Kantian Review, **24**, 3, 465–481 © Kantian Review, 2019
doi:10.1017/S1369415419000219

A Juridical Right to Lie

HAMISH STEWART
University of Toronto
Email: hamish.stewart@utoronto.ca

Abstract
Kant's essay 'On a Supposed Right to Lie from Philanthropy' claims that everyone has an unconditional duty of right not to lie under any circumstances. This claim creates a conflict within the doctrine of right because Kant also claims that each of us is under an unconditional duty of right to obey the positive law in force in the civil condition in all circumstances. In Kant's specific example, truthfulness would violate the positive law because it would make the speaker an accomplice to a crime. Since both duties flow from the requirement that we not act inconsistently with the possibility of rightful relations among humans, a juridical solution to the conflict must be possible. That solution is to recognize that lying in appropriate circumstances is akin to the use of force in self-defence or defence of a third party.

Keywords: lying, Kant's legal philosophy, Kant's political philosophy, self-defence

1. Introduction

Immanuel Kant's essay 'On a Supposed Right to Lie from Philanthropy' makes a provocative and powerful claim. Kant says that everyone has an unconditional duty of right not to lie under any circumstances. Even in a situation where no specific person has a right to the speaker's truthfulness and where truthfulness could bring about a very significant harm, the speaker should not lie. If your friend is fleeing from a murderer and hides in your house, and the murderer comes to your door and asks about your friend's whereabouts, Kant says that it is impermissible to lie: if you cannot avoid speaking, you must be truthful.[1] Commentators who situate the essay within Kant's doctrine of right[2] have often suggested, contrary to Kant, that lying to the murderer is as a matter of right sometimes permissible, perhaps even required, because it frustrates the murderer's unlawful purpose and

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

so is akin to the use of force in legitimate defence of a third party.[3] In this article, I show that the need for a resolution of this kind is both urgent and possible within the doctrine of right. A resolution is urgent because Kant's claim that each of us is under an unconditional duty not to lie conflicts with his claim that each of us is under an unconditional duty of right to obey the positive law in force in the civil condition in all circumstances. That is because, as a matter of positive law, telling the murderer the truth is a crime, but lying to him is not; so if you tell the murderer the truth, you violate your duty to obey the positive law. The conflict is serious because both duties are duties of right, flowing from the requirement that we not act on maxims that are inconsistent with the possibility of rightful relations among humans. A resolution is possible because, like the use of force in self-defence, lying to the murderer is hindering a hindrance to freedom and so is a permissible use of freedom.

2. The Juridical Wrong of Lying

The Unconditional Duty of Truthfulness

To bring the duty not to lie into stark relief, Kant considers a scenario originally presented by Benjamin Constant (1988: 136). A murderer (call him Bailey) is intent on murdering someone (call him Colin). Colin has taken refuge in the house of his friend Ann. Bailey comes to Ann's door and asks where Colin is to be found (SRL, 8: 426). What should Ann do? If she cannot avoid giving an answer, Kant says, Ann must not lie; if she cannot avoid giving Bailey a direct and clear answer, she must be truthful and tell Bailey where (she believes) Colin is to be found. Kant puts this claim in two ways:

> Truthfulness in statements that one cannot avoid is a human being's duty to everyone, however great the disadvantage to him or to another that may result from it; and although I indeed do no wrong to him who unjustly compels me to make the statement if I falsify it, I nevertheless do wrong in the most essential part of duty *in general* by such falsification, which may therefore be called a lie (though not in a jurist's sense); that is, I bring it about, as far as I can, that statements (declarations) in general are not believed, and so too that all rights which are based on contracts come to nothing and lose their force; and this is a wrong inflicted upon humanity generally. (8: 426)

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

> though by a certain lie I in fact wrong no one, I nevertheless violate the principle of right with respect to all unavoidably necessary statements *in general* (I do wrong formally though not materially); and this is much worse than committing an injustice to someone or other, since such a deed does not always presuppose in the subject a principle of doing so. (8: 429)

I begin by emphasizing five points about the interpretation of this argument that I follow here. First, Kant does not say that one has a duty of right to voluntarily offer truthful information under all circumstances. He assumes that it would be better for Ann to avoid answering Bailey's question[4]; but if, for some reason, Ann 'cannot evade an answer of "yes" or "no"', she must be truthful (SRL, 8: 426). Second, the question is whether Ann has a duty to be truthful (a duty not to lie), not whether she has a duty to tell the truth. No one can have a right or duty in relation to the truth but only in relation to truthfulness, 'that is, to the subjective truth in [one's] own person' (8: 425). So if Ann honestly but mistakenly believes that Colin is not in the house, and tells Bailey that, she has done no wrong. Third, Kant does not think that if Ann lies to Bailey, she has done *him* any wrong; indeed, Kant tells us elsewhere, as a general matter no one has a right to another's truthfulness unless he or she has acquired that right in some way (*MM*, 6: 232). Certainly, Bailey has no right to Ann's truthfulness in this situation; the wrong of Ann's untruthfulness lies elsewhere.

