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In What Sense, If Any, is Kant's Legal and Political Philosophy Non-Ideal?

Abstract: Kant's moral philosophy is infamously unambiguous, non-negotiable, and overly demanding. With his highly idealized picture of our moral capacities, we would expect Kant to follow in Plato's utopian footsteps to develop a theory of the ideal society. According to Christoph Horn's novel reading of Kant's legal and political philosophy, however, Kant turns out to be the anti-Plato. In his view, Kant's moral philosophy and his legal and political philosophy are based on two forms of normativity: ideal and non-ideal normativity. In this essay, I will investigate whether Horn's conceptual distinction depicts the relationship between ethics and law accurately. I will discuss three puzzles that the non-ideal reading faces and argue that the distinction fails to make good on its promise to successfully "dissolve" the traditional controversy about the relationship between ethics and law in Kant. Against the non-ideal reading I will propose a unitary account of moral and legal normativity.

1 Introduction

The principle of Kant's moral philosophy is infamously unambiguous, non-negotiable, and overly demanding. His "rigorism" commits him to the view that an agent or an action can only be either good or evil, not both. He allows for stages of evil but leaves no room for degrees of goodness (Rel, AA 06: 29–30). Moreover, since moral considerations always override all other considerations, tradeoffs between moral and non-moral values are ruled out. Finally, since Kantian moral agents possess transcendental freedom, the bar of moral requirements is unrealistically high. Transcendental freedom is a psychological superpower; it transcends empirical nature and enables moral agents to suspend all of their competing inclinations so that they can act from duty, regardless of the lives they have lived. With this highly idealized picture of our moral capacities, we would expect Kant to step into Plato's utopian footsteps to develop a theory of the ideal society, where everyone is morally perfect, willing to give and share (Plato, *Laws* 739a–740): a society which is not a good place, but a no-place.

According to Christoph Horn's novel reading of Kant's legal and political philosophy, however, Kant turns out to be the anti-Plato. His wide ranging and subtle analysis aims to make Kant's legal and political philosophy more palatable to con-

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temporary political realists. In his view, Kant's moral philosophy and his legal and political philosophy are based on two forms of normativity: ideal and non-ideal normativity. Non-ideal normativity allows us to understand our legal and political life in its complexity and nuance. In the legal and political context, Kant's theory is highly sensitive to ambiguity, feasibility considerations, and strategic concerns. In these contexts, Kant is aware that we need to act "as best as [we] can" with an eye to "what is [realistically] possible" (Horn 2014, 326). The "political realm forces a practice-suitable (praxisgerecht) modification of morality" (Horn 2014, 311). Kant's legal and political philosophy turns out to be a "non-ideal weakening [of morality] in political-historical reality" (Horn 2014, 163). What makes Horn's non-ideal approach particularly attractive is its ability to make nuanced prescriptions, avoiding the full/no-prescription alternative that ideal normativity supposedly entails. Horn's ambitious reading promises to redeem Kant's legal and political philosophy from the pyre of impracticable theory. Let us call Horn's reading the "non-ideal reading" of Kant's legal and political philosophy.

There is a well-known and ongoing debate between those who believe that Kant's philosophy of law is independent of his moral philosophy and those who see it as dependent thereon. Horn's non-ideal reading is supposed to help us to understand the relation between Kant's moral philosophy and his philosophy of law. Horn does not want to take sides in the debate; instead, he believes that his distinction can "resolve" it (Horn 2014, 9). At points, however, Horn claims that Kant's "idea of legal-political normativity differs *fundamentally* from his concept of moral normativity" (Horn 2014, 229, my emphasis). The legal order, he says, has its own "legitimacy *sui generis*" (Horn 2014, 327). Passages like these suggest that non-ideal normativity is a different *kind* of normativity. If this is Horn's view, he would side with the independence camp. Horn's rejection of legal moralism further supports this reading (Horn 2014, 28–31).

However, Horn is aware that there is "only one" single capacity of reason in Kant. Both forms of normativity cannot be fundamentally different ("grundverschieden"), but must have the same source. Horn's considered view, then, is that law is neither a "normative phenomenon *sui generis*" (against the independence view) nor merely, as proponents of the dependence view have it, a "subset of morality" (Horn 2014, 163). Instead, he holds that the one capacity of practical reason "generates two variants of normativity" (Horn 2014, 302).

In this essay, I will investigate whether Horn's conceptual distinction brings the relationship between ethics and law accurately into view. To this end, I will begin by distinguishing three different ways in which Kant's philosophy of law might be independent of his ethics. I believe that this distinction will help us to give more nuance to the independence controversy (2.). Against the backdrop of my threefold distinction, I will discuss three puzzles that Horn's non-ideal reading

faces and argue that Horn's distinction fails to make good on its promise to successfully "dissolve" the traditional controversy. One of the core problems of Horn's ambitious reading is that it is insufficiently sensitive to the modality of the imperative of right. I show why Horn is at least an independent theorist in two of the senses that I outline (3.). In the fourth section, I will propose a unitary account of moral and legal normativity. Against Horn's reading, I will argue that the categorical imperative is not, at best, a morally requisite but otherwise optional testing device. Instead, it informs *all* our practical judgments as the form of practical cognition. Horn's reading cannot account for the common source of ideal and non-ideal normativity.

