

The Public Form of Law: Kant on the Second-Personal Constitution of Freedom

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Abstract

The two standard interpretations of Kant's view of the relationship between external freedom and public law make one of the terms a means for the production of the other: either public law is justified as a means to external freedom, or external freedom is justified as a means for producing a system of public law. This article defends an alternative, constitutive interpretation: public law is justified because it is partly constitutive of external freedom. The constitutive view requires conceiving of external freedom in a novel, second-personal way, that is, as an irreducibly relational norm.

Keywords: Kant, External Freedom, Public Law, Second Person.

1. Introduction

What, according to Immanuel Kant, is the relationship between external freedom and public law? Commentators tend to follow one of two interpretative paths: either the state and its public law are means to securing external freedom rights (call it the 'freedom-based' view), or external freedom is a means to establish public law (call it the 'public law-based' view).¹

In recent Anglophone scholarship, the freedom-based view is the dominant interpretation.² On this reading, according to Kant public laws derive their validity from the extent to which they secure the independent value of external freedom. However, this line of interpretation faces three difficulties. Nowhere in the *Metaphysics of Morals* does Kant explicitly ground the right to external freedom in the independent value as such of exercising one's capacity to set ends or one's ability to move without hindrance. Second, the instrumentalism characteristic of the freedom-based view sits oddly with Kant's general non-instrumentalism in practical philosophy. And third, the freedom-based view appears committed to the view that external freedom is essentially negative, independence from constraint by others. However, this stands in tension with Kant's own description of external freedom as essentially positive, the dependence of the will on the metaphysical principles of right and on public law.³

A straightforward way to avoid these difficulties is to pursue the second interpretative strategy. On this less common reading, according to Kant the right to external freedom has no validity or existence apart from public law⁴ Instead, the establishment of public law, both domestically and internationally, is the final end of Kant's philosophy of right, to which end individual rights to external freedom must be subordinated. The main attraction of this view is that it takes seriously the primary importance of public law in Kant's philosophy of right. But this view does so at the high cost of making it difficult to see how following public law could be a form of external freedom. If external freedom rights can be

subordinated for the sake of establishing any old law, the law itself begins to look arbitrary and too detached from the principle of external freedom.

My aim in this article is to articulate and defend a third interpretative alternative.⁵ We should reject the shared assumption of these interpretations, namely, that the relationship between external freedom and public law is one of means to end. Instead, we should read Kant as proposing a constitutive model: external freedom is partly constituted by a priori law (the metaphysical principles of right) and partly by a posteriori law (public law). The constitutive interpretation proposed here avoids the challenges of the freedom-based view (its instrumentalism and essentially negative conception of freedom) and of the public law-based view. In the paradigmatic case, following public law is a species of positive freedom.

Articulating the constitutive interpretation requires abandoning the common interpretation of external freedom favoured by proponents of the freedom-based view and endorsing what I will call a ‘second-personal’ conception of external freedom. The standard freedom-based view is that the significance of external freedom turns on the (moral) value of the capacity to set one’s own ends. We may think of this as a ‘first-personal’ view insofar as the value of this capacity is intelligible independently of any relationship one has to others. This first-personal conception leads to the view that external freedom is paradigmatically negative, the absence of constraint by others in the exercise of one’s capacity to

set ends. By contrast, I will argue that Kant's idea of external freedom is better understood along second-personal lines. Instead of thinking of the value of a first-personal capacity as the ground of interpersonal rights, Kant thinks of the relationship of right to another as normative bedrock. Such a conception is irreducibly second-personal in the sense that it refuses to ground the moral significance of the relationship of external freedom in any underlying non-relational value. The second-personal conception opens up space for the view that external freedom is paradigmatically positive, the dependence of the individual will on both a priori laws of right and a posteriori public law. And the view that external freedom is paradigmatically positive undergirds the proposed constitutive view: public law is justified because it constitutes the external freedom of its subjects.

2. Freedom as Following the Law

In order to develop Kant's constitutive account of public law, I need first to introduce the second-personal interpretation of external freedom. To do so, I will show how this interpretation grows out of Kant's generic idea of freedom as self-determination through law. The central idea is that, in general, for Kant the moral law is constitutive of freedom, such that to be positively free is to follow the moral law. Similarly, it will transpire that in the juridical case, public law is constitutive of external freedom, such that to be positively externally free is to follow public law.

