CHAPTER 4

Kant's Right as Normatively Independent
One Strategy Considered and Rejected

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4.1 Introduction

Recent debates on the relation in Kant between the Categorical Imperative, as the fundamental principle of ethics,[1] and the Universal Principle of Right, as the fundamental principle of politico-legal norms,[2] are underpinned by the significant question of how politics and ethics are supposed to connect (if at all) – not only in Kant's work, but also more generally in our societies.[3] The range of plausible answers with regard to Kant is surprisingly varied: from the claim that politico-legal principles

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[1] Henceforth CI. I have here in mind the fundamental principle of the doctrine of virtue (TL 6:395). It is true that Kant also talks about a CI as the fundamental principle of the 'doctrine of morals [*Sittenlehre*]' (e.g. MS 6:226), but he specifies that this 'as such only affirms what obligation is' (MS 6:225). I take, with Kant, the various formulations of the CI to be 'so many formulae of the very same law', with the difference between them being 'subjectively, rather than objectively practical' (GMS 4:435). I understand this as follows: the CI, as the fundamental principle of the doctrine of morals, affirms what obligation in general is and without concern for the motivation with which the obligation is to be fulfilled. This contrasts with the CI, as the fundamental principle of ethics or the doctrine of virtue, where the way the obligation is to be fulfilled is important. A proper discussion of the relation, in Kant, between the various formulations of the CI must be left for another occasion. A discussion of the fundamental principles of morals, doctrine of right, and doctrine of virtue is provided in this volume by Marcus Willaschek (Chapter 1).

[2] Henceforth UPR.

[3] As Willaschek notes in his contribution to this volume (Chapter 1), it is not always clear what the debate on the connection between politics and ethics refers to. What I am interested in, in this chapter, is the connection between ethical and juridical lawgiving [*Gesetzgebung*]. (MS 6:218–19) I assume that the UPR is the fundamental principle of juridical lawgiving, whereas the CI is the fundamental principle of ethical lawgiving. I clarify further in n. 11.

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should depend normatively on ethical ones, to the view that the former are independent of the latter and even to a conception of a complex relation of dependence of legal duties on ethical principles.[4]

One interesting implication of readings which dismiss a relation of simple dependence of politico-legal principles on ethical ones is that they contest one of the stereotypical views of Kant's practical philosophy as impractical and idealistic, as what texts such as 'Perpetual Peace' and 'On a Supposed Right to Lie from Philanthropy', seem to suggest (ZeF; VRML).[5] While interpretations according to which the UPR is independent from the CI run

[4] In a previous text (Baiasu, 'Right's Complex Relation to Ethics in Kant: The Limits of Independentism', *Kant-Studien* 107 (2016), 2–33), I called these positions Simple Dependentist (for instance, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, MA: MIT Press, 1996, esp. 105–6), Simple Independentist (among others, Allen Wood, 'The Final Form of Kant's Practical Philosophy', *The Southern Journal of Philosophy* 36 (1997), 1–20 and Willaschek, esp. 'Why the *Doctrine of Right* Does Not Belong in the *Metaphysics of Morals*: On Some Basic Distinctions in Kant's Moral Philosophy', *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics* 5 (1997), 205–27, but also 'Recht ohne Ethik? Kant über die Gründe, das Recht nicht zu brechen', in Volker Gerhardt (ed.) *Kant im Streit der Fakultäten*, Berlin: De Gruyter, 2005, 188–204; 'Right and Coercion: Can Kant's Conception of Right be Derived from His Moral Theory?', *International Journal of Philosophical Studies* 17 (2009), 49–70; 'The Non-Derivability of Kantian Right from the Categorical Imperative: A Response to Nance', *International Journal of Philosophical Studies* 20 (2012), 557–64) and Complex or Relative Dependentist (e.g. Paul Guyer, 'Kant's Deductions of the Principles of Right', in Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays*, Oxford: Oxford University Press, 2002, 23–64; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, Cambridge, MA: Harvard University Press, 2009; and Bernd Ludwig, 'Whence Public Right? The Role of Theoretical and Practical Reason in Kant's Doctrine of Right', in Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays*, Oxford: Oxford University Press, 2002, 159–84), respectively. One aim of that text was to account for this relation of complex dependence, since although a few Kant interpreters did suggest the UPR cannot simply be derived from the CI and a more complex relation of dependence between them should be considered, there was no account of this more complex relation. In another text (Baiasu, 'Ethical and Politico-Juridical Norms in the *Tugendlehre*', *Studi Kantiani* 29 (2016), 59–76), I argued that the relation is in fact even more complex, when we take into account some of Kant's claims in the 'Doctrine of Virtue' (TL).