For this reason, it remains unclear why, in his view, non-ideal legal normativity is merely one of "two variants" of normativity and not a normativity "*sui generis*" (Horn 2014, 302, 163). If he wants to hold onto his distinction, he must give up on the idea that Kant's legal and political philosophy is part of the same cognitivist project as his moral philosophy. They cannot both be ultimately grounded in reason. Non-ideal normativity must be grounded in something else if his distinction is to hold.

In my view, the principle of right is grounded in the fundamental law of practical reason (the categorical imperative). This principle says that we have an innate right to freedom insofar as it can coexist with other people's freedom. That it merely requires us to respect each other's freedom, without requiring that we *also* do so because it is right, is not a non-ideal concession to the "crooked timber" of human nature. Rather, the principle sets the limits of (morally) legitimate state force. This principle is non-ideal only in the sense that it *allows* for state force and hence reflects the *possibility* of transgression. However, even the categorical imperative is non-ideal in this sense; as an imperative, it reflects the possibility of transgression and sets the bar for divine punishment. In dealing with particular legal or political "problems," the value of equal freedom must always be "maintained" (SRL, AA 08: 429). There is nothing ambiguous, negotiable, or overly demanding about this requirement. Enforcing this principle is the state's (morally) legitimate contribution to the highest good. Ideal moral theory requires that the state's authority ends here. What remains must, ideally, come from moral agents (perfect goodness) or, as the morally good person believes, at least implicitly, from God (complete happiness). Equal external freedom is not to be sacrificed on the altar of feasibility considerations and strategic concerns.

2 The Relation between Ethics and Law

Let me begin with what I take to be uncontroversial observations. Kant's first groundbreaking monograph in ethics is titled *Groundwork of the Metaphysics of Morals.* "Groundwork" is sometimes also translated as "Foundations." The monograph in which Kant develops his doctrine of law and virtue is simply called *Metaphysics of Morals.* If we follow Kant's architectural metaphor, there is not much to be said here for a "separation" of ethics and law. One would expect the *Groundwork* to lay the foundation and the *Metaphysics of Morals*, with its two parts, the Metaphysical Foundations of the Doctrine of Right and the Metaphysical Foundations of the Doctrine of Virtue, to be two separate halves of the same building, built on the foundation of the *Groundwork.* Kant explicitly develops this architectonic idea in the preface to the *Groundwork*, where he describes it as the "foundation" of a "metaphysics of morals" and promises an "application […] of the supreme principle of morality to the whole system" (GMM, AA 04: 391–92).

A second obvious finding confirms this reading. Kant's *Metaphysical Foundations of Natural Science* applies the principles of the *Critique of Pure Reason* to the field of physics. Similarly, the Metaphysical Foundations of the Doctrine of Right and the Metaphysical Foundations of the Doctrine of Virtue must be understood as an application of the principles of the *Critique of Practical Reason* to the fields of law and virtuous life. Kant's critical works are systematically prior to his doctrinal works, and the development of the latter is guided by the former (CJ, AA 05: 170). The relationship between the *Groundwork of the Metaphysics of Morals* and the *Metaphysics of Morals* is characterized as a foundational relationship, like that between a building and its foundation. The relationship between the *Critique of Pure Reason* and the *Metaphysical Foundations of Natural Science* is to be understood as an application of the same metaphysical principles to a particular field. Kant draws this analogy in the preface to the *Metaphysics of Morals* (MS, AA 06: 205). Despite all this textual evidence, there are still some who assert the independence of ethics and law in Kant. Since we may assume that these readers are not naïve, we need to inquire into why they claim that these parts of Kant's practical philosophy are independent.

Julius Ebbinghaus has perhaps most prominently advocated for the so-called "independence claim." According to Ebbinghaus, the fundamental law of Kant's doctrine of right in its "objective validity is completely independent […] of the admissibility of the Kantian assumption of the possibility of human action under purely intelligible conditions." Even if, according to Ebbinghaus, Kant had not restricted natural causality to empirical objectivity (phenomena) in the first *Cri-*

tique, his principle of right, in contrast to his principle of morality, would not lose its validity (Ebbinghaus 1972, 165). Elsewhere, Ebbinghaus writes:

> For the law, as a law of a union of men who stand in relations of external freedom to one another, conceivable only by pure reason, to serve as a possible motive, we need not make any assumptions about the powers of man that go beyond his nature as it is known to us through experience. (1972, 165)

We can already see here that the ambiguity of what "independent" means stands in the way of a clear understanding of "the" independence thesis. Let me try to clarify. Two objects can be partially or wholly independent of one another. To take up Kant's foundation metaphor again, the spatial layout of a building can be independent of the foundation, even if the building could not stand without the foundation. Partial independence does not necessarily rule out Kant's structural metaphor. Ebbinghaus only holds that the *validity* of the fundamental law of Kant's doctrine of right is independent of Kant's *transcendental* concept of freedom. And since transcendental freedom is based on an ideal space and time or subjective forms of intuition, Kant's philosophy of law is also, at least in this regard, independent of his transcendental idealism. Let us call the claim that law is independent of transcendental freedom the "independence of law from transcendental freedom" principle, or ITF for short. We can then distinguish ITF from two other, more radical independence claims.