The highest division of philosophy, Kant argues, is that organized by the concepts of nature and freedom, a division between theoretical and practical philosophy (*MM*, 6: 217; *CPJ*, 5: 171). This basic division represents two forms of causality.

Natural causality represents the determination of an effect from a cause different from itself, as when a billiard ball is caused to move by the impact of another ball. Kant calls this causal nexus ‘that of efficient cause (*nexus effectivus*)’ (*CPJ*, 5: 372). We might call the efficient causal nexus other-determination, determination by an alien cause.

The causality of other-determination also gives us an initial and merely negative idea of freedom: to be free is to be independent from determination by alien causes (*G*, 4: 446). But as Kant notes, this initial negative representation must lead to a positive one, representing the essence of freedom: to be free is to be determined by an immanent principle. In the most elementary case, this is the causality of life, the causality of the concept of an end (*MM*, 6: 211). Kant calls such a causal nexus ‘that of final causes (*nexus finalis*)’ (*CPJ*, 5:372). We might call the form of final causality self-determination. In its paradigmatic form, that of rational beings, the idea of such a causal power is the will: the power not simply to act in accordance with laws (something accomplished by a mere billiard ball), but also the power to act in accordance with the representation of laws (*G*, 4: 412). And for the will to be self-determining, it must act in accordance with the representation of laws immanent rather than alien to its own activity. This brings

into view the positive idea of freedom, namely, the idea of a self-legislating or autonomous will.⁶

Just as the generic idea of a causal power divides into two (other- and self-determining causality), so too the idea of a self-determining causality divides into two. This generates the division of the idea of freedom into two species: inner and outer freedom (*MM*, 6: 406-7). This division also represents the highest division of the *Metaphysics of Morals*, and the organizing principle for distinguishing the doctrine of right from the doctrine of virtue.

Roughly, inner freedom is the will's independence from inclinations (the negative aspect) and its dependence on the moral law (its positive aspect). But how exactly should we understand Kant's idea of external freedom?

Unfortunately, Kant did not explain this pivotal concept as clearly as he should have. This is his clearest statement about external freedom:

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with universal law, is the only original right belonging to every man by virtue of his humanity. (*MM*, 6: 237)

The dominant interpretation picks up on Kant's claim that external freedom is 'independence from being constrained by another's choice' and characterizes external freedom as essentially negative. External freedom can then be construed

either in descriptive terms (A is externally free just in case A can move around without impediments from others)⁷ or in normative ones (A is externally free just in case A's capacity to set ends and use means at A's disposal is not interfered with by others).⁸ The latter formulation is normative in the sense that it conceives of external freedom in terms of the value of A's capacity to set ends, rather than in terms of A's mere ability to move around.

There are important disagreements between these interpretations. For instance, is external freedom essentially descriptive or normative? Does limiting the option set of another count as an interference with the other's external freedom? Instead of focusing on such disagreements, I now want to focus on two shared assumptions of this line of interpretation in order to reject them.

The first is that external freedom is essentially negative. Inner freedom is widely understood to be essentially positive: the will's determination by the moral law. By contrast, according to this line of interpretation, external freedom is essentially negative: independence from the constraint of others — however this independence is construed. The second assumption is that external freedom is essentially first-personal. By 'first-personal' I mean a view that grounds or reduces the normative significance of the right to external freedom to a first-personally available non-relational norm. Thus Hodgson, for instance, explains the significance of external freedom in terms of the moral value of the ability to set and pursue ends for oneself.⁹ To the extent that the value of this ability is

intelligible independently of the agent's relations to others, the value is non-relational; to the extent that this non-relational value is accessible only from the first-person standpoint of deliberation, the value is first-personal.

The dominant conception of external freedom as essentially negative leads to a view of public law as limiting rather than enabling or constituting freedom. Public law will then be justified instrumentally as a means for the promotion of the independent value of external freedom. This is the core claim of the freedom-based view of public law. But how plausible is this line of interpretation?

Three considerations speak against this reading. First, nowhere in the *Metaphysics of Morals* does Kant ground the right to external freedom in some further value (such as the value of humanity or of setting ends for oneself). Indeed, he speaks twice of the right to external freedom as an 'axiom of right' (*MM*, 6: 250, 267). Kant's designation of the original right to freedom as an 'axiom of right' suggests that said right is not grounded in a further value.¹⁰

Second, the instrumentalist justification of public law encouraged by this reading sits oddly with Kant's non-instrumentalist approach to practical philosophy. In his moral philosophy, Kant insists that the justification of the moral law depends on its form, the law's relation to the activity of willing, rather than its matter, whether the law produces a desired outcome. It would be odd if Kant's legal and political philosophy suddenly took a sharp instrumentalist turn and justified laws of right in virtue of their matter rather than their form.

