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On Kant's Duty to Speak the Truth

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Abstract

In 'On the Supposed Right to Lie from Philanthropy', Kant defends a position that cannot be salvaged. The essay is nonetheless important because it helps us understand his philosophy of law and, more specifically, his interpretation of the social contract. Kant considers truthfulness a strict legal duty because it is the necessary condition for the juridical state. As attested by Kant's rejection of Beccaria's arguments against the death penalty, not even the right to life has such strict unconditional status. Within the juridical state, established by the social contract, the (single) innate right to freedom is transformed into a bundle of merely positive rights, including the right to life. Understanding the reason for the rejection of 'the right to lie from philanthropy' thus helps us understand the, in a sense, 'positivist' character of Kant's legal philosophy. In conclusion, some suggestions are made to bring his position closer to our common moral understanding.

Keywords: lying, Kant's philosophy of law, right to life, social contract, Beccaria, legal positivism

1. Introduction

In 'The Wall', the French philosopher Jean-Paul Sartre tells the story of Pablo who fights in the Spanish civil war against the Falangists, under the leadership of Ramon Gris. Pablo has been arrested and awaits his execution. His captors, however, are keen to discover the whereabouts of Gris. In the morning, just before his execution, Pablo is made an offer: if he reveals Gris's hiding-place, his life will be spared. Pablo does not want to hand over Gris to his enemies, but 'confesses' that Gris is hiding in a nearby graveyard, although he knows that Gris is actually hiding at his cousin's house. The Falangists leave in order to search for Gris, in vain Pablo supposes; yet when they return he is suddenly released. He is then told that Gris has been found and arrested. It turned out that Gris had had an argument with his cousin and left the house and had hidden instead in the cemetery, where he was then caught. Pablo is left distressed (Sartre 1966).

Sartre refers here to a well-known, and rather infamous, essay by Kant 'On the Supposed Right to Lie from Philanthropy', in which a similar case of whether or not to turn someone over to the enemy is considered. Sartre leaves the question of Pablo's responsibility unanswered and ends the story simply with the protagonist's distress. Sartre's dissatisfaction with Kant's ethics is confirmed in his famous lecture 'Existentialism is a Humanism' (Sartre 1996).[1] Kant is wrong in thinking that the formal and the universal suffice for the constitution of morality; his principles are too abstract and they break down when it comes down to deciding on action. And this is precisely the case in Kant's essay:

> 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. … if you had lied and said that he is not at home, and he has actually gone out (though you were 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. (L, 8: 427)[2]

Kant's harsh verdict on the liar follows from his claim that truthfulness in statements that one cannot avoid is a duty to everyone, even to a murderer who asks whether a friend has taken refuge in our house. According to Kant the duty to speak truthfully, irrespective of the harm that is caused to another or to oneself, has to be regarded as the basis of all duties based on contract, as a sacred command of reason, and as unconditional (L, 8: 427, 429). Because this seems both counterintuitive and outrageous, Kant's position has generated considerable controversy.[3]

2. Saving Kant from Himself: Hans Wagner

Given that Kant's position is considered as (much) too rigid, those commentators who regard themselves as the most loyal to his work have tried to rescue his position by devising ways to accommodate the claim that one should always speak the truth to our generally shared moral intuition that it is wrong to hand over one's friend to a murderer. I will discuss two representative examples of such an 'accommodation' and argue that they both fail. My first example stems from the classical German tradition of Kant scholarship and the second (§3) from the contemporary Anglo-Saxon tradition. Whereas the former focuses on the legal aspect[4] of Kant's claim, the latter emphasizes the moral aspect.[5]

In his classic essay on Kant against the supposed right to lie, Hans Wagner (1978: 69, 90–6) argues that Kant addresses here a legal problem and not

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an ethical one. Basically, Kant is right in holding that the possibility of a legal order is undermined if one's duty to speak truthfully would be made conditional upon whether the other person had a right to this truthfulness, or – to put things differently – if some principle of philanthropy could overrule this duty of law. The duty to truthfulness is the necessary condition for a legal constitution as such. According to Wagner, permitting lies on the basis of benevolence would indeed invalidate 'the basis of all duties to be grounded on contract' and this would make 'the source of right unusable' (L, 8: resp., 427, 426). Therefore, Wagner suggests, Kant's essay does not revolve around a specific casuistic question of whether the murderer at the door deserves a truthful answer, but on establishing 'truthfulness' as the 'condition of possibility' of a legal order as such. Any 'right' to lie grounded in philanthropy must be rejected as incompatible with the legal order. Since practical reason requires us to leave the state of nature and to enter into a juridical state and since this is only possible by means of (truthful) contract of all with all, a supposed right to violate the duty to truthfulness would endanger the lawful condition between men.

Later (§7) it will become clear that I agree to a large extent with Wagner's analysis of how Kant understands 'the legal condition'; I differ, however, in not accepting that there is a way of escaping the harsh consequences that Kant has in mind for those who, like Pablo, lie in the face of murderers and yet inadvertently lead them to their victims. According to Kant, people are criminally accountable for such a crime if they violate the duty to speak the truth. Since Kant also holds that not only murderers must suffer the death penalty but also their accomplices (*MdSR*, 6: 334), it seems that the liar who inadvertently helped a murderer attain his goal must face death. In the introduction to the Doctrine of Law, Kant makes it abundantly clear that the law has to do with external actions and not with internal motivations (*MdSR*, 6: 231). Wagner argues that such a harsh conclusion is unwarranted because Kant provides us with a solution, namely, the principle of necessity as also endorsed in the introduction to the Doctrine of Law.[6] According to this principle, a deed can be at the same time illegal in an objective sense and unpunishable in a subjective sense. Kant refers to the well-known example of the plank of Carneades where one person pushes another off the plank in order to save his own life. This person clearly violates (criminal) law but he cannot afterwards be punished for this crime because at the time the law had no deterrent effect, since 'a threat that is still uncertain cannot outweigh the fear of an ill that is certain'. Similarly, according to Wagner, lying is not 'inculpable' (*MdSR*, 6: 235–6) – it is objectively wrong to lie – but the pressing circumstances make this lie subjectively excusable, so that the liar cannot be punished. The liar

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deliberately violated the duty to truthfulness, but he was confronted with 'another and equally important' duty, namely, the duty to protect someone from an unjustified threat. Therefore one should, so Wagner writes, grant such a person 'the right' to try to prevent the murderer from obtaining his murderous aim. If the liar is prosecuted later, he cannot justify himself by reference to 'the supposed right to lie from philanthropy' but by reference to 'the right of necessity'.

