of speech may be suppressed, thereby depriving

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<sup>487</sup> Kleingeld, 186; Allison, 2009, p 26. Note that the end of *history* is not synonymous with the end of *Right*. As Kleingeld argues, while some commentators conceive of the final end of history in terms of the establishment of a republican constitution, the final end of history is broader than this; it is the complete development of human reason (Kleingeld, pp 172-4). Insofar as I am concerned with Kant's *Doctrine of Right*, I have referred in the main to the end of political society. However, in doing so I do not mean to equate the end of *Right* with the final end of history.

<sup>488</sup> Reiss, p 189

subjects of a necessary condition of progress. Reiss, for example, objects that Kant's faith in the inevitable resurgence of free speech was short-sighted, and did not anticipate the systematic suppression in 20<sup>th</sup> century Europe. The result of this short-sightedness is a "pernicious historicism" that sanctions oppression and tyranny, with the possibility that reform towards justice is suppressed for centuries.<sup>489</sup> Likewise, Beck objects that Kant's evolutionary conception of history prevents us from defending ourselves against a tyrant, even "to preserve the lives of thousands of millions of his subjects".<sup>490</sup> While both accept that free speech may *eventually* see a revival, their concern is that millions of people may be martyred to Kant's gradualism in the meantime. This is taken to be a sufficient threat to the realization of mankind's freedom to warrant serious reconsideration of Kant's absolute prohibition of revolution. As Reiss puts it, "is the prospect of centuries of complete intellectual and moral darkness not sufficient ground to reject his counsel of patience?".<sup>491</sup>

The first point to note against this objection is that those who criticise Kant on these grounds mistakenly identify *individual* progress as the concern of Kant's practical philosophy.<sup>492</sup> Yet its subject is not the individual, nor the freedom of a particular generation; rather its subject is the *species* as a whole.<sup>493</sup> His philosophy of history is a philosophy of *intergenerational* progress, and our duty as such is

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<sup>489</sup> Reiss, p 189

<sup>490</sup> Beck, 1971, p 420

<sup>491</sup> Reiss, p 189

<sup>492</sup> Reiss, p 190; Beck, 1971, p 420

<sup>493</sup> Americks, K., "The purposive development of human capacities" in A.O. Rorty and J. Schmidt. (eds), *Kant's Idea for a Universal History with a Cosmopolitan Aim: A Critical Guide*. Cambridge: Cambridge University Press, 2009, p 50

a duty of every member of the series of generations...so to influence posterity that it becomes always better...and to do it in such a way that this duty must be legitimately be handed down from one member [in the series of] generations to another (TP: 8:309).

This intergenerational nature of progress is a result of the fact that reason cannot be developed within the lifetime of one individual, but rather takes generations. This, as Allison point out, appears to be the reason why humankind has a history at all for Kant.<sup>494</sup> Thus while Kant acknowledges that "previous generations seem to have pursued their arduous endeavours only for the sake of the later ones...without themselves being able to share in the fortune that they themselves had worked towards", he takes it to be a necessary assumption about a species which was given reason as a means to enlightenment (IUH 8:18). Instead of lamenting the fact that progress must take place over generations, we should instead be reassured as a species that while our progress "will indeed be *interrupted* from time to time [it] will never be broken off" (TP 8:309). Even if humanity does see an age of moral and intellectual darkness, it will eventually pass into a more enlightened era.

Secondly, even with modern technological advancement of precisely the kind that Reiss fears, governments have been shown to be incapable of suppressing free speech entirely. As Nicholson points out in response to Reiss, "The events of 1989-91 in Soviet Union Russia and eastern Europe may make the strength and stamina of totalitarianism seem less than they did when Reiss stated his argument".<sup>495</sup> Likewise, Flikschuh argues that we may take current Chinese dissidents as a sign that, no matter how self-interested and censorial the state, free speech will prevail.<sup>496</sup>

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<sup>494</sup> Allison, 2009, p 27

<sup>495</sup> Nicholson, 1992, pp 253-4

<sup>496</sup> Flikschuh, 2008, p 143

Despite increasingly sophisticated means of censorship facilitated by social media sites and internet search engines; and despite the prosecution and reported harassment of activists and writers; the Chinese government has been unsuccessful in suppressing calls for state reform. Authors, artists and activists continue to find both a national and an international voice. Experience therefore tells us that no matter how thorough and technologically advanced the state's attempts at censorship, people *do* still speak out, and they *do* still contribute to reform through freedom of the pen.