[5] To give just a few examples, talking about Kant's political writings in general, including *Zum ewigen Frieden*, Graciela Fernández observes that, in reading them, 'one has the impression of having put foot on the soil of Utopia' ('Utopia and Perpetual Peace', in Valerio Rohden, R. R. Terra, G. A. de Almeida and Margit Ruffing (eds.), *Recht und Frieden in der Philosophie Kants: Akten des X. Internationalen Kant-Congresses*. Berlin: De Gruyter, 2008, 311–21, at 311). Christine Korsgaard, in a text about Kant's 'Über ein vermeintes Recht, aus Menschenliege zu lügen', claims in general about his moral philosophy that it 'sets a high ideal of conduct and tells us to live up to that ideal regardless of what other persons are doing' (Korsgaard, 'The Right to Lie: Kant on Dealing with Evil', *Philosophy and Public Affairs* 15 (1986), 325–49, at 325). Concerning *Zum ewigen Frieden*, see also Kleingeld, 'Kant's Theory of Peace', in Paul Guyer (ed.), *The Cambridge Companion to Kant and Modern Philosophy*, Cambridge: Cambridge University Press, 2006, 477–504, at 477). With regard to 'Über ein vermeintes Recht, aus Menschenliege zu lügen', see also Paul Formosa, '"All Politics Must Bend Its Knee Before Right": Kant on the Relation of Morals to Politics', *Social Theory and Practice* 34 (2008), 157–81, at 157.

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the risk of depriving Kant's moral philosophy of a feature attractive to many (namely, the ethics-sensitivity of his legal and political philosophy), they also seem to align his thought with that of contemporary influential political theorists, such as Rawls, who respond to the pluralism of our societies by separating politics from ethics, metaphysics, and even philosophy in general.[6]

I have two aims in this chapter. First, I develop, examine, and reject one interesting strategy for defending the independentist position.[7] This starts from a particular view of the UPR, according to which, contrary to the dominant reading, which regards it as representing a single standard, the UPR includes, in fact, two distinct principles – one for formal, and the second for material, wrongs.[8] This two-standard interpretation of the UPR (TSI) makes more difficult the task of the dependentists, who claim to be able to show that the UPR can be derived from the CI: with the TSI in place, they need to show that not only one, but two, principles can be derived from the CI. In addition, however, at least on a standard reading of the CI, TSI can make the dependentist's task impossible, if the distinct parts of the UPR are viewed as normatively irreducible.[9]

Before moving on to the second aim, I mention that my focus on this strategy is motivated by its philosophical significance: it challenges the dominant readings of Kant's politico-legal philosophy as ethics-sensitive by pointing to features internal to Kant's practical philosophy. Thus, if the TSI were correct (a claim which I will challenge in what follows), then the

[6] 'Thus, justice as fairness deliberately stays on the surface, philosophically speaking' (Rawls, 'Justice as Fairness: Political not Metaphysical', *Philosophy and Public Affairs* 14 (1985), 223–51, at 230). See also Rawls, *Political Liberalism*, rev. ed., New York: Columbia University Press, 2005 [1993].

[7] The chapters by Willaschek (Chapter 1), Ludwig, Christoph Horn (Chapter 3) and Guyer (Chapter 14) in this volume all reject an independentist position, but they do so by defending specific aspects or forms of dependentist views. For instance, Ludwig thinks that 'the formula of the *General Law of Right* [can be derived] directly from the formula of the *Categorical Imperative*' (p. 39). Horn also rejects an independentist position and argues that 'the GWT [the 'General Will Test' for the legitimacy of a draft law] and the CIP [the Categorical Imperative procedure] are interrelated in a quite characteristic manner, namely according to a relation of ideal and non-ideal normativity' (p. 54–5). Finally, Guyer also rejects independentism, but his focus is on what he thinks is 'the more interesting and timely issue of the need for individual morality – virtue – in the actual practice of justice' (p. 289). My aim here is to reconstruct an independentist position starting from a particular interpretation of the UPR and then to reject it, while at the same time providing support for a complex dependentist view on the relation in Kant between ethics and right.

[8] Call this the Two-standard Interpretation – henceforth TSI.

[9] This would, of course, not hold true, if the CI itself were viewed as including two or more normatively irreducible parts; yet, the CI is standardly viewed as normatively unitary and I am not aware of any dissenting readings.

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UPR could not depend normatively in a straightforward way on a normatively unitary CI. That conclusion would vindicate an independentist position in the debate on the relationship between the CI and the UPR.

By developing the argument against the TSI, my second aim in this chapter is to defend indirectly a complex dependentist position in the debate on the relationship between the UPR and the CI. According to this view, the UPR cannot be derived normatively in an immediate way from the CI, but can be derived from an intermediary principle,[10] from which the CI can also be derived.[11] This is a view I presented and argued for directly elsewhere, but the argument in this chapter provides additional support for it.[12]

4.2 The Independentism-Justifying Strategy

4.2.1 The TSI

Consider the UPR: '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 a universal law' (MS 6:230).

[10] The principle is intermediary, although it will turn out to have priority over both the CI and the UPR, from the perspective of the problem discussed in this chapter, as well as in other chapters of this volume (such as those by Guyer (Chapter 14), Willaschek (Chapter 1), Ludwig (Chapter 2) and Horn (Chapter 3)), of the relation in Kant between ethics and right. My claim is that the UPR is not directly derivable from the CI, but we can link the two through this principle, which, in *this* specific sense, is intermediary – it is a link *between* two other principles.