That brings us to the fourth point. Many commentators treat the duty under discussion in the 'Supposed Right to Lie' as a duty of virtue.[5] But it is not. Although there is a related duty of virtue,[6] Kant argues that the duty not to lie is a duty of right, a duty relating to the possibility of rightful relations among human beings. As he says (SRL, 8: 427), 'I prefer not to sharpen this principle to the point of saying "Untruthfulness is a violation of one's duty to oneself." For this belongs to ethics, but what is under discussion here is a duty of right.' The absolute prohibition on lying must be linked to Kant's doctrine of right, his account of law and the state; and this notwithstanding his leaving room for what seems to be a right to lie in the *MM*. Finally, I take it that Kant's concern is with the juridical significance of any lie, that is, any utterance that the speaker believes to be false and intends to be taken as true,[7] not with some subset of falsifications that already have juridical significance.[8]

The Juridical Role of Truthfulness

For Kant, human beings cannot stand in rightful relations to each other outside the legal order.[9] The task of the legal order is not to promote any

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

particular good but to ensure the freedom of all by providing a structure within which each can use his or her means to pursue his or her purposes consistent with everyone else's pursuit of their purposes. This structure consists of a set of permissions and limits on everyone's use of his or her means, permissions and limits which are reciprocal in the sense that they apply to each person and can be consistently exercised and observed. They constitute a set of private law rights. Although the main principles of private right are, in Kant's view, discoverable *a priori* without reference to the state, he also argues that private right cannot be guaranteed without a state because, outside a state, any individual's use of force against another to enforce his or her rights can only appear to be arbitrary; therefore, the reciprocal permissions and limits on everyone's use of his or her means have to be defined and enforced by an agent whose conduct can be understood as having been authorized by all: that is, by the state. The legal order must therefore consist not only of a set of rules that constitutes the reciprocal permissions and limits but also public authorities to enact them, to enforce them and to decide disputes arising under them. Thus rightful relations among human beings are impossible without institutions that can be understood to have been authorized by all to establish and to enforce, coercively if necessary, positive law that gives effect to rights. Without such institutions – that is, in a state of nature – 'individual human beings ... can never be secure against violence from one another, since each has its own right to do *what seems good and right to it* and not to be dependent on another's opinion about this'. Everyone is therefore under a duty of right 'to leave this state [of nature] and enter into a rightful condition' (*MM*, 6: 312). In moving from the state of nature to the rightful condition, 'the human being ... has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws' (6: 316). Thus, for Kant, 'All right ... depends on laws' (TP, 8: 290), that is, on the existence of a rightful condition.

The juridical role of truthfulness has to do with the possibility of such a rightful condition. Justice, Kant says (TPP, 8: 381), 'can be thought only as *publicly known*'; accordingly, '[e]very claim to a right must have th[e] capacity for publicity'. Putting this principle in transcendental form, he says (ibid.): 'All actions relating to the rights of others are wrong if their maxim is incompatible with publicity.' Actions which violate this principle are those which would necessarily fail if their maxim was publicly announced with intended juridical effect (any effect on rights).[10] So a people who, in a Lockean way, seek to reserve to themselves a right to overthrow the state if it does not do its job necessarily fail because their very

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

attempt to publicly reserve this right would mean that no state could be established. An essential attribute of the state is the irresistible power of its head; and a reserved right to rebel would mean that there was no head or (what amounts to the same thing) that his power would not be irresistible. If a state is successfully established, those who assert a right to rebel against it cannot publicly acknowledge their objective with intended juridical effect, while in contrast their ruler can publicly acknowledge his intention to prevent rebellion and to punish those who rebel against him.[11] Similarly, one who entered into a contract intending not to be bound by it acts on a maxim that would refute itself if she announced it, expecting it to have any juridical effect: for her announcement that she did not intend to be bound would, on any account of contract law, be inconsistent with whatever formalities the law might require for the successful formation of a contract. Depending on the particulars of the law of contract in the relevant legal order, she would either be a party to a binding contract notwithstanding her declaration or fail to form a contract because of her declaration.

The argument thus far shows only that there are ways in which acts based on a maxim that could not be made public with intended juridical effect are juridically incoherent. But such acts are not necessarily wrongful, especially if the underlying maxim is not announced. The rebel's assertion that he should be the new head of state has no juridical meaning, but if he succeeds in overthrowing the existing order, he will turn out after all to have been right in that assertion. A person who insincerely enters into a contract, without advertising her insincerity, may nevertheless carry out her contractual obligations after all and so violate no right of the other contracting party. The insincere contractor and the successful rebel may end up doing what is, or what must be taken to be, juridically right despite having acted on a wrongful maxim.[12] But, for Kant, such acts are not merely incoherent or ineffective: they are juridically wrong because founded on maxims that, if generalized, are inconsistent with the possibility of a rightful condition. The rebel does not merely act on a maxim that is self-refuting if publicly announced; he acts on a maxim which, if generalized, would make a rightful condition impossible because the rebel rejects the very idea of invoking the existing institutions of the civil condition to resolve his grievances, preferring instead to invoke the kind of lawless violence that the civil condition was supposed to remedy. If everyone did that, the civil condition would quickly collapse into a state of nature (TP, 8: 300). The insincere contracting party acts on a maxim which, if generalized, would cause 'all rights which are based on contracts [to] come to nothing and lose their force' (SRL, 8: 426) because no one