It is controversial whether Ebbinghaus also advocated a more radical thesis (see Geismann 2009, 74–77, 141–146): Ebbinghaus at least does not deny the categorical character of the fundamental principle of right. The legal imperative can certainly be categorically binding, but it isn't also "deducible" from the moral law as *the* categorical imperative. There is not much to be found in Kant scholarship on what exactly "deducible" means here. Does "deducible" mean it is analytically entailed in the categorical imperative? Is it to be derived as a synthetic principle from the categories under the conditions of space and time, analogous to the laws of nature in theoretical philosophy? Or is the legal imperative to be "generated," like particular maxims, by a universalization test, the so-called "CI procedure"? We can define this thesis as positing that the legal imperative is *independent* of the moral law (as the categorical imperative), ICI for short.

At least since 1796, in his *Grundlage des Naturrechts*, Johann Gottlieb Fichte advocated for an even more radical independence claim. According to Fichte's thesis, the law is independent not only of the transcendental concept of freedom but also of the fundamental law of morality (on Fichte, see Neuhouser 1994 and Kersting 2016). For Fichte, the imperative of law is then only a hypothetical imperative:

> [A] community of free beings as such, cannot exist if not everyone is subjected to this law; thus who wants this community, must also want the law and it has, therefore hypothetical validity. The hypothetical imperative of law reads as follows: If a community of free beings, as such, is possible, the fundamental law of right must hold/be valid. (Fichte 1971, 89)

Kant obviously did not explicitly claim that the legal imperative is a hypothetical imperative. Anyone who wanted to attribute this most radical independence claim to Kant would need to prove that he was mistaken about the deontic status of his legal imperative. We can call this third independence claim, according to which the imperative of law is of a different normative kind, corresponding to "the independence of categorical normativity," or ICN for short.

These are three ways in which ethics and law have been taken to be independent in Kant. As far as I can see, they have not been clearly distinguished in the history of Kant scholarship (see Widmer 2023, 643–44). Keeping the distinction between ITF, ICI, and ICN in mind will be crucial to better grasping the relationship between law and ethics in Kant. As indicated above, Christoph Horn does not want to take sides in this controversy, but rather to "resolve" the conflict with his distinction between ideal and non-ideal normativity. In my view, Horn cannot remain neutral here. Before turning to the issues Horn's approach faces, however, we first need to look closely at Horn's proposed solution.

3 Kant's Metaphysics of Morals as Non-Ideal Theory

Horn concedes that there is overwhelmingly more textual support for the dependence claim than for the independence claim (Horn 2014, 9, 38). We have seen some of this support in the previous section. According to Horn, however, in reflecting on the philosophical content of Kant's view, there is more reason to endorse the independence claim (Horn 2014, 40). What makes Horn's novel proposal particularly attractive is its promise to "resolve" the conflict between the dependence claim and the independence claim. This means that we do not need to take sides in this debate; instead, we can view the relationship between ethics and law in Kant through Horn's conceptual lens of ideal and non-ideal theory. In Horn's view, "legal-political normativity" is a "non-ideal variant of full normative validity (volle Normgeltung), which is generated through the categorical imperative" (Horn 2014, 10).

I will leave the misleading phrase "generated through" aside and briefly restate what I consider Horn's most precise account of the difference between ideal,

moral normativity and non-ideal, i. e., legal normativity. According to Horn, moral normativity consists of "at least" the following five essential features:

(a) It is cognized *a priori* (has its immediate origin in practical reason).
(b) Its bindingness (validity, "Geltung") is "inescapable."
(c) It is incommensurable with and trumps all other non-moral values.
(d) It must be pursued for its own sake.
(e) It is universally valid. (Horn 2014, 39)

Horn lists these five features without also considering their relation to one another. He claims that the similarity between non-ideal, legal normativity and ideal, moral normativity is limited to feature (a). Regarding all other features, the law fundamentally differs from morality. This claim is surprising. In the following three subsections (3.1 to 3.3), I want to pose three puzzles with which the distinction between legal and moral normativity, as Horn conceives it, must deal.

3.1 The Punishment Puzzle

To begin with, the claim that moral normativity is limited to feature (a) raises some immediate questions: If a principle is "*cognized* a priori," it must be a valid principle. Since it is "cognized *a priori*," it must also be universal. Hence, feature (a) entails (e). Moreover, if it is universally valid, it is, at least in one obvious sense of the word, also "inescapable"; everyone must recognize it as valid (i. e., no one can escape it). Therefore, (e) also entails (b). Horn's account is insufficiently explicit about the implications of each of these features.

What is more important is that his claim that legal normativity only satisfies feature (a) invites counterexamples. Here is one: "The law of punishment," which is at least also a legal institution, "is a categorical imperative" (MS, AA 06: 331). The idea of punishment only enters the picture in a world where people are non-compliant. Since non-compliance is a marker of a non-ideal world, a world in which the highest good is not fully realized, a theory of punishment seems to be a paradigm case of what has come to be known as "non-ideal theory" (Rawls 1971, 245).

This creates the following puzzle for Horn's non-ideal reading: A theory of punishment is an element that clearly belongs to non-ideal theory. According to Horn's interpretation, the "normativity" of Kant's theory of law is non-ideal. However, the kind of normativity that applies to Kant's "law of punishment" seems to contain at least features (a), (b), (d), and (e). If it also possesses feature c, then either legal normativity is moral normativity or, pace Horn, moral normativity is non-ideal. (I will say more about feature (c) when we turn to the third puzzle.)