[11] We can roughly regard the UPR as derivable from the CI, when we restrict the CI to the domain of external action. Yet, the CI so restricted still does not yield the UPR, since the motivation to act out of duty remains a requirement, which does not apply to the UPR. The intermediary principle from which we can normatively derive the UPR is a principle similar in its generality to the CI, but which, like the UPR, allows for action merely in accordance with duty and action for the sake of duty. Please note: this does not commit me to a reading of the CI, according to which the CI would impose action out of duty as a duty. I agree that such a reading would lead to various issues (for discussion, see, for instance, Michael Walschots, 'Kant and the Duty to Act from Duty', *History of Philosophy Quarterly* 39 (2022), 59–75; I also agree that readings of the CI, such as Ludwig's (Chapter 2 in this volume), or Hirsch's (*Freiheit und Staatlichkeit bei Kant: Die autonomietheoretische Begründung von Recht und Staat und das Widerstandsproblem*, Berlin: De Gruyter, 2017, 108ff.), avoid these problems, by regarding the CI as merely stating that a certain duty is to be fulfilled, but not how this is to be done. On my reading, the CI would need to require ethical motivation (although, as already mentioned, not as a duty), if it is to represent the fundamental principle of ethics. Hence, if the question is the relation, in Kant, between the CI, as the fundamental principle of ethics, and the UPR, as the fundamental principle of right, then the CI would need to be connected with a requirement of ethical motivation. It can do so, however, in a weak sense – for instance, as the CI applies to ethical maxims, ethical motivation can be seen as required by what ethical maxims mean by definition. Of course, a proper discussion of these claims would need serious consideration of alternative interpretations of the CI, which needs to be left for another occasion.

[12] See n. 4.

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The first part of the UPR, call it P1, can be read as formulating, in inverse form, Kant's standard for material wrongs. According to P1, action A is right, if it can coexist with everyone's freedom in accordance with a universal law. We can understand a material wrong as an action *physically* incompatible with the rights of one or more individuals. On this construal, that action A cannot coexist with everyone's freedom in accordance with a universal law means that A is physically incompatible with the rights of one or more individuals. For instance, A may interfere with an individual's use of what is theirs or may actually use what is theirs.

The second part of the UPR, call it P2, can be seen as expressing, in inverse form, Kant's standard for formal wrongs. On this reading, A is right, if, on A's maxim, the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law. We can understand a formal wrong as a wrong against the right of human beings as such, rather than as a wrong against particular individuals (e.g. MS 6:307n). Hence, the specific wrong for this type of action is not given by physical incompatibility with the rights of specific individuals. For instance, the maxim of being willing to be and remain in the state of nature is formally wrong, even when we are in a rightful condition and even when acting in accordance with that maxim happens not to have any effect on the rightful condition. Similarly, attempted murder is formally wrong, even when it is unsuccessful.

Many Kantians read the UPR as formulating one standard of right conduct.[13] Yet, given Kant's distinction between material and formal wrongdoing (e.g. MS 6:307–8 and 307n) and the specific formulation of the UPR, the TSI argues that the UPR is better read according to the previous interpretation: P1 is the inverse form of a standard of what is materially wrong, whereas P2, of what is formally wrong.[14]

4.2.2 *Formal and Material Wrongs*

On the TSI, a *merely* material wrong may occur by accident, if a person fails to realize that she is using something that belongs to someone else.

[13] This, for instance, has been my default understanding of Kant's UPR. See also Allen Wood, *Kantian Ethics: A Hermeneutic of Freedom*, Cambridge: Cambridge University Press, 2008, 243, and Arthur Ripstein, 'Means and Ends', *Jurisprudence* 6 (2015), 1–23, at 8.

[14] Marie Newhouse, 'Two Types of Legal Wrongdoing', *Legal Theory* 22 (2016), 59–75; I am not aware of other commentators who defend an interpretation of the UPR as formulating two normatively distinct and irreducible standards, so, in this chapter, I engage with this text. The example of Richard and Edward in the next section, for instance, is in Newhouse's text. I should add that Newhouse's article does not link the TSI she proposes to the debate on the relation of dependence between the CI and the UPR. I am also not aware of any other commentator who would develop this independentism-justifying strategy from the TSI in the way in which I do in this chapter.

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Consider Arthur Ripstein's example of a tort of innocent trespass: if I build a treehouse on your property, because I misread the map, then my innocent intention (and maxim) to build the treehouse on my property leads nevertheless to a material wrong – I use your property without your authorization.[15]

Merely formal wrongs, by contrast, occur when someone tries to wrong another person, yet fails to do so. Say, Richard and Edward want the same job.[16] To prevent Edward from attending the interview, Richard tries to steal the spark plugs from Edward's car, so that Edward cannot drive to the interview; yet, by mistake, Richard removes the spark plugs from his own car. Richard has not wronged Edward, but this does not mean that he has not acted wrongly at all – this is a merely formal wrong.