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

would ever be able to rely on another's word in the process of forming and executing contracts. Generalizing this idea further, one might attribute to Kant the view that truthfulness is an essential quality for the members of the rightful condition because it is through language that they communicate ideas, exchange commitments and make laws. As Weinrib puts it, 'the liar does wrong by using language, the means through which wills are united and rights proceed, in a manner that is inconsistent with its publicity'.[13] If everyone acted on a maxim of using language that way, being truthful or lying according to his or her apparent advantage, a rightful condition would be an impossibility.

For Kant, the wrong of acting on a maxim that is inconsistent with the possibility of rightful relations among persons is a particular kind of wrong. It is not a failure of virtue or a violation of another's rights (though it could be either of those as well); rather, it is the wrong of acting in a way that is inconsistent with right generally. In the 'Supposed Right to Lie', he calls it a wrong inflicted upon humanity generally, or a formal wrong as opposed to a material wrong (SRL, 8: 427). Elsewhere, he calls it a wrong in the highest degree, giving the examples of individuals' refusing to leave the state of nature and the sovereign's pardoning convicted offenders (*MM*, 6: 307, 337). These wrongs are juridical wrongs because they are wrongs to the possibility of right, and they are wrongs to humanity in general because they are wrongs to the possibility of rightful relations among persons (rather than wrongs to any human being in particular). The wrong of lying is one of these wrongs. So, Kant says, if Ann lies to Bailey, she violates a duty of right; but it is not a wrong to Bailey because, on Kant's view, one does not in general wrong another by being untruthful unless the other has already somehow acquired the right to one's truthfulness (*MM*, 6: 238). Rather, it is a wrong to humanity in general: a wrong in the highest degree.

3. The Wrong of Truthfulness

The duty not to lie is, however, not the only unconditional duty of right. Kant also held that everyone has a duty to obey the positive law in force in the rightful condition. Like the duty of truthfulness, this duty is connected with the duty to enter into and maintain a rightful condition. And sometimes this duty seems to conflict with the duty of truthfulness.

The Criminal Liability of Assisting a Murderer

It has often been suggested that Kant's claim that if Ann is truthful with Bailey about Colin's whereabouts, she is complicit in Bailey's evil deed; thus, even within Kant's own moral philosophy, his conclusion that she

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

must be truthful cannot be right.[14] Kant denies this, on the ground that an actor cannot be blamed for the unfortunate consequences of a rightful act; although Ann's conduct may well be causally linked to Bailey's murderous attack on Colin, Ann is not responsible for the consequences of her truthfulness because it is rightful.[15] Kant's point, which for the purposes of this article I accept, is that one cannot show that an act is wrongful by showing its unfortunate consequences; rather, one must show that the act is wrongful in order to make the actor liable for its unfortunate consequences. But there is a Kantian argument for the wrongfulness of Ann's truthfulness that does not depend on the consequences of her truthfulness.

Suppose that Ann follows Kant's advice and, having no choice but to give an answer that will be true or false, tells Bailey where Colin is to be found. Bailey uses that information to kill Colin. What are the criminal law consequences for Ann? Kant thought that there were none: 'if you have kept strictly to the truth, then public justice can hold nothing against you' (SRL, 8: 427). But, as Shiffrin has rightly pointed out, Ann's conduct not only makes her complicit in an evil deed but also, as a matter of positive law, makes her an accessory to Bailey's crime.[16] Generally speaking, one is liable as an aider if he provides assistance to the principal, knowing that the principal intends to commit the offence and intending to assist.[17] By telling the murderer the truth about Colin's location, Ann assists the murderer. She knows the offence that Bailey intends to commit. And as long as she knows or is substantially certain that her conduct will provide some assistance to Bailey, for criminal law purposes she intends to assist him.[18]

Moreover, the precise consequences of Ann's truthfulness do not matter for her criminal liability. If she sincerely but mistakenly tells Bailey that Colin is in the house when in fact he is not and if Bailey nevertheless somehow manages to locate and kill Colin, then she is an accomplice to the murder, having acted with the required intention. If Bailey fails in or abandons his purpose of killing Colin, Ann is guilty of attempted murder (assuming Bailey himself has done enough to be guilty of an attempt). And even if Ann's truthfulness is in the end useless to Bailey, she is nevertheless an accomplice, as there is no requirement that the assistance given by an accomplice be causally effective, either in the sense of causing the principal offender to pursue his unlawful purpose or in the sense of causing his purpose to be achieved.[19] So if Ann tells the truth to the murderer, she has disobeyed the law and is herself guilty of a crime.