Wagner provides us with an elegant way out of the dilemma, but his attempt to have his Kantian cake and eat it is not convincing. First, Kant's essay provides no textual evidence for the claim that our liar could indeed invoke the – in any case 'ambiguous' (*MdSR*, 6: 233) – right of necessity. As already noted, the liar should be prosecuted as 'the author of [the victim's] death' and 'pay the penalty', 'however well-disposed he may be', if the murderer succeeds in his murderous aims as a result of that lie (L, 6: 427).[7] Second, Wagner is not clear as to whether the right of necessity, if acceptable at all, would lead in this case to an excuse or a justification. In the case of the plank of Carneades, there is little doubt that necessity only amounts to an excuse. The person who saves his life by pushing an innocent person off the plank is certainly not justified in doing so. There can only be an excuse for killing an innocent person: the person found himself in a life-threatening situation and therefore the threat attached to the prohibition against violently taking the life of another person was ineffective.[8] The fact that he should not be punished does not imply that the deed was not wrong (*MdSR*, 6: 236; 'the deed is not inculpable'). The situation of the benevolent liar is however, according to Wagner, entirely different: the liar has the 'right' (of necessity) to try to prevent an unjustified murder by lying. He is confronted, Wagner writes, with the mere *prima facie* duty of truthfulness but also with an equally important duty to protect his friend. This must mean that his act is justified, as our moral intuition has it. It would be incorrect to qualify the friend's act of lying as excused rather than justified: it is the 'right' way to protect a friend from an unjustified attack.

Third, Wagner describes the situation as a conflict between two equally strong duties. Kant, however, explicitly rules out such conflicts. Since two practical rules cannot be necessary at the same time, 'a collision of duties and obligations is inconceivable' (*MdSR*, 6: 224).[9] The title of Kant's essay confirms this: it discusses the *alleged* right to lie from 'Menschenliebe', i.e. from philanthropy. The person confronted with the murderer at the door falsely represents the situation if he understands it as a conflict between two equal duties. Rather, the duty to speak the truth is a perfect or strict duty

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(of law) to others whereas the duty of benevolence (i.e. to care for the well-being of the friend) is merely an imperfect or wide duty (of virtue). In such cases, the 'priority rule' applies so that strict duties such as the duty to speak the truth take precedence over wide duties such as the duty of benevolence to protect the friend. This is precisely the striking feature of Kant's presentation of the case: interpreting the duty to protect one's friend as (merely) a duty of benevolence is contrary to moral intuition.

3. Saving Kant from Himself: Christine Korsgaard

Another effort to save Kant from himself is made by Christine Korsgaard. The argument in her essay 'The Right to Lie: Kant on Dealing with Evil' consists of two steps. The starting point is a reflection on the different formulations of the categorical imperative. According to Korsgaard, these formulations lead to different answers to the question of whether it is ever permitted to lie under the circumstances of Kant's case. The formula of the universal law seems to lead to a permissive answer: because the murderer himself must deceive you in order to receive a true answer, it seems 'permissible to lie to deceivers in order to counteract the intended results of their deceptions'.[10] Yet both the formula of humanity as end in itself and the formula of the kingdom of ends point in a different direction: deception and coercion are the most fundamental forms of wrongdoing to others (Korsgaard 1996: 140). Since lying to a murderer means deceiving him and using him as a means to the end of protecting the friend – an end to which he would not consent – lying must be wrong. It looks therefore as if the formulas of humanity and kingdom of ends narrow down any options still open on the basis of the universalizability formula: it is indeed prohibited to lie to a murderer. The difference between the three formulas of the categorical imperative alone can therefore not solve the dilemma we face when reading Kant's essay.[11]

According to Korsgaard, a second step is therefore needed to accommodate Kant's insistence on telling the truth to our intuition that it is right to lie to a murderer. This step consists in invoking Rawls's distinction between ideal and non-ideal theory. This enables us to distinguish between the ways in which we have to act under ideal and non-ideal conditions. Single-level theories like Kant's do not: the formula of the kingdom of ends obliges us to act as if we live in such a kingdom even though we do not. The humanity formula obliges us to act morally whatever the (bad) consequences, for which one is then supposedly not responsible. But this cannot be correct: 'it seems grotesque simply to say that I have done my part by telling the truth and the bad results are not my responsibility' (Korsgaard 1996: 140–50). Here the distinction between ideal and non-ideal theory helps: the formula

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of the kingdom of ends and that of humanity as an end in itself provide us, according to Korsgaard, with 'the ideal which governs our daily conduct'. But when we are dealing with evil we may, so she holds, 'depart from this ideal' in order to prevent ourselves from becoming a tool of evil (Korsgaard 1996: 151). Under evil circumstances we are allowed to rely on the more permissive formula of the universal law. This formula instructs us not on what we ought to do with an eye to the ideal but on what we in any case should not do.

The combination of the different formulations of the categorical imperative and the distinction between ideal and non-ideal theory leads Korsgaard to conclude that it is not categorically prohibited to lie to someone who has already deceived us (1996: 136). Korsgaard's analysis is ingenious, but not without serious problems. First, her way of solving the dilemma builds on an alleged difference between the three formulas of the categorical imperative. This, she admits, 'impugns Kant's belief that the formulas are equivalent' (Korsgaard 1996: 143). Kant holds that there is only one single categorical imperative (*G*, 4: 421); the different formulas represent the 'same law' and Kant recommends that from the moral perspective we proceed in accordance with the strict method, i.e. relying on the universal law formula (*G*, 4: 436–7). Yet it is precisely this formula that authorizes us, according to Korsgaard, to lie in the face of a murderer. Kant, however, holds that the duty to speak the truth is not valid only with respect 'to one who had a right to the truth' (L, 8: 425). This is Constant's position, which Kant explicitly rejects in the essay.

The second problem with Korsgaard's solution lies in her description of the position of the 'moral' liar: 'morality itself sometimes allows or even requires us to do something that from an ideal perspective is wrong' or, elsewhere, 'when dealing with evil circumstances we may depart from this ideal' (as provided by the formula of humanity) (Korsgaard 1996: 135, 151). This resembles Wagner's position: giving a false answer is under the circumstances excusable, but not justified. Yet most people would consider the act of protecting a friend by telling a lie not as excusable, but rather as doing the right thing. Neither Wagner's analysis nor that of Korsgaard captures precisely the fact that lying seems justified in this case. In my view, their efforts to save Kant therefore fail. Perhaps even more importantly, both interpreters do not provide the exact reason why Kant insists categorically on the duty to tell the truth, even when encountering a murderer at one's door. It is my aim here to uncover this reason. This requires a fresh approach, including a detour in order to make clear how exceptional Kant's position is with regard to lying, when compared with other strict duties.

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4. Strict Duties to Others

In my view, a new approach is needed in order to understand the difficulty raised by Kant's essay: why does the strict duty to others to speak the truth have a special status and why is this duty 'more strict', as we will see, than other 'strict' duties that we have vis-à-vis others and ourselves, especially with regard to respecting life? Discussing these duties, Kant emphasizes the respect of life as a general rule, but he allows that this rule can be set aside – in exceptional circumstances – because of other, morally more weighty considerations. Why do these duties with regard to life allow of certain exceptions, but not the duty not to lie? Why is not lying for Kant more important than not killing? This is astonishing, because the Doctrine of Law starts out – with regard to lying – with a position that is not special at all. According to Kant, one should distinguish between situations in which I am permitted to communicate my thoughts to another person whether they are true or not (it is up to the hearer to believe me or not) and situations in which it is not permitted to lie because this 'kind of untruth' would violate the right of another person. Only when I violate the right of another am I properly speaking 'lying' (*MdSR*, 6: 238 and note). Why does the situation of the murderer at the door belong to the second category and not to the first? This is precisely Constant's point: why would the murderer be entitled to a true answer? Why should my lying to him be conceived of as a violation of his 'right' (even if I do no wrong to him: L, 8: 426) and thus as a violation of my strict duty to him? What makes this strict duty special in comparison with other strict duties?