According to the TSI, a confirmation of the accuracy of this reading is provided by Kant's definition of 'transgression' ('a deed contrary to duty', MS 6:224), which includes both material and formal wrongs:

> An *unintentional* transgression which can still be imputed to the agent is called a mere *fault* (*culpa*). An *intentional* transgression (i.e. one accompanied by consciousness of its being a transgression) is called a *crime* (*dolus*). (MS 6:224)

For the TSI, an intentional transgression generates a formal wrong; by contrast, an unintentional transgression, which can still be imputed to the agent, leads to a material wrong. For instance, misreading the map and mistakenly building my tree house on your property would be considered a mere fault, a merely material wrong. Such mistakes, on this reading, although innocently committed, can still be imputed to the agent in a civil lawsuit, but they are not crimes. Crimes have objectionable maxims, such as that of interfering with another person's property, in order to deprive them of a chance to compete for a job.

Again, for the TSI, Kant seems to confirm this, because he says that material wrongs do 'not always presuppose in the subject a principle of doing so [namely, committing an injustice]' (VRML 8:429). In other words, on TSI's reading of Kant, merely material wrongs are not performed on wrongful maxims (but on innocent maxims). Moreover, Kant suggests that a formal wrong which 'escapes being punishable merely by accident can be condemned as wrong even in accordance with external laws' (VRML 8:427). In the example of Edward and Richard above, if Richard mistakenly removes his own spark plugs, then Edward will be able

[15] Ripstein, *Force and Freedom*, 380–1. [16] Concerning this example, see n. 14.

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to drive to the interview on the next day. To the TSI, this seems to suggest that, although by accident Richard does not commit a material wrong, his action might still be condemned as wrong even according to external laws; given its maxim of intending to wrong another person, the action is (merely) formally wrong.

On this interpretation of the distinction between material and formal wrongs, certain wrongs are both formal and material – the performed actions represent intentional transgressions, but also violate the rights of individuals (for instance, in the case of a thief, the right to property). Other wrongs are merely formal, when the perpetrators are unsuccessful in their attempt to violate a particular person's or specific individuals' rights. Still other wrongs are merely material, as in the case of an unintentional, but still imputable, transgression.[17] Moreover, on this interpretation, P1 and P2 are normatively irreducible, since a merely material wrong, which does not pass P1, will nevertheless pass the test offered by P2 (given that the action which does not pass P1 as a merely material wrong is performed on an innocent maxim); similarly, a merely formal wrong, which does not pass P2, will nevertheless satisfy P1 (given that the respective action is performed on a maxim rejected by P2, but produces no material wrong, so will not be rejected by P1).

4.2.3 *Merely Material Wrongs and Unintentional Transgressions*

Now, the notion of a merely formal wrong and its connection with the notion of an intentional transgression seem quite clear. By contrast, the notions of a merely material wrong and of an unintentional transgression seem more obscure. To be sure, Kant is quite clear about the notion of something's being unintentional; in his definition of intentional transgression, he specifies that by an intentional transgression he means one accompanied by consciousness of its being a transgression. (MS 6:224) Hence, an unintentional transgression is one which is not accompanied by consciousness of its being a transgression. It follows that, for the TSI, a merely

[17] P1 and P2 are stated in Kant's UPR, but separated as disjuncts. Given that P1 and P2 are supposed to be normatively distinct and possibly irreducible, an action is right if it meets *both* P1 and P1; either of them would not be sufficient. Yet, Kant does formulate the UPR as a *disjunction* with P1 and P2 as disjuncts. A possible reply is that this is an editorial mistake. Another reply is that the UPR is not meant to set the conditions for an action's rightness, but to describe the ways in which an action may be right: satisfying P1 just shows one way in which an action may be right (materially) and satisfying P2 just shows another way in which an action may be right (formally). Why did Kant not specify the UPR in this way? The answer related to poor editorial work could be invoked again here.

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material wrong is supposed to be such an unintentional transgression, which is still imputable; however, when is such a transgression imputable?

4.2.3.1 Conceptual Framework of Imputation

Kant's account of imputation is complex, particularly if we consider the context in which he was writing.[18] Nevertheless, for my argument here, it is sufficient to mention the general framework of his account and one particular aspect; first, concerning the general framework, Kant says:

> *Imputation* (*imputatio*) in the moral sense is the *judgement* by which someone is regarded as the author (*causa libera*) of an action, which is then called a *deed* (*factum*) and stands under laws. If the judgement also carries with it the rightful consequences of the deed, it is an imputation having rightful force (*imputatio iudiciara s. valida*); otherwise it is merely an imputation *appraising* the deed (*imputatio diiudicatoria*). (MS 6:227)

One preliminary clarification concerns the notions of author of an action and of a deed. A deed is a specific type of action, more exactly, an action 'insofar as it comes under obligatory laws and hence insofar as the subject, in doing it, is considered in terms of the freedom of his choice' (MS 6:223). Some actions may not have moral import and, hence, may not fall under the jurisdiction of obligatory laws. For instance, whether I choose orange or papaya juice as a drink when offered is an action without moral relevance, unless some relevant conditions are in place (such as, that the orange juice producer is unethical). In this case, my choice will not be constrained by any moral obligatory laws. By contrast, for those actions, which do have moral import, we can further consider whether the agent will observe the respective moral obligation(s) or not.