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

The Duty to Obey the Law

Kant's project in his juridical writings was not to provide an account of the positive law as he found it but to give an *a priori* account of the idea of right (*MM*, 6: 229-30). So a conflict between Kant's views about the duty not to lie and the demands of positive law may seem to be of little significance. But Kant also held that everyone has a duty of right to comply with whatever positive law happens to be in force; moreover, Kant characterizes the wrong of violating this duty in a very similar way to the wrong of lying. Kant understands acts that violate either of these duties as wrongful because they are based on maxims that are inconsistent with the possibility of a rightful condition.

The most extreme way to refuse compliance with the existing legal order is to take up arms against it, to foment revolution. Kant notoriously denied that the people had any right of revolution against the legal order, no matter how unjust it had become (*MM*, 6: 320; TP, 8: 298–302). This claim about the impermissibility of revolution was continuous with his views about less extreme methods of non-compliance. The people, he said, had no right 'to *inquire* with any practical aim in view' into the origin of whatever legal authority presently existed (*MM*, 6: 318). I take it that this does not preclude theoretical inquiry, that is, historical research into the origin of the legal order or the chronicling and analysis of historical events that did involve the replacement of one legal order with another. But it does preclude asserting that the existing legal order is illegitimate because of the way it came about, with the intent that the people should act on that opinion. For Kant, that would be seditious. Further, there is in Kant's political theory no room for civil disobedience, even if understood as conscientious, non-seditious and non-violent disobedience to the positive law. It was, he argued, impermissible to challenge the existing legal order in any way other than advocating for reform. He held that 'the presently existing legislative authority ought to be obeyed' (6: 319) regardless of its origin and regardless of its content. Faced with an unjust law, the citizens may complain about it but, 'however bitter they might find it', should accept it and obey it (TP, 8: 299).

If there is no right to rebellion, sedition or civil disobedience as responses to the juridical defects of the existing legal order, there can certainly be no right to violate the positive law from the kind of motive that is the everyday stuff of the criminal law, such as anger, greed, fear or addiction. What is more, the wrong of all these forms of intentional non-compliance with positive law is of the same kind as the wrong of lying. Although Kant does not go so far as to characterize all crime, or more generally all intentional

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

disobedience to the law, as wrong in the highest degree, his claims about the impermissibility of remaining in the state of nature, of revolution, of lying and of disobeying the positive law are all based on the same idea: that everyone has a duty of right to enter into and to maintain a rightful condition and that violating these duties is a wrong to humanity in general, if not to a particular individual. Intentionally committing a crime is akin to a wrong to humanity in general, whether or not the crime has a particular victim, because the criminal who intentionally disobeys the positive law, like the rebel or the liar, acts on a maxim which, if generalized, would make rightful relations impossible. In Kant's view, the duty to obey the positive law is absolute and admits of no exceptions.

Readers sympathetic to Kant's account of right have sometimes resisted his claim that the duty to obey the positive law is absolute.[20] It has been suggested that he could not have believed that one had an absolute duty to obey the law of a state that had totally failed in its task of being a rightful condition (Korsgaard 1997) or that he must have believed that the question whether to obey the law is a matter of virtue rather than right (Wood 2014: 97–8). These suggestions may well be correct, but even if they are, they do not resolve the problem posed by the 'Supposed Right to Lie': whatever a justified Kantian refusal to obey valid law might look like, it would not extend to complicity in murder. Even if Kant's views on the duty to obey the positive law are not as stringent as I have supposed, there could be no Kantian basis for refusing to comply with the law prohibiting murder.

4. Resolving the Conflict

Kant's position on lying and his position on obedience to positive law seem to put Ann in the impossible position of doing wrong to humanity generally regardless of the choice she makes. If she lies, she violates her unconditional duty not to lie and does wrong in the highest degree by acting on a maxim ('you may lie when you think it expedient') that would make the civil condition impossible; but if she tells the truth, she violates the positive law and does wrong in the highest degree by acting on a maxim ('you may disobey the positive law by committing a crime when you think it expedient') that would make the civil condition impossible. For Kant, this kind of conflict of duties is a practical impossibility (*MM*, 6: 224). So there must be a way of reconciling them.

It has frequently been argued that, even for Kant, it should be permissible for Ann to lie to Bailey in the same way that she would be allowed to use physical force against Bailey: in either case, she would be acting in defence

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

of a third party.[21] I think this argument is correct, that it is necessary to avoid the apparent conflict of duties of right that I have identified in Kant's doctrine of right, and moreover that it is consistent with the central idea that some means of hindering a hindrance to freedom are rightful.

An action is rightful, Kant tells us, 'if it can coexist with everyone's freedom in accordance with a universal law' (*MM*, 6: 230). An action is wrong if it hinders a rightful action. In turn, an action that hinders a wrongful action is itself rightful: 'if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, is right' (6: 231). Kant gives the example of a creditor who invokes the law's processes to enforce an unpaid debt; these processes coerce the debtor but hinder his failure to repay his debt, which was itself a hindrance of the creditor's freedom; so they are rightful uses of coercion.[22] Similarly, since Bailey's actions in pursuit of his murderous purpose are a hindrance to Colin's freedom, she may make use of her freedom to hinder his purpose. Everyone agrees that she would be permitted to use physical force. The suggestion is that she may also lie to Bailey. Moreover, if such a lie is permissible in her situation, it would also be permissible where Ann was acting in defence of herself, and for the same reason: it would be a hindrance to a hindrance of (Ann's) freedom.