Classically, Kant distinguishes between strict duties, to others and to oneself, and wide duties, to others and to oneself (e.g. *MdSR*, 6: 395). Whereas strict duties do not allow for any exceptions, the wide duties involve judgement. The reason for 'latitude' in the latter is simple: while it is my (wide) duty to promote the happiness of others and to promote my own perfection, it is often far from clear what one ought to do to promote someone else's happiness or to perfect oneself; hence the need for judgement. What one is required to do in the case of strict duties is always clear. According to Kant's 'Lügen' essay the duty to speak the truth is a strict duty and thus something I owe to everybody, irrespective of his standing. In order to contextualize this position, I will start by examining Kant's other writings in which we prominently find the strict duty to speak the truth, mostly but not always in the context of the duty to keep one's promises.

In *Groundwork*, Kant presents the case of someone who considers borrowing money knowing that he will be unable to repay. The question is whether it is permitted to make the false promise that the money

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will be repaid. Kant says no. The money lender would never consent[12] to lend the money if he knew that the borrower's promise was false. A false promise is non-universalizable: it can only succeed on the basis of a general acceptance of the institution of making and keeping promises. A deceiving, lying borrower accepts this institution as binding for everybody, in particular for the lender, yet claims for himself the exception. 'Theory and Practice' presents a person who has somebody else's property in trust. Imagine that the owner dies, his heirs are ignorant of the endowment and they are 'rich, uncharitable, thoroughly extravagant and luxurious'; returning the deposit would make little or no difference to their lives. Imagine as well, writes Kant, that the trustee

> through no fault of his own, has at this very time suffered a complete collapse in his financial circumstances, and has around him a miserable family of wife and children, oppressed by want, and knows that he could at once relieve this distress if he appropriated the pledge entrusted to him. (TuP, 8: 286)

Does he have the right to keep the deposit, from philanthropy so to speak? Kant unequivocally states that the deposit must be returned. As in (as henceforth) 'Lügen', Kant presents this case as a clash between the strict duty to others, i.e. to return the deposit, and the wide duty to others, i.e. to care for family members. Because the duty that I have towards 'my miserable family of wife and children' is merely a wide duty to further their happiness,[13] the strict duty of justice has priority. As a result, no genuine conflict of duties arises.

There is also an intriguing case in *Critique of Practical Reason*. Here Kant asks us to imagine a prince who demands from one of his subjects, on the threat of immediate execution, to give 'false testimony against an honourable man whom the prince would like to destroy under a plausible pretext' (*KprV*, 5: 30). What should he do? According to Kant, he must refuse to give such false testimony: no one has the right to give false testimony for the 'philanthropic' reason that this might save one's life. It has been argued (Neiman 2008) that saving or defending this 'honourable man' against false allegations is for Kant the crucial moral consideration. But is it? According to Lügen, 'truthfulness in statements that one cannot avoid is a human duty to everyone, however great the disadvantage to him or to another that may result from it' (L, 8: 426). The reason why 'this subject' ought not to give 'false testimony' is that it would be a lie, not the saving of an innocent man. Duty is to speak the truth.

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It is nonetheless intriguing that Kant seems to consider the strict duty not to give false testimony morally decisive here, and not the duty to defend the life of this 'honourable man' against false allegations and a malicious prince. Along similar lines, it is intriguing that it is not my primary duty to defend my friend against the attack of a 'murderer', but to refuse to give 'false testimony'. Why is the emphasis in both cases on the strict duty to speak the truth, whatever the consequences (presumably positive for the honourable man and negative for my friend), as if it is irrelevant what happens to these lives, endangered by unwarranted accusations and murderous intentions? Matters are complicated here because Kant seems to accept self-defence and defending others, both collectively and individually, as morally justified.[14] If indeed citizens of a state have the right to defend themselves collectively against attacks from without (ZeF, 8: 345), it seems that a person has a similar[15] right, individually, to defend a fellow subject against the unjustified threats of a prince or a friend against a murderer. Again, why is the prohibition to lie decisive for Kant and not the duty to defend those clearly innocent lives? According to *Critique of Practical Reason*, the prince seeks a 'pretext' for destroying the honourable man; according to Lügen, the person at the door is a 'murderer' (L, 8: 425, 427, 'bent on murder'). It is clear that neither the prince nor the murderer at the door are acting legally, e.g. in seeking to impose a legitimate death penalty on the honourable man or in murdering my friend.[16]

Even though the morally salient matter in these two cases seems for us to be situated in the fact that presumably innocent lives are under threat, Kant hardly hints at the duty to defend those others, but insists rigorously on the strict duty (to others) to speak the truth. Apparently, this duty allows no exceptions. It is puzzling that the defence of others, in modern parlance their right to life, is not Kant's main consideration, which suggests that life itself is for Kant not a supreme value. This is confirmed when we turn to the strict duty to oneself. Here we will encounter a similar result: even though Kant's *Groundwork* (*G*, 4: 422) presents the prohibition on suicide as parallel to the prohibition on lying, the strict duty to self to respect one's own life allows of exceptions (§5). It is not categorically required to respect one's own life (or the lives of others), yet it is never permitted to deviate from the strict duty to others to speak the truth, even if it would save the life of one's innocent friend.

5. Strict Duties to Self: Respecting one's own Life

In Kant's ethical writings one finds a variety of reasons for opposing suicide (Wittwer 2001).We find the religious perspective, according to which suicide is prohibited by 'God', and the sociological perspective,

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according to which any 'acceptance' of suicide would have a pernicious effect on society (whoever does not value his own life will not value the life of others and is thus capable of committing the most horrible crimes). But decisive for Kant is that it is impossible to universalize the maxim on which suicide is based: the maxim of someone who is sick of life and considers bringing an end to his life can never become a universal law of nature (*G*, 4: 422). Respecting one's own life is for Kant a strict duty to self.

Many commentators have noted that Kant's argument is problematic because it is based on nature, i.e. the contradiction supposedly lies in nature itself: 'a nature whose laws it would be to destroy life itself by means of the same feeling whose destination it is to impel towards the furtherance of life would contradict itself' (*G*, 4: 422). Imagine that nature presents us, as it does, with cases of (animal) suicide. Further, what would be contradictory if all people were to commit suicide? Therefore Kant's proper 'argument' against suicide, commentators argue, is situated in what could be called the perspective of morality as such.[17] Suicide is prohibited because 'to annihilate the subject of morality in one's own person is to root out the existence of morality itself from the world' (*MdST*, 6: 423). Suicide conflicts with every person's unconditional duty for moral self-preservation.