Now, for Kant, '*freedom* of choice is this independence from being *determined* by sensible impulses' (MS 6:213). Because a deed is that action which comes under obligatory laws, the agent who performs a morally relevant action would need to act on the obligatory laws, even when her sensible impulses motivate her to act differently. So it is for this reason that Kant regards a deed as an action for which the subject, in performing the action, is considered in terms of the freedom of their choice. By contrast, a morally irrelevant action is not considered in relation to morally obligatory laws and, hence, the question whether the person performing it could have

[18] For instance, for a discussion of Kant's engagement with what is called today the '*versari*' rule, as well as Wolff's and Pufendorf's accounts, see Sharon B. Byrd and Joachim Hruschka, *Kant's* Doctrine of Right*: A Commentary*, Cambridge: Cambridge University Press, 2010, esp. ch. 14 §4 and Appendix II.

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observed the laws even when this required acting independently from the sensible impulses (and, hence, whether the person had freedom of choice) does not apply.

Now, for the notion of the author of an action, we have the necessary conceptual background. Kant notes that, by performing such an action (i.e. a deed), the agent 'is regarded as the *author* of its effect, and this, together with the action itself, can be *imputed* to him' (MS 6:223). In other words, a person is the author of an action when the person has freedom of choice, that is, when the person could act independently of her sensible impulses. This does not mean that a person who satisfies some subjective impulses by acting could not count as being the author of the action, since what is important is that the person *could have acted* independently from sensible impulses.

4.2.3.2 Moral Imputation

With the notions of author of an action and deed clarified, we can return to Kant's general account of imputation. In the previous quotation, we had a threefold distinction between moral, appraising or judging, and rightfully forceful imputation ['Zurechnung (*imputatio*) in moralischer Bedeutung'/ 'beurteilende Zurechnung (*imputatio diiudicatoria*)'/'rechtkräftige Zurechnung (*imputatio iudiciaria s. valida*)']. Moral imputation judges whether the agent can be considered the author of the respective action. Appraising imputation evaluates the attributed action as right or wrong, and, as a result, as we will see, whether the action and its consequences require that the agent be rewarded, punished, or simply not considered for the purpose of punishment or reward. Finally, the rightfully forceful imputation determines the reward or punishment appropriate in the case of an action or its consequences, for which a reward or punishment is appropriate.

According to Kant,

> [i]f someone does *more* in the way of duty than he can be constrained by law to do, what he does is *meritorious* (*meritum*); if what he does is just exactly what the law *requires*, he does *what is owed* (*debitum*); finally, if what he does is *less* than the law requires, it is morally *culpable* (*demeritum*). (MS 6:227)

Doing what is meritorious, owed, and culpable is defined by Kant in relation to what the law requires and, in particular, as doing more than, exactly what, and less than, the law requires. Kant specifies, however, that: 'The good or bad results of an action that is owed, like the results of omitting a meritorious action, cannot be imputed to the subject [. . .]. The

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good results of a meritorious action, like the bad results of a wrongful action, can be imputed to the subject [. . .]' (MS 6:228).

Doing exactly what the law requires is doing what is owed, so the agent does not qualify either for a reward or for punishment. Omitting an action which would do more than the law requires and simply doing what the law requires, again, do not qualify the agent either for reward or for punishment. Moreover, the good or bad consequences of such actions are not imputable to the agent. By contrast, doing less than the law requires or doing more than the law requires makes the agent culpable or meritorious, respectively, and, hence entitles the agent to punishment or reward. The bad or good results of these actions can also be imputed to the agent.

This point can be illustrated with Kant's famous examples from 'A Supposed Right to Lie from Philanthropy'. The would-be murderer is pursuing my friend, who tries to escape by taking refuge in my house; the murderer knocks on the door and asks me whether I know my friend's whereabouts; according to Kant:

> If you have *by a lie* prevented someone just now bent on murder from committing the deed, then you are legally accountable for all the consequences that might arise from it. But if you have kept strictly to the truth, then public justice can hold nothing against you, whatever the unforeseen consequences might be. It is still possible that, after you have honestly answered 'yes' to the murderer's question as to whether his enemy is at home, the latter has nevertheless gone out unnoticed, so that he would not meet the murderer and the deed would not be done; but if you had lied and said that he is not at home, and he has actually gone out (though you are not aware of it), so that the murderer encounters him while going away and perpetrates his deed on him, then you can by right be prosecuted as the author of his death. For if you had told the truth to the best of your knowledge, then neighbours might have come and apprehended the murderer while he was searching the house for his enemy and the deed would have been prevented. (VRML 8:427)

Hence, a wrong action makes the agent culpable not only for the action itself, but also for all of the action's consequences, no matter how unforeseeable. By contrast, the right action leaves the agent irreproachable, from the perspective of justice, both with regard to the action and to its consequences. While Kant has been criticized for his answer to the problem of the murderer at the door, his account of imputation has been defended as plausible.[19] However, one question about this account

[19] See, for instance, Andrews Reath, 'Agency and the Imputation of Consequences in Kant's Ethics', in *Agency and Autonomy in Kant's Moral Theory: Selected Essays*, Oxford: Oxford University Press, 2006, 250–69.