Kant implicitly rejects this suggestion.[23] While implicitly accepting that the use of violence is not necessarily inconsistent with the rightful condition, he expressly argues that lying always is (SRL, 8: 427). This is puzzling. Although lying and the use of personal violence, if generalized as means for the pursuit of individual (or indeed public) purposes, are both inconsistent with the possibility of a rightful condition, there may be occasions on which either could be, as hindering a hindrance to freedom, rightful. If lying is always prohibited but violence is sometimes permitted, there must be something about the former but not the latter that makes it inconsistent as such with the rightful condition. There are three plausible ways of making such a distinction; but none of them is persuasive.

First, it might be thought that only the use of physical force against a person or property could count as hindering a hindrance to freedom. But that cannot be Kant's view. Hindrances, whether wrongful or rightful, are uses of freedom, and there are many uses of freedom other than using physical force against a person or his property. Just as something other than physical force can be a hindrance to freedom, so can hindering a

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

hindrance to freedom include uses of freedom besides physical force. Right, as expressed in positive law, is itself such a hindrance to a hindrance. And although right may ultimately give rise to an authorization to use physical force, that is typically the last step, one not usually reached, in the legal process. To take Kant's own example, it is trite creditor–debtor law that a creditor cannot in general forcibly seize the assets of a defaulting debtor; instead, there is an extensive process that must be followed before that stage is reached. Much less can the creditor use force against the debtor's person.

Second, there might be something about the maxim of lying that makes the lie always and everywhere inconsistent with a rightful condition, while the same is not true of a maxim of using force. This seems to be Kant's own position. If Ann lies to Bailey, she acts on the maxim that it is, at least sometimes, permissible to lie to achieve an end. Kant says that if Ann acts on such a maxim, she 'bring[s] it about, as far as [she] can, that statements (declarations) in general are not believed' (SRL, 8: 426; Kant does not use the word 'maxim' in the essay). If she even thinks about possible exceptions to the duty of truthfulness, she is 'already a liar (*in potentia*); for [she] shows that [she] does not recognize truthfulness as a duty in itself but reserves for [herself] exceptions to a rule that by its essence does not admit of exceptions, since in so doing it would directly contradict itself' (8: 430). Or, as Weinrib (2008: 162) puts it, a lie is always impermissible because 'the liar wills the overturning of the rule of law in favour of the lawless and potentially violent state of nature'.

The difficulty with this argument is that it is equally applicable to uses of force, so if correct, it also rules out use of force as a permissible response to a threat of force. If the neighbour uses force to hinder Bailey, he acts on a maxim that sometimes permits the use of force to an end. And so, it seems, he brings it about as far as he can that relations among humans are governed by violence rather than by law, and by even thinking of the possibility of exceptions to the law prohibiting personal violence (the law of assault and homicide), he shows himself to be a criminal *in potentia* because he reserves for himself the right to define exceptions to the law's rejection of private force as a way of deciding disputes. It might even be said that he who exercises his own judgement as to when use of force is permitted does '*what seems right and good to [him]*' (*MM*, 6: 312) as in the state of nature, rather than what the law requires and so undermines the rightful condition. Moreover, just as generalized lying as a means for achieving one's purposes would make a rightful condition impossible, so would generalized resort to physical force. In both cases,

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

Ann does exactly what the rightful condition is supposed to forbid, namely, to depart from her duty of right to solve disputes through the legal process rather than with lies and violence (cf. Sussman 2009: 239–40).

The solution is to recognise that defensive force and lying are indeed similar in that they put Ann in the position of having to decide on her own whether to do what is normally a juridical wrong, and in the face of use of force, what is normally not only a juridical wrong but contrary to positive law. But the law of self-defence allows for exactly that: it envisages situations where it is not possible for someone who is wrongfully threatened with grievous harm to call on the institutions of the state to protect him, and so permits him – arguably deputizes him – to use the kind of force that is normally permitted only to state agents.[24] Perhaps right can also authorize a lie on such occasions. It is certainly troubling to imagine the state using lies as an instrument of policy whenever it wished; but it no more troubling than imagining the state systematically using force whenever it wishes; yet, at the same time, one can imagine cases where the use of such means might be justified.[25] So it seems we need some principles that contain such departures from what is normally wrongful behaviour. But, once again, the use of force and the use of lies are analogous in this respect. Although Ann is permitted to use force, the law of self-defence in general does not permit a defender to do whatever she likes to an attacker; although the details of the law of self-defence may vary from place to place, at its core it permits only force that is necessary and proportionate. Excessive use of force in self-defence or defence of others is not justified. Lying is much less tightly controlled by positive law than the use of force, but assuming that Kant's duties of right include some that do not and even could not take the form of positive laws,[26] one can well imagine a similar set of juridical restraints on lying. If, for example, Ann has a choice among various things she might say that will throw Bailey off Colin's trail, short of lying, she should not lie. She can then comply with both her duties under positive law and her duty of truthfulness, and that conclusion is entirely consistent with the claim that Ann must lie in the different situation where the lie is the only way to avoid accessorial liability. This conclusion is analogous to the legal requirement that any physical force that Ann uses to prevent Bailey from getting at Colin must be necessary and proportionate. The juridical constraints imposed by the idea of the rightful condition are capable of containing both force and lies.