The third and most serious difficulty is related to the second. If external freedom really were essentially negative, it would stand in tension with Kant's repeated claims that practical freedom is essentially positive, the power to follow the moral law.¹¹ Similarly, it would be odd if external freedom were not a species of practical freedom.¹² Let me explain.

If external freedom were essentially negative, it would amount to the power to choose for or against the law. The law would be externally related to the power of freedom. But Kant explicitly rejects this conception of freedom as the liberty of indifference.

As a general matter, Kant maintains that there is a conceptual, necessary connection between a causal power and its corresponding form of law.¹³ He says: 'the concept of causality brings with it that of laws in accordance with which, by something that we call a cause, something else, namely, an effect, must be posited' (*G*, 4: 446). The concept of an effect necessarily presupposes the law according to which it was produced from a cause. To suppose otherwise would render a causal power unintelligible, since a causal power ungoverned by law would be a causal power that does not determine its effects, that is, a causal power without causal power, an absurdity.

Similarly, the very idea of a self-determining (free) causal power contains the idea of a law governing its activity. To suppose otherwise is to think of freedom as the liberty of indifference: 'freedom of choice cannot be defined – as some have tried

to define it – as the power to make a choice (*durch das Vermögen der Wahl*) for or against the law (*libertas indifferentiae*)’ (*MM*, 6: 226).¹⁴ The liberty of indifference represents a causal power as fundamentally undetermined by law. But again, Kant has argued that this would be a causal power without causal power, an absurdity. Freedom is not the power to choose for or against the law, but is instead a law-conferred power. Law is internal to freedom. And the very idea of a power always already makes reference to the law under which its activity is governed.

We may put this point differently, now in terms of Kant’s contrast between two forms of unity, the unity of a *compositum* and that of a *totum* — an *aggregate* and a whole (*CPR*, A428/B466). The first is the contingent unity of a composite aggregated from simple (independently intelligible) parts, as in a heap of sand. The second is the necessary unity of a whole constituted through the reciprocal relations of its parts, which parts are only intelligible in the whole. Kant deploys this distinction to argue that all of the following should be understood as wholes rather than aggregates: space and time (*CPR*, A428/B466), living beings as self-maintaining wholes (*CPJ*, §§64-65), history as the whole of the development of the human species (*TP*, 8: 310), or cognition as a system (*CPR*, A797/B825).

Similarly, I am suggesting that Kant understands the unity of law as that of a whole linking its parts (self-determining causal powers) in reciprocal relations. The very idea of a person, qua self-determining causal power, already contains the idea of the bearer of that power as standing in reciprocal relations to others

of its kind and thus, equivalently, as standing under law.

By contrast, the view that external freedom is essentially negative supposes that the unity of law is that of an aggregate, a unity external to its parts. To be externally free would be equivalent to the liberty of indifference. And this, Kant has argued, is to misunderstand the relationship between a free being – as a causal power – and the law which constitutes it as a causal power.

These considerations suggest an alternative conception of external freedom, one I will call ‘second-personal’. To present this reading, let me say a few words first about how I will understand the idea of a second-personal norm.

Stephen Darwall has distinguished first-, second- and third-personal reasons (Darwall 2006: 4-12). Roughly, a third-personal reason is one that refers to the impersonal value of an outcome to be promoted (e.g. well-being); a merely first-personal reason is one that refers to an agent’s standing before a norm, regardless of that agent’s interpersonal relations (e.g. an agent’s standing before a logical norm); and a second-personal reason refers to interpersonal norms governing the claims one agent has on another or, equivalently, the duties one agent owes another (e.g. the rights of one agent against another). To borrow an example from Darwall, consider the different kinds of reasons you may have not to step on another’s gouty toe. If you appeal exclusively to the bad state of affairs that would be produced, say, in terms of the other’s suffering, then you would appeal to a third-personal kind of reason. By contrast, if you appeal exclusively to the

other's right against you that you not step on her toe or, equivalently, to the duty you owe the other to the same effect, then you would appeal to a second-personal kind of reason. This distinction is rough, but it should suffice for our purpose.¹⁵

I now want to suggest that this distinction in kinds of practical reasons can be fruitfully applied to Kant's idea of the right to external freedom. On the freedom-based view, the right to external freedom would be grounded in a first-personal reason (e.g. the value of the capacity to set ends) or in a third-personal one (e.g. the undesirability of being interfered with in one's movement). By contrast, I am suggesting that the right to external freedom has an irreducibly second-personal structure. This means that the right to external freedom is an irreducibly relational norm, linking the right of one agent to the duty of another. This conception is second-personal, then, in the sense that it treats the right to freedom as an 'axiom of right' and grants ultimate normative significance to the relationship of right itself.