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concerns the notions of right and wrong actions, which lead differently to imputation. According to TSI, we have two types of notion of right/wrong, which are normatively irreducible. Hence, the question is whether both material and formal right/wrong actions have the same implications for imputation.

I think the answer here is that only formally wrong/right actions should be considered. This is because a material wrong is defined as an action physically incompatible with the rights of other individuals. Yet, an action's physical incompatibility is not a matter of the agent's will; it is, however, a matter of the agent's will to be aware of existing legislation, to draw conclusions about legal restrictions in specific circumstances, and to formulate a maxim and rules of actions that are in accordance with what the law requires. An action's physical incompatibility with other individuals' rights might be the result of various contingent factors beyond the agent's control. An agent may be blown by strong winds onto another person's property or may be misguided by the directions of a distracted police officer or may damage another person's property due to a device's manufacturing fault.[20] Hence, there can be no conclusions drawn about imputation from a material wrong.

This is one reason why the distinction between material and formal wrongs, as presented by the TSI, cannot track Kant's distinction between intentional and unintentional transgressions. Unintentional transgressions are always transgressions, that is, deeds contrary to duty, but material wrongs need not always be contrary to duty, although they are physically incompatible with the rights of some individuals. Material wrongs can be starting points for a consideration of whether the agent can be regarded as the author of the action under consideration, whether another agent is the author, or whether there is no moral agent authoring the action, but only a natural factor causing a particular effect.[21]

4.2.3.3 Complex Moral Imputation and Judging Imputation

This is, in fact, the particular aspect of Kant's account of imputation, which I said would be useful for my purpose in this chapter. Consider a

[20] For instance, '[y]ou are not a trespasser if the wind blows you onto your neighbor's land, but you are if you are mistaken about where the boundary is, because you are still using another person's land' (Ripstein, *Force and Freedom*, 381).

[21] To be sure, the implication is that, contrary to the TSI, according to Kant, if it turns out that a physical incompatibility with the rights of some individuals is the effect of some natural factor, then the source of this incompatibility is not a wrong. The TSI would regard it as a 'merely material wrong', but, in fact, 'wrong' here would not be the appropriate term, since the source of this incompatibility is not morally imputable. I am grateful to Philipp-Alexander Hirsch and Martin Brecher for suggesting I clarify the expression 'material wrong' here.

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situation in which more than one action contributes to a particularly bad outcome. If some of these contributing actions are performed in accordance with their respective obligatory laws, whereas others are performed against these laws, then the bad outcome will be imputed to the author(s) of the wrongful actions. It might well be that this bad outcome would not have been possible without the actions which observe obligatory laws; yet, according to the rules of imputation which represent Kant's account, the moral author of the bad outcome will be the author(s) of the wrongful actions.

For instance, say I need to pay my mortgage rate by a certain day of the month. Throughout the month I am being very careful about how I spend my monthly salary, in order to have sufficient funds to pay to the bank. On the day my mortgage rate is due, on my way to the bank, I go to a shop to buy some food, pay for the food, and the shopkeeper gives me the right change, part of which is needed for my mortgage payment. Without being aware of this, the shopkeeper includes in the change counterfeit money, with which another customer had just paid. When I go to the bank to pay, I end up being arrested. In order for the bad outcome of circulating counterfeit money to occur, a series of actions have had to take place, which represent exactly what the law requires (such as, the fact that I spend my money carefully in order to be able to pay the amount I owe or the fact that the shopkeeper gives me the right change, which includes money for the mortgage rate); yet, culpable for this outcome is only the person who produced the fake money and used it.[22]

Let us assume, however, that I am the author of the action which takes me on my neighbour's property (which, as we have seen, only requires my freedom of choice) – I get onto my neighbour's property, as a result of a set of decisions I make. We have seen that, for Kant, the process of moral imputation involves also a process of assessing the moral status of the action I authored – together, these two forms of judgement are called by Kant appraising imputation. Again, the fact that the action under consideration is physically incompatible with, say, the rights of another person is just a starting point for the process of appraising imputation. Since there are rights of other individuals, which need to be considered, and since, in this case, I can be expected to be aware of these rights (and the fact that I follow a map is an indication that I am), the question is how my action did lead to a physical incompatibility with those rights.

[22] The shopkeeper might also be culpable if there is an expectation that she verifies the authenticity of the banknotes before accepting them.

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Various things may concur to produce this result: I may have taken the wrong edition of the map or I may be an incompetent map-reader or I may be negligent or any combinations of these and other similar factors. All these are situations in which what I do is wrong, since I fail to take reasonable steps to make sure I am not trespassing and, hence, not infringing on the legitimate rights of other individuals. It follows that I am liable for my action and for the consequences of this action. For instance, as my action leads me to being on my neighbour's property, the fact that the treehouse I built is on the neighbour's property, rather than on mine, is a result of my initial wrongful action and I need to compensate the neighbour for this appropriately.

But imagine now that I am being careful to take with me the latest edition of the map, I have just refreshed my knowledge of map-reading the day before, and I am concentrating to read the map and follow its guidance. There is nothing more that I can reasonably be expected to do, in order to make sure that the existing legitimate norms (for instance, those constituting the relevant rights of other persons) are respected. Yet there is a mistake in the map, and I end up building a treehouse for my children on the neighbour's property. Hence, the fact that I am mistaken about the boundary of my property does not necessarily imply that the action which takes me on my neighbour's property is wrongful.