If, by contrast, (a), (b), (d), and (e) are sufficient for what Horn calls "ideal normativity," then Kant's doctrine of law is, at least in part, ideal normativity. Call this the "punishment puzzle" for Horn's distinction between ideal and non-ideal normativity. The punishment puzzle challenges the belief that ideal normativity may not apply to an area commonly understood as a clear area of non-ideal theory (punishment). Either we must believe that punishment does not belong to non-ideal theory after all, or we must give up the belief that the difference between Kant's moral philosophy and his philosophy of law and politics can be cashed out in these terms.

3.2 The Duty of Right Puzzle

Horn might concede that the law of punishment is a categorical imperative and thus instantiates features of ideal, moral normativity. This would be a significant concession since the distinction between ideal and non-ideal normativity is supposed to show us what the difference between ethics and law is. Suppose some legal institutions are grounded on ideal normativity (whatever that might mean). In that case, Horn's reading fails to deliver on its promise, i. e., to capture the fundamental normative difference between ethics and the law.

However, Horn might argue that conceding this leaves the non-ideal normativity of the "universal law of right" untouched. Horn is sympathetic to Marcus Willaschek's claim that the "universal law of right" is not prescriptive but merely "describes [...] what ought to be the case. The state's rule of law must externally enforce its realization (Durchsetzung)" (Horn 2014, 43; see Willaschek 2005, 196–197). How can we understand the distinction between a normative and a prescriptive principle? If I understand Willaschek correctly here, he wants to draw a subtle distinction between a practical principle that appeals to the agent from the first-person perspective (an imperative) and a principle that merely articulates a normatively desirable relation between citizens of the state that would be better than any alternative (a normative principle). Since the "universal law of right" is, according to this view, a normative principle but not an imperative, the question of whether the universal law of right is a hypothetical or a categorical imperative is moot (Willaschek 2005, 196–197). Let us call Willaschek's reading the non-imperatival reading of the principle of right.

Horn holds that Willaschek's reading is "basically correct" (Horn 2014, 44). What exactly he takes to be correct is less transparent since he disagrees, on textual grounds, with the non-imperatival reading. He points out that the "duties of right" should be driven by intrinsic motivation and must therefore rest on the categorical imperative (Horn 2014, 44). Accordingly, duties of right do not merely ar-

ticulate rightful relations between citizens and they are not, to use Willaschek's distinction, merely "normative" but are rather "prescriptive" (Willaschek 2005, 196). However, since Horn disagrees with Willaschek about the non-imperatival character of the principles of right, one may wonder what it is about that reading that goes "in the right direction."

Moreover, if the duties of right are to be followed on the basis of intrinsic motivation, how can right "*therefore*" consist of a "non-ideal weakening of morality" (Horn 2014, 44, my emphasis)? Suppose duties of right in the *Doctrine of Right* have the same motivational character as those in the *Groundwork.* How is feature (d) still a distinguishing feature between ideal, moral normativity and non-ideal, legal normativity? I don't see how this claim can be squared with Horn's general assessment that the non-ideal normativity of the law does *not* satisfy feature (d): The norms must be pursued for their own sake.

So here, then, is a second puzzle for Horn's reading – the "duty of right puzzle," if you will: Either "duties of right" are (also) legal duties, in which case at least some legal principles, pace (d), require intrinsic motivation, or the duties of right are duties of right in a moral sense of the term. "Duty of right" then simply means that the humanity in us (i. e., duties towards ourselves) and in other human beings (i. e., duties towards others) has a moral claim on us in every instance of that duty. As perfect duties, duties of right differ from imperfect duties, where the general obligation (e. g., charity) does not also entail a claim right in each instance and is thus not enforceable.

Perhaps Horn's considered view is that the non-imperatival reading is incorrect because duties of right are still *duties* and hence are not only normative but prescriptive. However, since the realization of these duties *may* be externally enforced, Horn might argue that legal normativity is, in contrast to moral normativity, non-ideal. This would then explain the sense in which Horn agrees with Willaschek. Since Willaschek's non-imperatival reading also draws a normative distinction between morality and law, Horn can approvingly speak of this reading as "basically correct."

I agree with Horn that the distinction between "prescriptive" and "normative" fails to capture the difference between morality and law. We do not need to invoke the duties of right to drive home this point and can stick to the principle of right, which indicates a clear "obligation" to respect everyone's (outer) freedom:

> 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 a 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; 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; and it says this as a postulate that is incapable of further proof. – When one's aim is not to teach virtue but only to set forth what is right, one need not and should not represent that law of right as itself the incentive to action. (MS, AA 06: 231)

This passage indicates what both Horn and Willaschek would not deny: that the principle of right does *not require* that we follow it from an intrinsic motivation. However, it also shows, pace Willaschek's non-imperatival reading, that the principle of right is an obligation and hence does not merely "describe" rightful relations among citizens. However, even if Horn is right about the non-imperatival reading, the duty of right puzzle remains: Either "duties of right" are (also) legal duties, in which case at least some legal principles, pace (d), require intrinsic motivation, or duties of right are duties of right in a moral sense of the term.