That brings us to the third and most significant potential disanalogy between the right to use force in self-defence and the supposed right to

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

lie. It might be thought that the state cannot authorize a right to lie in the way it can authorize the right to use force because such a purported authorization would be incoherent. As Kant puts it, the duty of truthfulness is a 'rule that by its essence does not admit of exceptions, since in so doing it would directly contradict itself' (SRL, 4: 430). The argument would be that an action taken under a law permitting the use of force for defensive purposes is compatible with the transcendental principle of public right, while an action taken under a law permitting a lie for private defensive purposes is not.[27] That principle states that an action is rightful only if its maxim is compatible with publicity, that is, if the success of the action is compatible with publicly announcing its maxim. It might seem that making a statement that purports to be a lie would necessarily fail this test, for announcing one's maxim that one will use untruthful statements as a general means to achieve one's purposes would undermine the possibility that any statement would be taken as true, including the announcement itself, and so deprive it of any value as a means for pursuing a purpose. A law that permitted or mandated lying as a general practice would be self-defeating in this way and so incompatible with the transcendental principle of public right (as would a law permitting or mandating violence as a general practice). But that is not what the law of accessorial liability authorizes or demands. It neither mandates nor permits lying (or violence) as a general practice; it requires, more narrowly, that each of us not assist others in their pursuit of their criminal purposes. In the specific situation posited by Kant, this branch of the law does indeed mandate a lie. But the maxim of this action is not the incoherent and prohibited one of lying whenever that would seem an effective means to achieve one's purposes; it is, rather, the legally permitted one of using one's freedom, possibly including a lie, so as to hinder a hindrance to freedom, just as the maxim of one who uses force defensively is not the prohibited one of using force whenever that would appear to be an effective means to achieve an end but of using force, within the bounds permitted by law, to hinder a hindrance to freedom. Moreover, in this restricted context, the maxim is consistent with the transcendental principle of public right. Ann's announcing her maxim might indeed undermine Bailey's confidence in Ann's truthfulness, but in this particular situation, that would be the whole point: if Ann has some choice about what to say, the law requires her to say nothing that would be helpful to Bailey.

5. Conclusion: Saving Kant from Himself, One More Time

The usual approach to Kant's 'Supposed Right to Lie' is to save Kant from himself by showing that his claim that we have an exceptionless duty not to lie is not required by other parts of his moral philosophy.[28] I have

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

argued that Kant's need to be saved is even more urgent than usually supposed: the claim is not just implausible but in conflict with another aspect of his doctrine of right. His claim that there is an exceptionless duty not to lie is, in the very example he considers, inconsistent with his claim that there is an exceptionless duty to obey the positive law. If a murderer comes to your door asking about the whereabouts of your friend and you cannot avoid giving a straight answer, the Kant of the 'Supposed Right to Lie' says you must tell the truth, while the Kant of the *Metaphysics of Morals* and 'Theory and Practice' would say that you must lie in order to comply with the positive law. Moreover, both duties flow from the obligation to act so as to preserve the possibility of rightful relations among human beings. The juridical way out of this predicament is to recognize that, as has often been suggested, in this scenario the normally impermissible lie, like the normally impermissible use of violence, is defensive. There are occasions on which a lie, like the use of physical force, can be a hindrance to a hindrance to freedom and so rightful.

Notes

1 SRL, 8: 426. The major texts by Kant referred to in this article are 'On a Supposed Right to Lie from Philanthropy' (SRL); 'On the Common Saying: That may be Correct in Theory, But it is of No Use in Practice' (TP); 'Toward Perpetual Peace' (TPP); and *The Metaphysics of Morals* (*MM*). All of these texts are collected in Kant (1996), from which the translations are taken, and are referred to by the volume and page number of the Royal Prussian Academy edition, as they appear in the margins of the Cambridge edition.

2 As do Sussman (2009), Wood (2008), Weinrib (2008), Varden (2010) and Mertens (2016).

3 Sussman (2009) offers the most developed version of this suggestion but see also Wood (2008: 246–7).

4 Compare *MM*, 6: 431, though the example given there is connected with the speaker's duty of virtue rather than his duty of right.

5 Commentators who situate the SRL in Kant's doctrine of virtue include Paton (1954), Dietrichson (1964), Sedgwick (1991), Korsgaard (1996: 133–58), Schapiro (2006), Herman (2011), Shiffrin (2015: ch. 1).