The case of the mistake in the map, which leads (precisely because I am careful to follow the map accurately) to being on my neighbour's property is, I take it, the outcome of a series of actions; some of these are my actions, but, in performing them, I do the right thing and am irreproachable; as Kant puts it, 'public justice can hold nothing against [me]' (VRML 8:427); yet, various factors beyond my control affect the performance of my action. My actions satisfy what is owed in accordance with the relevant obligatory laws and, hence, these actions are right, and the bad results are not imputable (in any sense) to me (but perhaps to the cartographer, editor, or publisher of the map).[23]

[23] Let me mention, for the sake of completeness, that, when it turns out that my action is less than it is owed by obligatory laws, there is still the question of judiciary imputation, namely, the judgement of the punishment that is the appropriate response to my wrongful action and its bad results. This, too, is a complex process, because, according to Kant, 'the state of mind of the subject, whether he committed the deed in a state of agitation or with cool deliberation, makes a difference in imputation, which has results' (MS 6:228). The issue of judiciary imputation, however, goes beyond the scope of this chapter and will not be discussed further here. I make one note of clarification: I might end up compensating the neighbour for the damage, although I am irreproachable – this is, of course, not because the treehouse would be the result of some wrongful action I performed (since otherwise I would not be irreproachable); it might be a

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4.3 The Argument against the Independentist Strategy

To sum up, one of the issues of the TSI is the construal of Kant's distinction between formal and material wrongs. For instance, Kant talks about this distinction at MS 6:307–8; in the footnote to 6:307, he says: 'This distinction between what is merely formally wrong and what is also materially wrong has many applications in the doctrine of right.' This, however, suggests a different distinction from that offered by the TSI: Kant does not mention anything about a merely material wrong; he only talks about formal wrongs, which may or may not be at the same time material. The intention to be and remain in the state of nature may be incompatible with no particular person's rights, but, Kant adds, in general it does 'wrong to the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence' (MS 6:307–8).

Wrongs are, therefore, always formal; when they also go against particular individuals' rights, they are also material; otherwise, they are merely formal. It follows that the distinction between intentional and unintentional transgressions is also misconstrued by the TSI: both these transgressions are formal wrongs and both may be merely formal or, if not merely formal, then formal and material. The case of negligence seems to be one case Kant has in mind, when he talks about the second type of transgression, the unintentional transgression he calls fault. This is unintentional, since, for instance, I do not intend to misread the map (in the case where the map is accurate and I am distracted), although I can be said to intend to be negligent or at least I can be said to accept the risk, given that I do not do anything to address this; instead, misreading the map is an unintended, although perhaps expected, result of being negligent when I try to get a treehouse built on my property.[24] There are contemporary

pragmatic decision on my part not to waste time by trying to get the publisher of the map to pay or a decision not to upset my neighbour by delaying the compensation and reparation of the damage or it might be a mistake (assuming the account presented here is correct) in the judgement of the person who has the authority to make the decision and who happens to have a different account of imputation than the Kantian account I presented here; other similar practical or pragmatic reasons are possible.

[24] A similar example considered in the literature is that of a philosopher, who acts on the maxim 'I will drive to the store to get some milk.' On the way, she is distracted by thoughts about metaethics, fails to notice a red light, and hits another vehicle. This is also a case of negligence, and the maxim of action should reflect this. Consider now those cases, in which we fail to pay particular attention and also fail to realize that we have not paid sufficient attention (I am grateful to Luke Davies for raising this example). I think that, for the purposes of imputation, the situation is the same as that in which I realize I am being negligent. Say I am distracted by the conversation in the car; I do not realize that

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accounts of negligence along Kantian lines, which attempt to account precisely for this 'paradox' of imputability without intention.[25]

We have seen that the interpretation of the distinction between material and formal wrongs as part of the TSI seems to be confirmed by two of Kant's claims concerning these wrongs. First, Kant says that material wrongs do 'not always presuppose in the subject a principle of doing so [namely, committing an injustice]' (VRML 8:429). Yet, as we have seen, this applies to cases of negligence and also cases of wrongful acts which have unexpected bad consequences. Secondly, Kant suggests that a formal wrong, which 'escapes being punishable merely by accident can be condemned as wrong even in accordance with external laws' (VRML 8:427). The context for this claim is Kant's example of the murderer at the door, from 'On a Supposed Right to Lie from Philanthropy', in particular, the situation in which a lie told to the murderer may not be punishable, given the context (which is accidental), but, through its consequences, can become punishable, as in the case of Kant's imagined situation, where the potential victim leaves the house without the owner's knowledge, the owner tells a lie to the would-be murderer, and the murderer encounters the potential victim and kills her. Again, here we have a case of accidental consequences of wrongful actions, rather than a case of a merely formal wrong.