A second-personal conception opens up space for conceiving of external freedom as essentially positive. External freedom is indeed the title of one agent to not be subordinated to the will of another, but external freedom is also and fundamentally the dependence of the will on the practical law. So understood, the practical law is not externally related to a self-determining causal power. Instead, the practical law just is the form of the relationship between persons. The unity of practical law – moral law and public law – is that of whole, not that

of an aggregate.¹⁶ In the next two sections, I explain this generic thought and show how it supports a constitutive view of the justification of public law.

3. The Universal Principle of Right: A Reciprocal Second-Personal Norm

If external freedom were an essentially positive and second-personal idea, we would expect Kant's view to be that external freedom is dependence on practical law. As I will now argue, that is exactly Kant's view: external freedom is dependence on two internally related kinds of practical law, your dependence on a priori practical laws (the metaphysical principles of right) and on a posteriori laws (public laws) (*MM*, 6: 237). This section covers the former, the next the latter.

The supreme, a priori principle of a system of right is the Universal Principle of Right (henceforth, UPR):

[UPR] Any action is right if it can coexist with everyone's freedom
in accordance with a universal law. (*MM*, 6: 230)

Of course, at first sight, UPR can appear ambiguous. Should we understand 'everyone's freedom' in negative, first-personal terms, or in positive, second-personal ones? As we have seen, Kant's statement of what he means by external freedom does not settle the interpretative issue.

Nevertheless, I would like to suggest that UPR is essentially a second-personal principle of positive freedom. Kant makes it clear that UPR is a principle of

positive freedom when he qualifies any right action as one that must be consistent with the freedom of all ‘in accordance with a universal law’. The idea behind UPR is not that an action is right simply when it does not interfere with the exercise of my capacity to set ends. Instead, the idea is that any action is right when it is consistent with and determined by a universal law governing the interactions between persons as equals. I exercise my external freedom when I act in a way consistent with your equal freedom. But this is equivalent to saying that my action is right when my power of choice is in agreement with, or depends on, a universal practical law. And this is the first manifestation of the idea that external freedom is a genuine species of practical freedom: one is externally free not only when one is independent from the constraining choice of others but primarily when one’s actions are in agreement with or depend on a universal law relating one to others in a rightful manner.¹⁷ To act rightly under UPR is to exercise one’s external freedom positively.

Pursuing further the earlier analogy with forms of unity, on the proposed reading the unity of UPR is that of a whole (*totum*): the law as a whole is prior to and determines its parts (externally free persons) into reciprocal relations. By contrast, if UPR manifested the unity of an aggregate (*compositum*), the law would be external to free persons, and the relations between such persons would be accidental. The negative conception sees the individual power as prior and then construes the law as an aggregate of accidental relations between individuals. Conversely, the positive, second-personal conception sees the law as prior and

then construes individuals as aspects of that whole in necessary reciprocal relations.

This suggests that UPR itself has a second-personal form. But what exactly is this form? UPR has a second-personal form in the sense that it represents a reciprocal and directed norm.

From the standpoint of rights, a self-determining power is a juridical power (*facultas juridica*), that is, the power to coercively bind others in accordance with universal law.¹⁸ UPR, then, is a basic norm of reciprocity in the sense that my innate right (my basic status as a juridical power) binds you to respect my external freedom, but in so binding you, I am always already bound to you in the very same way. Kant puts this point by saying that the innate right to freedom necessarily involves the authorization to innate equality: ‘that is, independence from being bound by others to more than one can in turn bind them’ (*MM*, 6: 237-8).¹⁹

And UPR is a basic directed norm in the sense that the duties it requires are owed to others. Directed norms contrast with undirected norms: the infringement of a directed norm is a wrong to another; the infringement of an undirected is a wrong action simpliciter (*MM*, 6: 442-3).²⁰ If I steal your car, I wrong you, but if in driving your car aimlessly I also pollute the environment, I do something wrong without necessarily wronging anybody in particular.²¹ To say, then, that UPR is a directed norm is to say that duties under UPR are directed to a specific

other, that is, are duties I owe you. Actions in accordance with this norm represent rights against others; actions contrary to this norm are wrongs to others.