Of course, Kant takes such empirical arguments to be irrelevant to the assumption of progress. It has practical necessity in our conceptualisation of the world and the human condition, and therefore has dogmatic practical validity (PP 8:362). However, cases such as Nazi Germany, as used by Reiss, and the Khmer Rouge, as discussed by Flikschuh, certainly serve as powerful intuitive arguments against a theory of reform based on freedom of the pen. There is therefore merit in contesting them, in order to show that our suspicions of Kant on these grounds are unfounded. Reform *can* come about. It is just that we sometimes require a longer lens in order to see this.

It is this last point that is the main point of contention for commentators such as Reiss and Beck. It is the fact that Kant's theory of reform requires patience, and a holistic view of humanity, which causes an intuitive rejection of his teleology. We do not want to condemn one generation to suffering for the benefit of the next. However, we should be reassured that, contrary to what criticisms like Beck's and Reiss' seem to suppose, Kant's teleology does not condemn entire generations to a complete denial of their freedom. Kant's "counsel of patience" is not a counsel of

passive inactivity, a theory of reform on which we must simply sit and wait, impotent in the face of tyrannical rule. Precisely the opposite is the case for Kant: not only must we engage and contribute through freedom of speech and the public use of our reason; we will be compelled to do so by nature. Far from making man subject to the whims of history and nature in the face of tyrannical and oppressive regimes, Kant's teleology therefore empowers humanity to act in furtherance of their own freedom.

I therefore conclude that there is no conflict within Kant's political philosophy between his *Doctrine of Right* as a theory of freedom and his philosophy of history as a doctrine of reform. Though it is demanding in its intergenerational nature, the reformative nature of Kant's doctrine of Right does not create an impasse between theory and practice. There is neither practical nor theoretical warrant for objecting to Kant's absolute prohibition of revolution in his *Doctrine of Right* as a doctrine of freedom.



## Concluding remarks

I began this thesis by suggesting that Korsgaard's problematization of Kant's absolute prohibition of revolution is appealing, in the idea that under certain conditions, justice "turns against itself". Such conditions were characterized as perverted justice, in which the procedures of the state (positive law) deny the realization of external freedom as the end of Right. The proposed argument was that, if such conditions were to arise, then a contradiction arises, making it impossible to obey such states as a matter of justice. For in order to realize the end of freedom, we must obey the law; and yet in obeying an unjust state's law, we violate the very end we are trying to pursue.

In investigating the possibility of conditions of perverted justice on Kant's *Doctrine of Right*, I did not adopt Korsgaard's argument in its original form, on the grounds that it makes an unwarranted appeal to Kant's *ethics*. Instead, I situated the dilemma within the juridical domain, conceived as a conflict between the procedures of justice, in positive law, and the end of justice, in the concept of external freedom.

Establishing the possibility of perverted justice took me into an inquiry into the nature of Kant's moral theory as a theory of freedom, and specifically, the particular kind of freedom that Right takes as its end. I took the contrast between the ethical and juridical domains as my point of departure, defending Kant's strict division between the two domains. In doing so I defended the moral status of Right against commentators who exclude it on grounds of its external nature, arguing for a conception of practical freedom that is broader than the internal freedom of autonomy, and hence can include Right under its scope. From this I offered an

account of external freedom as acting in accordance with the universal principle of Right, as the mutual constraint of one's choice under universal law.

I have, however, disputed the possibility of conditions of perverted justice arising on Kant's *Doctrine of Right*. For the construction of such cases relies on an ends-based interpretation of external freedom that is unwarranted on Kant's moral theory. Specifically, such cases rely on a two-fold conditionality, on which external freedom is dependent both on the realization of *certain ends*, and the further realization of those ends *by the state*. Such an argument requires recourse to a substantive conception of freedom, and an instrumental view of obedience to the law, both of which are unwarranted on Kant's formal *Doctrine of Right*. As such, there is no contradiction at the theoretical level between positive law as a necessary condition of Right, and external freedom as its end. Nor, I have argued, is there one on a practical level within Kant's theory or reform as a theory of the actualization of external freedom. As such, despite its initial promise, Korsgaard's problematization of Kant's theory of justice fails to move us beyond the current state of Kantian literature on the problem of revolution.

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