6 On the ethical duty of truthfulness, see *MM*, 6: 429–31.

7 The duty of truthfulness therefore has no application to human activities within which a statement that is literally false does not count as a lie because there is something about the context in which the duty to be truthful is in some sense suspended or inapplicable, typically because no one would take the speaker to be asserting a fact or because no one would take the listener to believe the fact: telling stories, putting on plays, making movies or (to take Kant's own example) using formulas of politeness (*MM*, 6: 431; and see Shiffrin 2015: 18–19).

8 Allen Wood proposes a much more restrictive reading, according to which the statements Kant is concerned about are 'declarations', that is 'statement[s] made by another on whose truthfulness I am authorized to rely' (Wood 2008: 243); he therefore proposes that the lies at issue in the essay are those falsified declarations 'that occur in a context where others are warranted or authorized in relying on the truthfulness of what is said,

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

and make the speaker liable by right ... if what is said is knowingly false' (241). See also Mahon (2009). But Kant explicitly states that his concern is with 'a lie, defined merely as an intentionally untrue declaration to another, [which] does not require what jurists insist upon adding to their definition, that it must harm another' (SLR, 8: 426).

9 This paragraph essentially follows the interpretation developed by Ripstein (2009). See also Byrd and Hruschka (2010); and, in relation to the 'Supposed Right to Lie' in particular, Weinrib (2008: 148–50), Sussman (2009: 231–3), Varden (2010: 407–8).

10 Kant offers five such examples, two linked examples relating to the right of a state (domestic public law) and three relating to the right of nations (public international law). He begins to speak of a sixth example relating to cosmopolitan right, but he provides no exposition of this example on the ground that 'its maxims are easy to state and to evaluate' (TPP, 8: 384).

11 TPP, 8: 382–3; TP, 8: 303; *MM*, 6: 320. The example of the rebel shows the need for a rider about anticipated juridical effect; otherwise Kant's claim is too readily defeated by history. The leaders of the Russian and Chinese revolutions, among many others, did not hesitate to publicly announce their purpose and were nevertheless successful in attaining it (compare Wood 2014: 106). What Kant was getting at, I suggest, is that an act is juridically wrongful if publicly acknowledging its maxim with intended juridical effect is impossible. And for Kant that is true even of successful revolutions because a revolution has no juridical effect unless and until it succeeds (*MM*, 6: 323).

12 Regardless of their success or failure, both of them will have failed in their ethical duties, but that is another issue: see e.g. *MM*, 6: 219–20 on the difference between the ethical and the juridical understanding of acting rightly in the fulfilment of a contract.

13 Weinrib (2008: 152). See also Shiffrin (2015: 9–10, 23–4) and Varden (2010: 409), though Varden interprets the 'Supposed Right to Lie' as being specifically focused on the legal punishability of lying.

14 The point can be made regardless of whether one takes the duties in question to be those of right or those of virtue. See e.g. Korsgaard (1996: 146), Herman (2011: 108), Sussman (2009: 240–1).

15 '... in telling the truth he himself does not, strictly speaking, *do* the harm to the one who suffers by it; instead, an accident *causes* the harm. For he is not at all free to choose in the matter, because truthfulness (if he must speak) is an unconditional duty' (SRL, 8: 428).

16 Shiffrin (2015: 34); see also Mertens (2016: 45).

17 Ormerod (2011: 192–204); Dubber (2002: 110–20), discussing the Model Penal Code, §2.06(3); *R. v. Briscoe*, 2010 SCC 13, interpreting *Criminal Code*, RSC 1985, c. C-46, s. 21(1)(*b*); Stefani et al. (2003: 281–92), discussing *Code pénal*, art. 121-7.

18 It is possible that if Bailey's compulsion is of a certain kind, Ann might be entitled to a defence of duress, but that possibility is tangential to the argument I make here.

19 The classic example is that of the accomplice who acts as a lookout but whose services are, in the event, not required. See *Larkins v. Police*, [1987] 2 NZLR 282 at p. 288; *R. v. Alcantara*, 2015 ABCA 258. This is consistent with Kant's view about responsibility for consequences for wrongful acts (SRL, 8: 427).

20 There are, however, some who accept it: Ripstein (2009) and Weinrib (2016).

21 See Sussman (2009: 239–43) and Wood (2008: 246–7). Versions of this suggestion founded in Kant's ethical doctrine rather than his doctrine of right include Schapiro (2006: 52–3), Paton (1954: 201), Korsgaard (1996: 137), Shiffrin (2015: 32) and Herman (2011: 109).

22 *MM*, 6: 232. The debtor is under a duty of virtue to repay, but that duty plays no role in the creditor's right to coerce him. The most the creditor could do with the duty of virtue is to 'remind the debtor that his reason itself puts him under obligation to perform' (ibid.).