However, circumstances may arise in which the deliberate choice for death is permitted according to Kant, not merely as excusable, but even as justified. This is not so remarkable, when looking at the precise question Kant poses in *Groundwork* (and elsewhere), namely, whether suicide is permitted when a person feels sick of life, i.e. when one is tempted to choose death over life on the basis of self-love. Here Kant's answer is a clear no: morality cannot be based on self-love. The point of prohibiting suicide out of self-love is precisely that the 'strength of soul not to fear death and to know of something that a human being can value even more highly than his life' should convince him that he should not kill himself. Man is a 'being with such powerful authority over the strongest sensible incentives' (*MdST*, 6: 422).

Matters are, however, for Kant entirely different in the admittedly rare cases of life and death where morality itself seems at stake. Morality does not require us to respect or value our physical life under all circumstances. In the exceptional cases of tension between the physical life of a human being and morality, opting for suicide can be the right thing to do. In the *Lectures on Ethics* Kant presents, like many philosophers and theologians, Cato's suicide as a good suicide (Goodman and Soni 2012: 2). By committing

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suicide, Cato prevented Caesar from killing him and thus from the disastrous effect that this killing would have had on the resistance of the people of Rome against Caesar. Although Cato's behaviour according to Kant would have been even more 'heroic' had he endured Caesar's torments instead of preventing them by suicide, this still is an example of a justified suicide (*Vorlesungen zur Moralphilosophie*, Kant 2004: 218–24). Kant seems to deny that there are other examples (*MdST*, 6: 422), but a closer look at his texts reveals quite a few other cases in which the choice of death is presented as honourable (Pinzani 2015) because here a person could have saved his life only at the cost of dishonourable actions.

In the Doctrine of Law, Kant mentions the Scottish rebel Balmerino (and others), who was offered the choice between death and convict labour. As a 'man of honour' he chose 'death' whereas a scoundrel would have chosen convict labour (*MdSR*, 6: 333). This case is remarkable not only because Balmerino's choice of death is apparently not a violation of his strict duty not to commit suicide, but also because he participated in the Scottish rebellion and thus he must have been, unlike Cato, a criminal: rebels are according to Kant great political criminals who deserve in principle execution as their punishment (TuP, 8: 301). Perhaps it could even be argued that by choosing the path of rebellion Balmerino had already violated the strict duty to self, namely, by exposing himself to the risk of being executed. Does the reach of the prohibition of suicide include the prohibition of exposing oneself to situations in which one risks death as a punishment? This is maybe the idea behind Kant's remark that a murderer 'chooses' his own death by killing another person (*MdSR*, 6: 332; see Ataner 2006). In this context, it is noteworthy that Kant does not seem to understand engaging in a duel, and thus voluntarily accepting the risk of being killed, as a violation of strict duty to self.[18]

Although the Doctrine of Virtue formulates a straightforward prohibition of suicide, it introduces 'casuistic questions' in which Kant seems to endorse Curtius's decision to choose death in order to save his country; he finds it justifiable that Frederick the Great carried a fast-acting poison in case of being captured alive by the enemy; he seems to praise the man who was bitten by a dog and killed himself in order to prevent harming others because of hydrophobia; and he accepts that a person puts himself in mortal danger by having himself vaccinated (*MdST*, 6: 423–4). It might be argued that these casuistic examples should not be taken too seriously. Yet the intriguing case of *Critique of Practical Reason*, discussed above, confirms that honour should override the duty of self-preservation. First, Kant invites us to imagine a person of 'lustful inclination' who claims that it is quite

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impossible for him to resist (sexual) temptation if the opportunity arises. But given the opportunity to gratify his lust in a brothel at the cost of being hanged immediately afterwards, it soon turns out that his temptation was not so irresistible after all. However, second, if we imagine a person who is asked to give false testimony (against an honourable man) in order to escape immediate execution, we might not know what he would do, but we know that he ought to value the moral duty not to give false testimony higher than life (*KprV*, 5: 30). According to Kant, this is not a conflict between two strict duties, self-preservation and refraining from lying. In conformity with the Lügen essay, Kant argues that one ought not to lie, not even at the cost of losing one's life. Using Rawls's formulation: Kant's doctrine excludes suicide for reasons solely based on our natural inclinations, but it is not forbidden whatever the reasons (Rawls 2000: 193).[19] Kant's prohibition of suicide is not based on the value of life as such, but of human life as the 'bearer' of morality.

6. The Right to Life

In one sense, this short examination of Kant's position with regard to strict duties to others and to oneself has not brought us much further: it merely made the categorical prohibition against lying more remarkable. According to Kant it is sometimes permitted, in cases of self-defence, to take someone else's life and, when the common good and one's honour is at stake, to take one's own life, but it is never permitted to lie when this would bear upon the rights of others (*MdSR*, 6: 238 n.), not even when an innocent life is in danger. In another sense, however, this outcome is very helpful. Even if we do not yet understand the special status of the duty to speak the truth, the basis of the prohibition against taking a life is now clear: suicide is prohibited because it roots out, in one's own person, the existence of morality from the world (*MdST*, 6: 423); this surely must also be the basis of the duty to respect the life of others. Conceiving of human beings as 'bearers of morality' suggests that this duty must for Kant be at the core of what we owe to others.

The moral history of mankind confirms how central the duty to respect each other's life is. In the Ten Commandments, the duty not to kill is in particular much more prominent than the prohibition on giving false testimony against one's neighbour.[20] In present human rights law, the right to life is often considered the most fundamental right, on which the existence of all other rights depends.[21] Rawls presents the right to life as the first on his 'shortlist' of internationally recognized, urgent human rights (Rawls 1999: 65). For the state, this right entails not only the negative duty not to kill, but also the positive duty to actively protect human life (Fredman 2008: 74). But while at

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present a plethora of human rights exists, it seems that no such thing as a human right to truthfulness exists.

By contrast, Kant's philosophy of law posits at a very early stage, in the context of introducing freedom as the 'only one innate right', the prohibition of the 'kind of untruth' that 'directly infringes upon another's right' (*MdSR*, 6: 238 n.), but it remains rather silent with regard to the status of the right to life or the prohibition on taking someone else's life. Kant does emphasize the importance of establishing a *status juridicus* so that the 'common interest of all' (*MdSR*, 6: 311), such as life and property,[22] is protected. Therefore murder is strictly prohibited. But it has already been noted that Kant accepts quite a few instances of the deliberate taking of someone else's life. Cases such as lifeboat situations fall into the category of excusable killings; killings in self-defence also seem justifiable: if it is excusable to save my life by killing in the face of an innocent threat, it must surely be permissible to defend myself with lethal force against a culpable threat.