3.3 The Categorical Imperative of Right Puzzle

An obvious difference between moral and legal normativity seems to be feature (c). Since legal normativity is, by definition, not moral normativity, it (trivially) cannot "trump all other non-moral values." However, defining law in this way begs the question dependence theorists raise: How can the fundamental principle of law, the imperative of right, be a *categorical* imperative without being grounded in morality? Horn's non-ideal reading is too focused on the content of the imperative of right and insufficiently sensitive to its modality. This then raises the more general puzzle of categorical legal obligation for Horn: if only moral obligation is categorical obligation and only moral obligation is ideal normativity, then how can the imperative of right be non-ideal normativity?

Horn may deny the antecedent of the conditional, since any obligation can be voluntarily turned into a categorical sentence. However, categorical obligation cannot be read off the surface grammar of our language. "No ladies are permitted in the smoking room" is not, pace Foot, a categorical imperative simply because it is grammatically a categorical sentence (Foot 1972, 308–309). An imperative of this kind presupposes some desire that someone or some group may or may not have. It can therefore be a hypothetical imperative at best. Categorical obligation, by contrast, applies to all rational agents regardless of what they want in particular, since it takes the form of rational volition, i. e., particular volition under the condition of universality. In violating a categorical obligation, we are not violating our particular ends (e. g., we can secure money by making a false promise). Still, we are violating the end of humanity in us. What is implicitly presupposed here is

that we have a capacity for practical reason; the *telos* or goal of this capacity is to act from practical knowledge, and as rational agents we consider what we *know* to be obligatory as normative for our particular ends.

The categorical imperative of right says: "Handle äußerlich so, daß der freie Gebrauch deiner Willkür mit der Freiheit von jedermann nach einem allgemeinen Gesetze zusammen bestehen könne." For the imperative of right to be categorical is, contra Horn's analysis, for it to "trump," as feature (c) has it, all other non-moral values. No matter what our particular desire may be, everyone must act such that the use of their faculty of choice is compatible with everyone else's use of their faculty of choice. We need not consciously represent that moral law to ourselves, but that we are addressees of the categorical imperative of right still reflects our moral capacities. The imperative of right is simply the external side of a universalizable maxim, and it has its justificatory ground in the fundamental law of practical reason (CPrR, AA 05: 30). The imperative of right gives *moral* permission to the state to limit everyone's use of their faculty of choice to the extent that it is incompatible with other people's choices. The fundamental law of practical reason, *the* categorical imperative, informs not only all particular moral obligations but also the categorical imperative of right. *The Metaphysics of Morals* with its two parts is then, as Kant correctly characterized it in the *Groundwork*, a part of the philosophical system to which the categorical imperative is applied (GMM, AA 04: 391–92). The goal of this application remains moral: to bring about the highest moral good in the world.

Horn claims that since the imperative of right does not demand that the agent follow the law *because it is right*, it is insensitive to the agent's cognitive and motivational state and is therefore not a moral requirement (Horn 2014, 50). However, even if the imperative of right does not require acting for the sake of the categorical imperative, i. e., acting *from duty*, this does not entail that the justification for that requirement is not a moral justification. Why is the imperative of right an imperative? Because it protects "the capacity of pure reason to be of itself practical," i. e., Kantian autonomy (MS, AA 06: 213–214). Why is state force justified in limiting the exercise of people's freedom? Because it protects the free use of our capacity to "act from the representation of laws," i. e., practical reason (GMM, AA 04: 412), and thus protects and enables our moral capacity. The categorical imperative of right is a moral imperative because it is grounded in morality. This does not turn the state into an institution that polices our cast of mind (*Gesinnung*). The correct moral disposition cannot be realized through force but must come from the free use of our moral capacities. Hence, Kant's limitation of state power to restricting the external use of freedom is not a non-ideal concession. A morally good disposition can, however, be facilitated through moral edu-

cation, and the state plays a crucial role in the arrangement of these educational institutions.

Horn will respond that only external freedom is protected by the state, not autonomy. In asserting the independence of the doctrine of right from transcendental freedom (ITF), Horn endorses one of the main features of the independence claim (Horn 2014, 51–53). Moreover, since he also believes that non-ideal normativity is not "generated through the CI-procedure," he also endorses ICI (Horn 2014, 27) – i. e., the claim that the legal imperative is independent of the categorical imperative. This reveals that Horn's distinction between ideal and non-ideal normativity both rests on and cannot stay neutral with regard to at least two central tenets of the independence claim. However, the independence thesis is both unlikely on textual grounds and philosophically incoherent.

Categorical obligation that is not deep down or covertly hypothetical presupposes a capacity of volition for which the idea of (practical) universality (i. e., the form of cognition) can be causally efficacious in action. This capacity of volition must also be transcendentally free; otherwise, its causal efficacy would depend on some given desire. This capacity gives us a dignity (inner value) that elevates us over non-rational creatures. And in virtue of this dignity, our equal freedom is not to be sacrificed over happiness calculations.