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

23 As many commentators have noted, Kant seems to have accepted it in his discussion of the 'necessary lie' during his 1784/85 lectures on ethics as recorded by Collins: see Kant 1997 (27: 448). Assuming that Collins accurately reported Kant's view as of the mid-1780s, I take the 'Supposed Right to Lie' (1797) to represent his settled position on this question and to implicitly reject the doctrine of the 'necessary lie'. The idea of the necessary lie does not appear in the corresponding passages of the lectures recorded by Vigilantius in 1793: see Kant 1997 (27: 699–701).

24 On the defender as a temporary state agent, see especially Thorburn (2008).

25 Consider, for example, President Kennedy's lie about the deal that concluded the Cuban Missile Crisis: a lie that, perhaps, saved the world.

26 I think we must assume this possibility to make sense of quite a lot of what Kant says about law and the state, notably, his conception of 'the moral politician' in 'Theory and Practice', although it is in serious tension with his apparently stark distinction between enforceable duties of right and unenforceable duties of virtue (*MM*, 6: 231). But that is a topic for another time.

27 Kant does not make this argument explicitly, but the transcendental principle of public right articulated in 'Perpetual Peace' fits well with the argument of the 'Supposed Right to Lie'.

28 See the sources cited in notes 2 and 5 above. A possible exception is Weinrib (2008); while he claims to offer merely an interpretation of the 'Supposed Right to Lie', his readers might be forgiven for inferring that he is one of the very few commentators who agrees with Kant's conclusion that it is always a juridical wrong to lie.

References

Byrd, Sharon and Hruschka, Joachim (2010) *Kant's Doctrine of Right: A Commentary*. Cambridge: Cambridge University Press.

Constant, Benjamin (1988) *De la force du gouvernement actuel de la France et de la nécessité de s'y rallier; Des Réactions politiques; Des Effets de la terreur*. Paris: Flammarion.

Dietrichson, Paul (1964) 'When is a Maxim Fully Universalizable?'. *Kant-Studien* 00, 143–70.

Dubber, Markus D. (2002) *Criminal Law: Model Penal Code*. New York: Foundation Press.

Herman, Barbara (2011) 'A Mismatch of Methods'. In Derek Parfit, *On What Matters* (Oxford: Oxford University Press), vol. 2, pp. 83–115.

Kant, Immanuel (1996) *Practical Philosophy*. Trans. and ed. Mary Gregor. Cambridge: Cambridge University Press.

—— (1997) *Lectures on Ethics*. Trans. Peter Heath, ed. Peter Heath and J. B. Schneewind. Cambridge: Cambridge University Press.

—— (1996) *Creating the Kingdom of Ends*. Cambridge: Cambridge University Press.

Korsgaard, Christine (1997) 'Taking the Law into our own Hands: Kant on the Right to Revolution'. In Andrews Reath, Barbara Herman and Christine Korsgaard (eds), *Reclaiming the History of Ethics: Essays for John Rawls* (Cambridge: Cambridge University Press), pp. 297–328.

Mahon, James Edwin (2009) 'The Truth about Kant on Lies'. In Clancy Martin (ed.), *The Philosophy of Deception* (Oxford: Oxford University Press), pp. 201–24.

Mertens, Thomas (2016) 'On Kant's Duty to Speak the Truth'. *Kantian Review*, 21, 27–51.

Ormerod, David (2011) *Smith and Hogan's Criminal Law*. 13th ed. Oxford: Oxford University Press.

Paton, H. J. (1954) 'An Alleged Right to Lie: A Problem in Kantian Ethics'. *Kant-Studien*, 45, 190–203.

Ripstein, Arthur (2009) *Force and Freedom*. Cambridge, MA: Harvard University Press.

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press

Schapiro, Tamar (2006) 'Kantian Rigorism and Mitigating Circumstances'. *Ethics*, 117, 32–57.
Sedgwick, Sally (1991) 'On Lying and the Role of Content in Kant's Ethics'. *Kant-Studien*, 82, 42–62.
Shiffrin, Barbara V. (2015) *Speech Matters*. Princeton: Princeton University Press.
Stefani, Gaston, *et al.* (2003) *Droit pénal générale*. 18th ed. Paris: Dalloz.
Sussman, David (2009) 'On the Supposed Duty of Truthfulness: Kant on Lying in Self-Defense'. In Clancy Martin (ed.), *The Philosophy of Deception* (Oxford: Oxford University Press), pp. 225–43.
Thorburn, Malcolm (2008) 'Justifications, Powers, and Authority'. *Yale Law Journal*, 117, 1070–1130.
Varden, Helga (2010) 'Kant and Lying to the Murderer at the Door ... One More Time: Kant's Legal Philosophy and Lies to Murderers and Nazis'. *Journal of Social Philosophy*, 41, 403–21.
Weinrib, Jacob (2008) 'The Juridical Significance of Kant's "Supposed Right to Lie"'. *Kantian Review*, 13, 141–70.
—— (2016) *Dimensions of Dignity*. Cambridge: Cambridge University Press.
Wood, Allen W. (2008) *Kantian Ethics*. Cambridge: Cambridge University Press.
—— (2014) *The Free Development of Each*. Oxford: Oxford University Press.

https://doi.org/10.1017/S1369415419000219 Published online by Cambridge University Press