It could be argued that these instances give us no indication of the status of the 'right to life' within Kant's legal philosophy. These cases take place outside the law: quite literally (as in lifeboat situations) or figuratively (as in situations where one's life is under immediate threat). Here individuals have no option but to take the law into their own hands. But even within Kant's *status juridicus*, 'life' does not have the same high status that it occupies in contemporary liberal societies. Within a Kantian legal order there are at least three cases in which the right to life is not prioritized. The first case has already been mentioned: the killing of an opponent during a duel. The second is a mother's killing of her child that is born out of wedlock. According to Kant, the state is unable to prosecute and punish these 'murderers', because 'it seems' (*MdSR*, 6: 336) that these killings take place in 'the state of nature' too: a child that is born outside the law (of marriage) lacks, therefore, the protection of the law; a junior officer who is insulted cannot find adequate compensation for the insult within the criminal law and therefore searches for redress by means of a duel (*MdSR*, 6: 336). But this is not convincing: both mother and officer live within a legal community in which human beings no longer have the right to do 'what seems right and good' to them (*MdSR*, 6: 312) on the basis of shame and injured honour. Surely a regime of punishments can be devised that in the long run will stop mothers from considering the killing of their child (in combination, perhaps, with a generous system of foundling homes, *MdSR*, 6: 326–7), or stop officers from challenging each other to embark on a duel. If the right to life is of the utmost importance, this would be a (positive) duty of the state.

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Even if we accept Kant's unlikely interpretation of these two cases as taking place in the state of nature, there is a remaining, pivotal case which shows Kant's understanding of (the right to) 'life': the death penalty. It has been argued that Kant is not conceptually committed to this institution as part of his retributive theory of criminal law (e.g. Höffe 1994: 238–40). Nonetheless, since capital punishment is nowadays seen in many legal systems, e.g. within the Council of Europe, as incompatible with the right to life, it is necessary to examine closely Kant's defence of the (legitimacy of the) death penalty. It will shed light on his conception of the social contract and therewith on the importance he attributes to the prohibition against lying. Kant's defence of the death penalty takes place in the context of a rejection of Beccaria's two arguments against it (Beccaria 2009: 72–81). Kant is not impressed by either argument. That the death penalty has no deterrent effect does not convince: punishment is not about deterrence but about what we now call just desert.[23] Nor is Kant impressed by the argument based on Beccaria's understanding of the social contract. According to this argument, the state is not authorized to apply the death penalty. The powers of the state are derived from the powers of its constituent elements, the citizens, by means of the social contract understood as a process of transfer. These powers do not include the power to apply the death penalty, simply because citizens cannot transfer what is not theirs. Since no man has according to Beccaria the right to kill himself, the right to end his life – the 'greatest of all goods' – cannot be transferred to the state (Beccaria 2009: 72–82). The state is simply not empowered to kill. This would also mean that the right to life does not include the right to end one's own life, as in euthanasia. Beccaria would probably argue, as e.g. Locke (Locke 2008: 216–20; see Griffin 2008: 213–16), that human beings have to await the natural end of their lives.

Kant too denies, as we saw, that human beings can arbitrarily dispose of their lives,[24] but from this the illegitimacy of the death penalty does not follow. Beccaria's argument is 'sophistry and juristic trickery' (*MdSR*, 6: 335) based on a superficial and ultimately wrong understanding of the social contract. Beccaria's quasi-empirical understanding of the social contract suggests that no citizen could ever consent to capital punishment being applied to him. But a true understanding of the social contract would distinguish, says Kant, between the person who 'participates' in the social contract as co-legislator and the person on whom the death penalty is imposed because of a capital crime. Beccaria overlooks the crucial distinction between reasonable persons in their capacity as co-legislators and co-drafters of the criminal law on the one hand and empirical, not so reasonable, persons capable of committing crimes on the other.

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In their former capacity, persons legislate for themselves; in their latter capacity, they are subject to the law. In other words, the 'civil union' is not, as Beccaria suggests, concluded between empirical, concrete individuals, including possible criminals. According to Kant, to understand the nature of the social contract is to distinguish between the person who is part of the legislative body as 'homo noumenon' and the person who is subsequently submitted to this law as 'homo phaenomenon' (*MdSR*, 6: 335). The legitimacy of the death penalty does not depend on the consent of empirical individuals, but on the outcome, so to speak, of the deliberation between reasonable individuals. Since reason dictates the 'law of retribution', the 'homines noumena' would indeed legislate that 'every murderer must suffer death' (*MdSR*, 6: 332–3). This law is then promulgated for all 'homines phaenomena' and applied to those who commit murder.[25]

7. Kant's Understanding of the Social Contract

This distinction leads us straight back to Kant's insistence on the categorical duty to speak the truth, because 'entering' the juridical state is only possible on the basis of a mutual and sincere agreement between its participants. Kant's use of the concept of the social contract (*MdSR*, 6: 335) is a metaphorical way of saying just that. Given the difficulties within Kant scholarship on how to understand his idea of the contract,[26] this is a bold statement. However, the discussion of Beccaria suggests at least two findings. The first is uncontested, namely, that the social contract should not be understood, as Beccaria does, in an empirical or historical sense; if that were the case, the contract would remain hypothetical, and the validity of the law would become a contingent matter, dependent on the changing whims and desires of ordinary people (of the 'homines phaenomena', so to speak). Elsewhere, Kant confirms that the social contract does not exist as a fact, but as an *a priori* idea, which 'obliges every legislator to frame his laws in such a way that they could have been produced by the united will of the whole people' (TuP, 8: 297). For that reason Kant insists on the difference between all arbitrary unions between persons based on the contingent aims that they happen to share, and the obligatory idea of the social contract that all human beings ought to share, i.e. establishing a juridical state as an end in itself (TuP, 8: 289). Everyone has the duty to enter with all other human beings into the condition of the *status civilis* (*MdSR*, 6: 306). This contract should be concluded, according to the introduction to the Doctrine of Law, by every human being 'in terms of his humanity', i.e. by 'his personality independent of physical attributes (homo noumenon), as distinguished from the same subject represented as affected by physical attributes', as 'homo phaenomenon' (*MdSR*, 6: 239).

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When I now suggest – this is not uncontested – that the social contract symbolizes the idea of a mutual and sincere agreement between all participants, i.e. the idea of a mutual truthful promise of all participants to live under a system of law rather than in the state of nature, I find myself in line with Wagner's interpretation of the Lügen essay. Wagner too argued that truthfulness is seen by Kant as the 'condition of possibility' of the social contract (*Urvertrag*, Wagner 1978: 94) and thus of any legal order. My sole disagreement with Wagner concerns his way out of the moral conundrum by invoking the right of necessity. Decisive for Kant in the essay is not to solve this particular case, but how to conceive of the existence of the legal order as such.

This leads to the second finding from Kant's discussion of Beccaria, namely, the resemblance of Kant's position to that of Rousseau.[27] Famously, Rousseau argues that the social contract leads to a complete transformation of its participants: 'Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole' (1997: *Social Contract*, bk 1, ch. 6). Therefore Rousseau refuses to accept even the slightest modification of the clauses of the contract.[28] In his own vocabulary, Kant stresses this fundamental change as well: 'in accordance with the original contract, everyone (*omnes et singuli*) within the people gives up his external freedom in order to take it up again immediately as a member of the commonwealth, that is, of a people considered as a state (*universi*)' (*MdRS*, 6: 315).[29] Can this contract be modified, e.g. in cases of necessity? This is unlikely. Kant explicitly denies that the right of necessity can be invoked from within the state, but solely in order to prevent a catastrophe from without. He presents us with the case of a father who cannot invoke necessity in order to escape from his duty to hand his son over to the authorities if he commits a crime against the state (TuP, 8: 300 and note).