Therefore, the categorical imperative of right presupposes a capacity for transcendental freedom; hence, ITF must be incorrect. To be sure, the content of the categorical imperative of right does not require transcendental freedom, making it tempting for the independence camp to assert ITF. However, if we think clearly about the implications of *categorical* obligation, ITF is no longer a viable option. This is not to say that all legal or political obligations are categorical, but that the state, at its very foundation, rests on a moral requirement. Horn explicitly resists the idea that Kant is a legal moralist (Horn 2014, 28–31). He repeatedly invokes the devil passage to show that the idea of right is independent of our moral capacities (Horn 2014, 234). Devils might indeed agree on the content of the fundamental principle of right. Still, in their case, the obligation can never be categorical, and this is the difference that drives the distinction between moral and non-moral requirements.

Notice that even John Ludwig Mackie famously invokes categorical imperatives (Mackie 1990, 44–56). If a fictionalist like Mackie can have imperatives of this kind, it seems strange to connect any deep ontological commitments to them. In Mackie, however, these obligations remain mere fictions, and there is some Freudian explanation as to why we have accepted them. They are so deeply rooted in our social conscience that we treat them *as if* they were categorical, but deep down they are not. Kant is not a fictionalist. For him, categorical obligation is as real as it gets. It requires our full moral capacities, i. e., our "capacity of pure

reason to be of itself [and not through something else] practical" (autonomy) (MS, AA 06: 213–214). Otherwise, categorical obligation would be covertly hypothetical.

4 The Unity of Ideal and Non-Ideal Normativity

In this final section, I will show why Horn's hybrid picture of normativity cannot account for the unity of reason. In response, I will try to outline what I take to be the unitary account of normativity in Kant.

4.1 The Form of Practical Cognition

Let me begin with the most fundamental difference between Horn's view and my own. Horn believes that moral duties are "generated" by an ideal "CI-procedure" and thereby "directed at the *homo noumenon* in us (i.e., our moral consciousness)." Legal norms, by contrast, rest on a "non-ideal procedure and are addressed to the *homo phaenomenon*, the empirical human" (40). Horn never explains how the ideal CI-procedure is supposed to work. He is most likely referring to the four examples of perfect and imperfect duties in the *Groundwork* and the deposit example in the second *Critique*, where Kant illustrates how the categorical imperative, as I prefer to put it, informs our practical judgments. Horn seems to believe that the "CI-procedure" is an optional "test" of practical reason. In Horn's view, the "point" (Sinn) of this test is not merely to determine whether the maxims are morally impermissible, permissible, or obligatory. The point is to tell us whether the action is done "from duty" or merely "in accordance with duty" (Horn 2014, 152). However, the categorical imperative, as the fundamental law of practical reason, can merely determine whether the form of a particular practical judgment is practically universal. The maxim is then a "mere maxim," a "precept," or a "law." The distinction between "in accordance with duty" and "contrary to duty" refers not to maxims but particular actions. For example, I can act from the maxim, "I only want to borrow money when I can pay it back." This maxim is a particular practical law. Still, it is a further question whether I act on this maxim because I am worried about my reputation or because it is practically universal, i.e., a law.

This point may seem pedantic, but it has important consequences. Horn is easily persuaded to deny the categorical imperative any positive role in Kant's legal and political philosophy because he understands it as a test procedure for "morality," where morality means "acting from duty." Since the law abstracts from our motivation and merely requires the compatibility of everyone's external

freedom, the categorical imperative seems to track something with which the law is not concerned. However, the categorical imperative remains the fundamental law of practical reason. It is an articulation of the form of practical cognition. If this law did not play a role in Kant's legal and political philosophy, Kant's practical philosophy would be based on a hybrid account of normativity, one based on reason and one based on something else. The fundamental law of practical reason determines practical principles or actions as permissible, impermissible, or obligatory according to the categories of freedom with respect to the concepts of "good" and "evil" (CPrR, AA 05: 66). These categories are the fundamental concepts of practical cognition. They inform all our particular moral judgments regardless of whether our maxim is lawlike or not, irrespective of whether we act contrary to duty or not. Suppose Horn wants to hold onto the view that what he calls "the CI-procedure" is not operative in legal normativity. In that case, he must develop an additional table of the categories. This table would have to be developed not with respect to the concepts of "good" and "evil" but with respect to "legal" and "illegal". He would then need to explain why these two concepts are still in some sense derived from the *fundamental* law of practical reason, for otherwise he is not entitled to the claim that non-ideal legal normativity is only one of "two variants" of normativity and not a normativity "*sui generis*" (Horn 2014, 302, 163). Alternatively, Horn could give up on the idea that Kant's legal and political philosophy are part of the same cognitivist project, as his moral philosophy and are ultimately grounded in reason.

4.2 Ideal Legal Normativity

Horn believes that the categorical imperative is only a testing procedure for particular maxims. For him, the connection between the categorical imperative qua fundamental law of practical reason and the categorical imperative of right is a merely verbal, arbitrary "terminological determination" (*terminologische Festlegung*) (Horn 2014, 28). However, the idea of practical universality which the fundamental law of practical reason (categorical imperative) articulates is also operative in the fundamental imperative of right (see Guyer 2005, ch. 9). "Act in such a way that the principle of your maxim can be a universal law" entails that it is only legitimate to act in such a way that the execution of your freedom (the material end of your maxim) is dependent upon its compatibility with everyone else's execution of their freedom (universal law). Particular legislation must be viewed through the lens of the equal freedom principle. Even if one were to make an exception to the equal freedom principle, this does not mean that the fundamental law of practical reason (the categorical imperative) loses its normative signifi-

cance. The exception counts as an exception in light of the operative normative principle. In this sense, "ideal normativity" continues to have a hold on the legal and political sphere.