I started with a brief presentation of an approach, which can use the TSI, that is, the view that the UPR has in fact two normatively irreducible parts – one concerning formal, and the other one identifying material, wrongs. If correct, this would mean that Kant's view could not be classed

the conversation distracts me, and I end up scratching my car. The situation in which I do not realize I am being distracted might actually be more serious than that in which I am aware I am distracted. Unless some pathological elements are involved, not being aware that I was not paying attention might mean that I will be required to undertake some exercises of concentration and reflection.

[25] For instance, for Erasmus Mayr, 'Unwitting Omissions, Mistakes and Responsibility', in George Pavlakos and Veronica Rodriguez-Blanco (eds.), *Agency, Negligence and Responsibility*, Cambridge: Cambridge University Press, 2021, 37–56: '[i]n everyday life, we hold one another responsible not only for what we do, or fail to do, intentionally or knowingly, but also for many things we do or fail to do unintentionally or inadvertently. [. . .] That these reactions are so commonplace suggests one can be morally responsible for one's actions and omissions even when one has neither decided on them nor been aware, at the time, that one was acting in a morally problematic way' (Mayr, 'Unwitting Omissions', 37). The account proposed by Mayr is that 'we are only blameworthy for an unwitting omission or similar failure, [. . .] if it manifests a failure to care sufficiently about morality and its general principles and values' (Mayr, 'Unwitting Omissions', 38). See also Joseph Raz, 'Responsibility and the Negligence Standard', *Oxford Journal of Legal Studies* 30 (2010), 1–18, for an analysis of negligence and a new conception of responsibility. I am grateful to George Pavlakos for suggesting these texts as useful for my argument.

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as dependentist (whether simple or complex[26]); on the contrary, this may even suggest that the UPR can be a ground (perhaps in a complex way) for the CI (say, P1 or P2 could ground the CI). In this section, I have, however, claimed that the two normative components identified by TSI as part of the UPR (P1 and P2) are not irreducibly distinct in their normative functions. They both formulate what it means for an action to be formally wrong with a difference of emphasis – P1, on actions, and P2, on maxims. There are no actions without maxims and no maxims without actions in Kant's philosophy of action, and the focus on the action or its maxim places emphasis on distinct important aspects – the physical, external character of the action and its intention.[27] There is, therefore, nothing surprising in the fact that Kant formulates the UPR in the way in which he does in the *Metaphysik der Sitten*.

4.4 Conclusion

In this chapter, I have developed, considered, and rejected a significant strategy that an independentist about the relation in Kant between ethics (in particular, the CI) and right (specifically, the UPR) can mobilize to motivate their reading. In my response, I identified some problems with this strategy and with the reading of Kant it relies on (more exactly, the TSI) and indirectly provided some further support for a complex dependentist position, which I find more convincing.

Systematically, what I find particularly significant about the complex dependentist reading is that it enables an account of political-juridical standards, which preserves a significant connection with ethical normativity, while at the same time it gives serious consideration to those aspects of political-juridical standards which distinguish them from ethical principles.

Even if we accept that the UPR represents a single standard – as I have argued in this chapter – a number of other strategies for supporting independentism can be formulated, including an argument from the innate right of humanity[28] and two paradoxes – one concerning juridical

[26] As these positions have been presented in Section 4.1.

[27] In this volume, Ludwig (Chapter 2) and Hirsch (Chapter 5) are in agreement with this interpretation of Kant.

[28] This is suggested by certain readings of Ripstein (for instance, *Force and Freedom*, 381) as defending an independentist, rather than a dependentist, account of the relation between the UPR and the CI, e.g. Ruhi M. Demiray, 'The Intrinsic Normativity of Law in Light of Kant's *Doctrine of Right*', *Contextos Kantianos* 3 (2016), 161–87; for a more detailed presentation of the context of his

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imperatives[29] and a second one concerning their performance's motivation.[30]

I have argued elsewhere how the paradox of juridical imperatives can be answered and why the best account of the relation between the CI and the UPR is a complex dependentist one.[31] Although I think the other independentism-justifying strategies can be rejected, these arguments are not needed for the purpose of this chapter and they will have to be presented elsewhere; in rejecting the argument of the first strategy, this chapter has also offered indirect support for the complex dependentist position, which I view as both the most philosophically convincing and the most accurate reading of Kant.

argument, see Demiray, 'Natural Law Theory, Legal Positivism and the Normativity of Law', *The European Legacy* 20 (2015), 807–26. A related argument is also offered by Christian Rostbøll, 'Kant and the Critique of the Ethics-First Approach to Politics', *Critical Review of International Social and Political Philosophy* 22 (2019), 55–70. For a related discussion of the role the innate right of humanity plays in Kant, see Katrin Flikschuh, 'Innate Right and Acquired Right in Arthur Ripstein's *Force and Freedom*', *Jurisprudence* 1 (2010), 295–304.

[29] See, for instance, Marcus Willaschek, 'Which Imperatives for Right? On the Non-prescriptive Character of Juridical Laws in Kant's Metaphysics of Morals', in Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays*, Oxford: Oxford University Press, 2002, 65–88.

[30] See Andre S. Campos, 'Kant on Acting from Juridical Duty', *International Journal of Philosophical Studies* 27 (2019), 498–514.

[31] Baiasu, 'Right's Complex Relation'.

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