Understanding the social contract as the result of the unconditional, strict duty of everyone towards all others to bring about a completely transforming juridical state explains the difference between Rousseau and Kant on the one hand and Beccaria on the other. Both Rousseau and Kant consider murder as a very serious violation of and withdrawal from the social contract. According to Rousseau, 'we' consent to die if we become a murderer in order not to fall victim to a murderer. Therefore an individual's right to life is not unconditional within the juridical state: the right to life cannot be invoked to invalidate the death penalty, as Beccaria wrongly claimed. Furthermore, the social contract so understood suggests the

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following status of rights in general according to Kant. The result of (the idea of) the contract must be the transformation of freedom as the 'only original right of every man by virtue of his humanity' (*MdSR*, 6: 237) into a bundle of positive rights, i.e. rights that 'exist' (only) within the juridical state.[30] This means that my rights in general, especially my right to life and to freedom,[31] are (mere) positive rights, posited and acknowledged by the state under the condition that I as 'homo phaenomenon' live my life in accordance with the legal provisions with which I agreed as 'homo noumenon' and as set out by the social contract. As 'homo phaenomenon' I am therefore not legally empowered to challenge the legitimacy of positive law by invoking 'natural rights'. Kant does not acknowledge the right to life as a moral or as a human right that has priority over the state in order to challenge the legitimacy of the death penalty,[32] but only as a right within a specific positive legal order.

This interpretation, based on an analysis of Kant's critique of Beccaria, helps us explain one of the major difficulties in his legal and political philosophy, namely, the consistent denial of any right of resistance against the state. Without being able to go into detail here, it seems clear that Kant's emphasis on the citizen's duty of obedience is closely connected with this view of the social contract.[33] 'After'[34] the conclusion of the contract, citizens are 'no longer' allowed to invoke their understanding of what 'natural freedom' entails, but they have to obey the existing, positive legal order. They are obligated to respect each other's right to life, to property, etc. as specified by positive law.[35] To reason otherwise would undermine the stability and the determinacy of the legal order. Precisely for this reason, some commentators have argued that Kant counts as a legal positivist.[36] Although it is perhaps still safe to say that Kant somehow conceives of the moral law as the ultimate source of the validity of positive law,[37] citizens within a state do not in any case have the right to challenge the validity of the existing legal order on the basis of their understanding of morality. A citizen is merely permitted to make his opinions public 'on whatever of the ruler's measure seems to him to constitute an injustice against the commonwealth' (TuP, 8: 304). But this freedom of the pen should not be understood as the (moral) right[38] to consider a particular law as 'statutory lawlessness', to use Radbruch's famous terminology (Radbruch 1946). The state of nature can only be overcome when each and every person *reciprocally* (*MdSR*, 6: 256) gives up the prerogative to do whatever he sees as right and good; he has to submit himself as citizen to the situation in which the law alone determines what is right and good, even if that would run counter to his moral views. Any person who actively resists positive law threatens the very idea of law. Kant thus adopts what Waldron calls 'normative positivism'.[39]

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8. Conclusion

This brings us back to the Lügen essay. If the core of Kant's philosophy of law lies in his conception of the social contract, which must be based, so to speak, on a sincere and mutual agreement of all with all, it is not surprising that Lügen points at truthfulness as its condition of possibility. But what remains surprising is that truthfulness is (therefore) 'an unconditional duty which holds in all relations' (L, 8: 429). Why should every subsequent contract ('after' the original contract, so to speak), and indeed every contact between citizens, be truthful as well, including the situation in which a murderer bangs on my door and demands that I tell him where my friend is? This seems quite different from the earlier finding that citizens cannot invoke their understanding of what the moral law requires in order to challenge positive law. Why does Kant take here a seemingly additional step and require that all contracts and contacts should be truthful? The answer to this final question lies in Kant's rejection of Constant's claim that the unconditional duty to speak the truth would make society impossible, exemplified by the case of the murderer at the door that he, Constant, attributes to 'the German philosopher'. For this reason, Constant claims the opposite, namely, the existence of a 'right to lie' on the basis of philanthropy. Kant reconstructs this claim as follows: I do not have the duty to speak the truth to someone else, if this person has no right to my truthful answer because of the harm this would bring to a third person. In other words, I have a right to falsehood in such cases. However, accepting this right would in Kant's view make society impossible and thus the opposite must be true: the duty to speak the truth is unconditional. This does not mean that I would commit an injustice to the murderer if I make a false statement to him, but I would nonetheless violate the duty on which society is based. For it is impossible, according to Kant, to imagine a society, let alone a stable one, if all contracts would be accompanied by a legally acknowledged proviso that they will not be binding whenever either of the parties considers the fulfilment of the terms of the contract as a violation of the interests of third parties. Such a proviso would not only make such contracts impossible but also destroy the contract on which society itself is based. To think, e.g. with 'the French philosopher', that we are only obliged to speak the truth to those who are worthy of it, would ensure that 'all rights that are based on contracts come to nothing and lose their force' (L, 8: 426). For Kant, the stakes in his little essay are indeed as high as in the Doctrine of Law: 'the supreme rightful condition' would be endangered without a mutual and sincere agreement between its participants. Here: without 'the duty of truthfulness'. Refusing to be truthful to a murderer amounts to inflicting 'a wrong on humanity' (L, 8: 429, 426).

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No other conclusion is possible: Kant's philosophy of law does not allow any right to lie from philanthropy.

Yet understanding Kant's rejection of such a right to lie as consistent with his philosophy of law is one thing; making up one's own mind on the matter, as commentators such as Wagner and Korsgaard (and many others) have done, is something entirely different. As noted, the analysis presented here has much in common with Wagner's, aside from his suggestion that we invoke a right of necessity. It has little in common with Korsgaard's analysis, because its solution would lead to Constant's position. Still, Korsgaard's approach is interesting, because it seeks ways to improve Kant's position. To be sure, the introduction of Rawls's distinction between ideal and non-ideal theory would not fit within the narrow confines of Kant's philosophy of law, because it leaves the question of who decides whether we are dealing with an ideal situation or not unresolved. Therefore Kant would reject such a distinction as a threat to the foundation of society. But why, Korsgaard suggests, should we accept Kant's narrow take on law; why not opt for a broader approach and look at the case of the murderer at the door from the point of view of Kant's moral philosophy as a whole?