This might still leave room for Horn's non-ideal normativity reading. The core idea of this reading is that the bar of legal norms is lower or "weaker" than the bar of morality because it merely requires acting in accordance with duty and not from duty (Horn 2014, 337). Let us call this the "lower bar" claim of Kant's imperative of right. Horn takes this claim to imply that moral norms don't have "full normative validity" ("volle Normgeltung") (Horn 2014, 9–10, 327). This is an unexpected and unnecessary move. The mandate "Jump 5 feet high" is weaker than the mandate "Jump 10 feet high." However, less demanding mandates are not for that reason less "valid."

I will focus on Horn's unambiguous and less problematic lower bar claim here. Is the law, or the state for that matter, less ideal because it does not demand that we act from duty? I am not convinced. We need to ask what "ideal" *should* refer to in this context. *Where* does Kant make a non-ideal concession to *what*, if he makes any? Let's begin with Kant's moral philosophy. In the *Groundwork*, he famously starts with the good will. He then moves from a perfect faculty of volition to our imperfect faculty of volition, subject to inclinations not necessarily in line with what is morally good. This is why the moral law is an imperative, a "duty," for us (GMM, AA 04: 397). Is this move from a perfect capacity of volition to an imperfect one already a move from ideal normativity to non-ideal normativity because it reflects the possibility of transgression? Or is the possibility of transgression constitutive of normativity (as argued in Korsgaard 1997 and rejected in Lavin 2004)? Be that as it may, Kant certainly does not lower the bar here because we are finite beings. The moral law applies both to us and to perfectly rational agents. In this sense, the categorical imperative can count, in Horn's sense, as "ideal normativity," a normativity, if I understand Horn correctly, that does not make any concessions to human weakness.

Horn's next move is to say that since the categorical imperative of right only requires acting in accordance with duty and not acting from duty, the imperative of right lowers the bar and is hence "weaker" or "non-ideal." This is not false, but it strikes me as a misunderstanding of Kant's project. The Doctrine of Right raises the question of what the state is entitled to do in light of the possibility of our moral failure. Kant answers that the state may use force to protect people's external freedom. This should not count as "weakening" the categorical imperative but as articulating the principle of an ideal state. Here is what Kant says:

> [Tugendpflichten können] keiner äußeren Gesetzgebung unterworfen werden, weil sie auf einen Zweck gehen, der (oder welchen zu haben) zugleich Pflicht ist; sich aber einen

> Zweck vorzusetzen, das kann durch keine äußerliche Gesetzgebung bewirkt werden (weil es ein innerer Act des Gemüths ist); obgleich äußere Handlungen geboten werden mögen, die dahin führen, ohne doch daß das Subject sie sich zum Zweck macht (MS, AA 06: 239).

Horn believes that we should expect the state to require the appropriate motivation; what the imperative of right reveals, however, is that Kant values external action more than the proper internal motivation (Horn 2014, 152–153). Here is an alternative reading: It is not that, for Kant, the state and its educational institutions ought not to care about its citizens' moral education. The Doctrine of Method of the second *Critique* and Kant's *Pedagogy* outline this project. However, the imperative of right reflects the *ideal* from which our moral character must be developed within through the free use of our moral capacities. State force undermines the moral value that we are supposed to create. The point is not that the state or the imperative of right sets a lower moral bar for its citizens. Instead, the point is that the bar for state force is limited to the realization of equal external freedom.

Restricting state intervention in this way is an enabling condition for properly developing our moral capacities. Again, this is not to say that the state has no active role in realizing the highest good, i. e., the full realization of virtue in proportion to happiness. It may punish transgressors and protect the compliant, but it may not punish transgressors *in spirit*, as this would, among other things, be to overstep its epistemic limits; the state is no god. This fact is not a concession to non-ideal normativity. It only receives its significance against the backdrop of the non-concessive, ideal normative principle that only the deserving ought to be punished. In short, Kant's philosophy of law does not entail a non-ideal variant of normativity because it only requires actions that are done in accordance with duty. It is an ideal theory about state intervention that is compatible with and conducive to the final ideal goal of humanity: the highest good. Thus, the imperative of right is not a concession to human weakness but an articulation of the ideal norm of state force.

4.3 Bowing to Crooked Timber?

Let me turn finally to what Horn takes to be a paradigmatic expression of Kant's non-ideal approach: the famous crooked timber passage from Kant's sixth thesis in the *Idea for a Universal History with Cosmopolitan Intent.* In this passage, Kant claims that humans "misuse" their freedom by violating the ends of other human beings. We do "wish to have a law which limits the freedom of all"; however, our "selfish animalistic inclinations" tempt us to "make an exception" for

ourselves. This observation then leads Kant to the claim that we need a master who "breaks [our] will and necessitates [us] to obey a universal will, allowing everyone to be free." Now the question is: "Where [do we] take this master from?" Kant's answer is as follows:

> Only from the human race. But then the master is himself an animal, and needs a master. Let him begin it as he will, it is not to be seen how he can procure a magistracy which can maintain public justice and which is itself just, whether it be a single person or a group of several elected persons. For each of them will always abuse his freedom if he has none above him to exercise force in accord with the laws. The highest master should be just in himself, and yet a man. This task is therefore the hardest of all; indeed, its complete solution is impossible, for from such crooked wood as man is made of, nothing perfectly straight can be built. That it is the last problem to be solved follows also from this: it requires that there be a correct conception of a possible constitution, great experience gained in many paths of life, and – far beyond these – a good will ready to accept such a constitution. Three such things are very hard, and if they are ever to be found together, it will be very late and after many vain attempts. (Idea, AA 08: 23)

Horn believes that this passage shows why "human beings cannot be immediately subjected to moral demands." However, the point of this passage is that we are subject to a moral obligation to improve, and this obligation does not cease to exist even though we are like "crooked timber." In fact, the crookedness of the timber can only be seen in light of the normative ideal. Now, it is true that this passage contains quite a few empirical claims about human beings that point to their, to put it mildly, lack of perfection. One might disagree with the notion that we need a "master" to become morally better, but the point is that this does not lead Kant to "weaken," to use Horn's term, his ideal normative belief: the idea of a person who is "just in himself, and yet a man."

Horn reads Kant's crooked timber remark and especially the claim that we can only "approximate" the idea of a wholly just human being as a characteristic formulation of an anti-Platonic non-ideal normativity. In his crooked timber passage Kant acknowledges the fundamental flaw of human nature, while Plato's account of human psychology in the *Republic* and the *Laws* is overly optimistic. However, if mere approximation were a sign of non-ideal theory, Kant's *moral* philosophy would also be non-ideal, and Horn would then at least be committed to the view that Kant's moral philosophy is non-ideal as well:

> Complete conformity of the will with the moral law is, however, holiness, a perfection of which no rational being of the sensible world is capable at any moment of his existence. Since it is nevertheless required as practically necessary, it can only be found in an endless progress toward that complete conformity, and in accordance with principles of pure practical reason it is necessary to assume such a practical progress as the real object of our will. (CPrR, AA 05: 122)

This is not the place to elaborate on the claim that holiness is practically necessary and yet can only be approached, never reached (see Bojanowski 2016). What is more important in this context is that Kant turns the ideal of holiness into the "real object of our will." We cannot fully achieve it, but it still has a guiding function. The postulate of immortality plays a crucial role in this context: In perfecting ourselves morally, we treat our souls *as if* they were immortal. We attempt to appropriate a moral disposition that *would* remain good into infinity.

Thus, I disagree with Horn that the crooked timber passage "can only be understood behind the backdrop [of Kant's non-ideal approach]." On the contrary, despite our diagnosed human weakness and the claimed impossibility of fully reaching perfection, we are not exempted from the obligation to perfect ourselves morally. Realizing our moral perfection may first require us "to find a master who breaks our will." However, this hypothetical obligation, if true, is guided by ideal, moral normativity: the obligation to contribute to the highest good of the person and, with it, to the highest good of the world. This (ideal) obligation ultimately provides all the particular fact-sensitive (non-ideal) hypothetical imperatives that may fall under it with their normative force.

5 Conclusion

In this essay, I have tried to show that Kant's legal and political philosophy is normatively grounded in his moral philosophy. The non-ideal reading of Kant's legal and political philosophy fails to capture the unity of practical reason. Moreover, it fails to "dissolve" the traditional independence debate and is instead, in at least two regards, itself an independence view (ITF and ICI). I have argued that the fundamental law of practical reason (the categorical imperative) determines our practical cognition all the way down. This law makes no concession to the "crooked timber of human nature." The principle of the doctrine of right is not a "non-ideal weakening" of the categorical imperative but an ideal restriction of state force to its (morally) legitimate (ideal) use. Non-ideal conditions do play a role in solving our particular political and legal problems. However, these problems have to be solved in light of these non-negotiable ideal principles. Right, Kant says, "must never be accommodated to politics, but politics must always be accommodated to right" (Kant, *RTL*, AA 08: 429), and, I might add, the moral law must never be accommodated to right, but right must be accommodated to the moral law.

Kant's legal and political philosophy should not be viewed as a realistic counterproposal to Plato's utopianism. The categorical imperative and the imperative of right are the two highest ideal principles that articulate in formal or abstract

terms the normative framework of a utopian society in which the highest good is realized. This kind of abstract utopianism does not commit itself to an empirically determined end state. In fact, one might express the possible agreement between Kant's and Plato's ideal theories with the following conditional statement: if Plato's descriptions of Atlantis in the *Critias* and the *Timaeus* are *mere* illustrations and not an empirically determined end state which the ideal society must realize, then Plato's and Kant's utopianisms may both be merely abstract or empirically undetermined end-state utopian theories.

If the highest good is realized in the ideal society, state force will not be exercised. But since we remain practically fallible, possible state force remains morally legitimate. How this normative framework is to be implemented requires rules of regulation that must be sensitive to current empirical conditions. Horn is right: "Political reality requires non-ideal solutions." When faced with non-cooperative agents or dilemmatic conditions, we would be mistaken to withdraw to "moral utopianism" (Horn 2014, 321). However, we would be equally mistaken to conclude that non-ideal conditions entail that we must lower the normative bar of what counts as good. Political theorizing of this sort has rightly been criticized as "practicablism" (Estlund 2019, 395). Normative political philosophy ought not to be confused with "normative social technology" (Cohen 2008, 306).

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