Rather than entering into the complex issue of the relationship between moral and legal normativity in Kant, I conclude with a few observations in favour of such a broader approach. First, it has already been noted that Kant's position with regard to the murderer at the door is at odds not only with what most people consider the right thing to do, but also with criminal law. According to Kant, I would be criminally liable as an accomplice to murder, if I deliberately provided the murderer with false information which would lead him by some unforeseeable coincidence to my friend. But no one would find this outcome acceptable and no minimally decent criminal system would authorize a prosecution on the basis of such strict liability. The case would simply be a matter of bad luck without criminal intent (or bad will) on the part of the liar. Rather, the opposite would be the case: abetting the murderer would make someone an accomplice. This incongruence between common moral understanding and Kant's view on this case is a problem. Repeatedly, Kant rejects any suggestion that he wants to invent a new moral principle. His sole aim is to provide common moral understanding with a better principle (*KprV*, 5: 8 n.; *G*, 4: 391, 404). This principle should be simple, clear and readily grasped, so that even an 8-year-old child could give us the right answer to a supposed moral dilemma (TuP, 8: 286). Here, Kant comes up with an implausible answer.

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Second, the Lügen essay case differs considerably from the most well-known cases in Kant's ethical writings. When faced with the question of whether a false promise could be made or whether a deposit should be returned, a particular relationship between two actors exists. The question what an agent should do is answered as follows: is it possible to make promising in bad faith into a universal law; is it possible to imagine a universal law which frees a debtor from his duty to return the deposit because of changing circumstances? The answer in both cases is negative. But is the answer as simple when we ask whether lying to a murderer is prohibited on the basis of a universal law? Korsgaard writes that the murderer must probably deceive us in order to let us give the correct answer. Moreover, whereas the cases of promising in bad faith and appropriating a deposit given in trust revolve around two actors, the Lügen case involves three 'participants': two actors and the friend. Is the fact that the person at the door and the murderer live in the same society, presumably 'based' on a social contract, sufficient to say that I owe him a truthful answer at the cost of my friend? Do I owe the murderer such an answer just as I owe someone a sincere promise or the proper owners their deposit? If Kant suggests that the cases of the false promise and the appropriation of a deposit are structurally similar to the Lügen case, this is incorrect. Why not argue that the murderer intends to violate the terms of the social contract, as Rousseau writes (1997: *Social Contract*, bk 2, ch. 5), and that he thus no longer has to be regarded as part of the 'civil union'? The only case which resembles the Lügen case is the one in which your prince demands from you a false statement against an honourable man. But then: who is who? Does not the honourable man occupy my friend's place and the prince with his malicious intention the place of the murderer at the door? If that makes sense, why should I give in to the murderer and not to the prince? Solely because the former asks me for a true and the latter for a false statement? That seems to make little moral sense. Do their intentions to destroy the honourable man or to kill my friend not put the prince and the murderer on the same level?

A final, related observation challenges Kant's description of the case. Is it plausible to conceive of the person answering the door and the murderer at the door as having equal standing? Kant presents the moral choice for the person at the door as a choice between a strict, legal obligation ('owed to humanity itself', L, 8: 426) and a wide, moral duty (of philanthropy). However, at stake is not my friend's well-being but his life and therefore it is my strict duty to protect him. It is considered unjust, at least since Cicero, not to deflect an injury inflicted upon others when one can: 'the man who does not defend someone, or obstruct the injustice when he

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can, is at fault just as if he had abandoned his parents or his friends or his country' (*De Officiis*, 1.23; Cicero 1991: 10). Korsgaard is right: telling the murderer the truth is wrong. In this regard, it is noteworthy that Kant acknowledges, in the Doctrine of Virtue, that the duty of truthfulness can sometimes be evaded because of social conventions (*MdST*, 6: 431). In our daily lives we often use expressions of politeness that may not reflect our inner convictions or we give diplomatic answers to challenging questions.[40] Certainly, more often than not, the truth is the better option (Harris 2013), but sometimes not. If white lies are acceptable, it certainly seems inconsistent to reject the possibility of lying in the face of a murderer.[41]

Notes

1 Here Sartre discusses the case of a son who has to decide whether to join the resistance movement against the Nazis or stay home and take care of his mother: 'The Kantian ethic says, Never regard another as a means, but always as an end. Very well; if I remain with my mother, I shall be regarding her as the end and not as a means; but by the same token I am in danger of treating as means those who are fighting on my behalf; and the converse is also true, that if I go to the aid of the combatants I shall be treating them as the end at the risk of treating my mother as a means.'

2 References to Kant's writings are given in brackets, by volume and page number, to the Academy Edition (Kant 1902–; AA). For translations I utilize Kant 1996, which contains the Academy pagination. The following abbreviations are used: L (Lügen) = Über ein vermeintes Recht aus Menschenliebe zu lügen (AA 8); *G* = *Grundlegung zur Metaphysik der Sitten* (AA 4); TuP = Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis (AA 8); *KprV* = *Kritik der praktischen Vernunft* (AA 5); *MdSR* = *Die Metaphysik der Sitten, Rechtslehre* (AA 6); *MdST* = *Die Metaphysik der Sitten, Tugendlehre* (AA 6); SdF = Der Streit der Fakultäten (AA 7); ZeF = Zum ewigen Frieden (AA 7).

3 Only towards the end of this paper will I attend to the historical context of Kant's essay as a reply to an essay written by Benjamin Constant in 1797. Constant (1964: 68) attributes this example to 'un philosophe allemand' who is supposed (Geismann and Oberer 1986: 12) to have argued that telling a lie to a murderer would be a crime; see also Benton 1982: 137–8. I will not discuss Kant's stance on the prohibition to lie as part of a long theological and philosophical discussion (Geismann and Oberer 1986: 8–20; Bok 1978).

4 Therefore Varden (2010: 403) overstates the point that Kant's philosophy of law has been given insufficient attention when interpreting this essay.

5 Kant's prohibition against lying to a murderer is well-known (or notorious) within Kant scholarship and beyond. Rather than setting myself the rather impossible task of giving an overview of its many interpretations, I restrict myself to two authoritative interpretations, those of Wagner and Korsgaard. They are representative of the German and the Anglo-Saxon scholarship as well as for understanding the problem either in the direction of law (e.g. Höffe 1994: 196; Wood 2008: 241; Varden 2010) or of morality (e.g. O'Neill 1989: 45; MacIntyre 2006: 129).

6 It has become quite common to translate Kant's 'Rechtslehre' as 'Doctrine of Right'. I translate it as 'Doctrine of Law' since it deals with law in the objective sense, not, as will become clear, with subjective rights, although this is sometimes (wrongly, I think) defended, e.g. by Byrd and Hruschka (2010); see Mertens 2013.

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7 I will later address the difficulty that Kant's position contradicts criminal law. Helping the murderer by providing the needed information would lead to 'complicity' in many legal systems.
8 Note that Kant's remark need not be true. Adopting a utilitarian perspective, it seems not impossible to imagine a criminal statute which deems any taking of an innocent life, even in cases of necessity, as punishable. Such a statute would have a deterrent effect, e.g. providing punishment not only for the 'criminal' but also for his relatives. Drafting a criminal statute could make sense in that it would prevent persons from taking innocent lives and then claiming they were in situations of necessity.
9 A careful analysis of the supposed absence of a conflict of duties in Kant can be found in Timmermann 2013.
10 For surely the murderer will not have asked, 'I wish to murder your friend; is he here in your house?' He will rather try to deceive you into telling him where your friend is in order to prevent you from resorting to a lie (Korsgaard 1996: 136).
11 Arguing like Korsgaard that the maxim of lying to a deceiver is morally acceptable on the basis of universalizability would bring Kant's position dangerously close to Constant's, which Kant explicitly rejects, namely that 'to tell the truth … is a duty … only to one who has a right to the truth' (L, 8: 425).
12 He 'cannot himself share the end of the action' (*G*, 4: 429).
13 Kant does not discuss the happiness or misery of the family, but focuses on the duty of the borrower only (TuP, 8: 286, line 34). However, the Doctrine of Law presents the duty to take care of one's children as derived from their original, innate right to be cared for (*MdSR*, 6: 280), and thus as a legal duty (although this duty does not apply, as we will see, to children born out of wedlock).
14 With regard to self-defence Kant would probably distinguish between a culpable and an innocent threat. As previously noted, self-defence against an innocent threat (as in the case in which someone pushes another survivor of a shipwreck from the plank that he occupies in order to save his life: TuP, 8: 300n.) can only be excused, not justified.
15 I use the word 'similar' here deliberately. Within the just war tradition, there is much discussion on how to conceive the relationship between self-defence, the defence of another person and collective self-defence (see McMahan 2011).
16 I take it that a hangman in a Kantian republic is not a murderer.
17 Wittwer 2001: 199. A similar argumentation with regard to dignity is found in Sensen 2009.
18 Whether engaging in a duel constitutes a violation of a duty to others is unclear. A person who survives a duel by killing his opponent cannot be prosecuted for murder (*MdSR*, 6: 336). According to Kant, the criminal law has no effect against the 'stain of suspicion of cowardice' (combining *MdST*, 6: 235 and 336). Perhaps it also matters that the other person consented to the duel, because of the 'volenti non fit iniuria' rule? See Stell 1979.
19 Along these lines, Kant's position might perhaps be reconciled with present-day pleas for preventing people from a degrading, horrible death by allowing them to die in an honourable, dignified manner (an important case in which this plea was not honoured: *European Court of Human Rights, Pretty v. United Kingdom*, 29 April 2002, case no. 2364/02). On the other hand, Kant argues that a human being can live a virtuous life as long as he lives (*MdST*, 6: 422; see also Wittwer 2001: 201).
20 Exodus 20: 16; Deuteronomy 5: 20.
21 See e.g. Smith 2005: 205: 'the right to life is undoubtedly at the apex of the hierarchy'.
22 Here I do not want to commit myself as to whether Kant adopts an interest theory or a will theory on the existence of 'rights' (although the latter is more likely).

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23 Hence Kant's notorious example of the duty to execute the last murderer who remains in prison before civil society dissolves itself (*MdSR*, 6: 333). If that is the case, is it contradictory that capital punishment need not be applied to someone who pushes an innocent person from a life-saving plank, to a mother who kills her illegitimate child, or to an officer who kills in a duel, because in those cases the law had no deterrent effect? Executing the last murderer has no deterrent effect either, and the remark on the 'blood guilt' that would otherwise cling to the (dissolving) people seems odd, coming from Kant.

24 Nor can the state arbitrarily dispose of the lives of its citizens as if they were 'mere machines and instruments' (ZeF, 8: 345). It cannot treat its citizens as its 'property' (*MdSR*, 6: 345).

25 Obviously, I use the plural of 'homo noumenon' and 'homo phaenomenon' here only rhetorically.

26 These difficulties are, in my view, adequately summarized by Horn (2014: 180–3).

27 Obviously, there is nothing new here. Many commentators have pointed out the similarities between Rousseau's idea of the general will and Kant's idea of the social contract, see e.g. Reich (1936: 5, 12); Cassirer (1970: 34–5), Horn (2014: 187). Others, however, disagree, e.g. Baynes (1989: 447–8).

28 Rousseau (1997: *Social Contract*, bk 1, ch. 6) speaks of 'total alienation'; unsurprisingly, he also endorses the death penalty (bk 2, ch. 5).

29 In other words, external freedom is replaced by the freedom of a member of the commonwealth. According to Horn (2014: 48, 224–5), the affinity between Rousseau and Kant consists indeed in what the social contract achieves: the complete surrender of individual (natural) freedom in 'exchange' for the rights of the citizen.

30 According to Alexy (2002: 118), it is not the case that the supposed natural rights are secured by positive law, or 'that the natural rights … are somehow incorporated into [Kant's] basic [legal] norm'.

31 As a citizen, I can lose the right to life; I can also lose the right to freedom. Astonishingly, Kant writes that someone can lose the dignity of a citizen because of his crime and that he as a consequence can be made into a mere tool of another's choice (*MdSR*, 6: 330–1).

32 Kant has often been hailed as the father of human rights (see e.g. Ju 1990), but this analysis points in another direction (see also Horn 2014: 68–84).

33 E.g. TuP, 8: 299: 'all resistance against the supreme legislative power … is the greatest and most punishable crime … This prohibition is *absolute*'; *MdSR*, 6: 372: 'unconditional submission of the people's will … to a *sovereign* will … is a *deed* that can begin only by seizing supreme power and so first establishing public right. – To permit any resistance to this absolute power … would be self-contradictory'.

34 'After' not in the temporal sense, because the social contract is for Kant an idea, not a particular historical event.

35 E.g. if the law either through statute or the terms of my labour contract does not foresee compensation for inflation, my salary consists of the amount originally agreed. I can ask my employer for compensation, but this is merely a right without coercion. See *MdSR*, 6: 234.

36 E.g. Waldron 1996: 1535–66; Horn 2014: 135; Alexy 2002: 118, 119 ('strict priority of positive law over the law of reason').

37 I cannot get into detail here on the controversial question whether legal normativity in Kant's philosophy of law is (e.g. Willaschek 2009) or is not (Höffe 1994: 126–50) independent of moral normativity, although the analysis presented here points in the direction of what is now sometimes called the separation thesis. For an excellent overview, see Pauer-Studer 2016.

38 Not even a jurist can claim this right. It is not the task of a jurist to prove the truth and legitimacy of the laws; he has to find the meaning of the law in 'the code of law publicly

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promulgated and sanctioned by the highest authority' (SdF, 7: 24–5). See Alexy 2002: 118–19.

39 Waldron 1996: 1540–1, 1564. Legal positivism does not necessarily entail moral scepticism, but can be normatively inspired. The stability and legal certainty of a society require that the law is authoritatively determined by reference to certain legal sources, and applied by coercive means. According to Alexy (2002: 118), Kant's basic (legal) norm is exclusively oriented to legal certainty and civic peace.

40 Kant's diplomatic answer to the king with regard to the prohibition against publishing on religion is a case in point: see SdF, 7: 10 and note.

41 Over the years I have discussed the subject of this paper with many colleagues and I have had the opportunity to present early drafts in various forums; my thanks to all who have commented. I am in particular grateful for their help to Alessandro Pinzani, Morag Goodwin, the anonymous referees and editors of *Kantian Review*.

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