In a word, UPR is a second-personal norm not simply because it captures an irreducibly second-personal kind of reason but, more specifically, because it takes a reciprocal and directed form.

Synthesizing the reciprocal and directed form of UPR we can now say that UPR is the basic a priori form of positive outer freedom. When you act rightly, in accordance with the rights of others, your action is determined by a universal law.

One way to put the point is in terms of Kant's distinction of two normative positions: the position of binding another and that of being bound (*der Verhältnis der Verpflichtenden und Verpflichteten*) (*MM*, 6: 241).²² UPR represents these two positions in a reciprocal and directed manner: qua juridical power I have an innate right by which I bind you, so that – equivalently – you are bound to me, but your duty to me is equivalent to your binding me in virtue of your innate right and thus my being bound to you. In UPR these two positions of binding and being bound are perfectly interchangeable. The perfect interchangeability of these two positions is a form of self-determination, or what Kant also calls the self-legislative or autonomous character of the will. In the *Groundwork* Kant says that your will is self-legislating when it is subject to (or bound by) laws of which it can, at the same time, regard itself as the author (or someone in the binding

position) (*G*, 4: 432). A self-legislating will is one that embodies the reciprocal form of relation between the two normative positions of binding and being bound. This is exactly what happens when you act in accordance with UPR. You manifest a form of autonomy, the positive aspect of external freedom.

In sum, it emerges that UPR is a paradigmatically second-personal norm, rather than a first-personal one. UPR is not grounded in a non-relational value, such as the value of exercising the capacity to set ends. Instead, UPR represents the ‘axiom of right’ that persons are constituted by their external freedom in a reciprocal and directed relationship to one another. Your duty to respect my innate right to freedom entails and is entailed by my duty to respect your equal innate right to freedom. That is because my right and your duty are necessary aspects of one and the same normative whole, which whole just is the a priori law of right.

This second-personal interpretation of external freedom supports a constitutive interpretation of the justification of law. External freedom and UPR are not related to one another as means to end. Instead, the law (here UPR) is constitutive of the external freedom of each person. To be a juridical person just is to have a normative standing in relation to others constituted by the a priori law of right. The law is a *totum*, manifesting the internal relationship of constitution between the law as whole and the parts it constitutes into reciprocal relations.

If this reading is correct, it also suggests that Kant's second-personal idea of law and external freedom is necessarily social and embodied. It is social because freedom is constituted in one's relationship to another. And it is embodied because the innate right to freedom is, in the first instance, one's right to move one's own body in terms of equality and reciprocity with others.²³ This view stands in stark contrast to that often attributed to Kant, according to which persons are disembodied atoms inhabiting a super-natural, immaterial, and noumenal realm.²⁴ If so, the distance between Kant's view of external freedom and that of some of his immediate predecessors (Rousseau) or successors (Fichte and Hegel) may not be as great as often supposed.

4. The Public Form of Law

I have just suggested that for Kant UPR is an a priori principle of external freedom: when you act consistently with the equal innate rights of others, you follow a law constitutive of your right to external freedom. The relationship between external freedom and the universal law of UPR is not one of means to end. Instead, the law constitutes external freedom, the normative power (*facultas juridica*) to have rights against and duties to others. UPR has an irreducibly second-personal form, for it constitutively links persons under a reciprocal and directed norm.

We are now in a position to see how public law develops this basic second-personal structure. The relationship between external freedom and public law is

not one of means to end. Instead, public law constitutes external freedom in virtue of its public or omnilateral form, specifically the standing of persons as subjects and possible co-legislators of said law.

In eighteenth-century fashion, Kant formulates the argument for public law in terms of an exit from the state of nature, a device for representing a condition where public law is absent. What makes such a condition defective, Kant argues, is its moral incoherence: should you and I inhabit a state of nature we would simultaneously be governed by UPR and necessarily contravene it.²⁵ In the state of nature we are governed by UPR, so we are entitled to claim rights against each other. But the juridical nature of our rights means also that we are entitled to enforce our rights. As Kant emphasizes, our innate right also authorizes us to do ‘what seems right and good ... and not to be dependent upon another’s opinion about this’ (*MM*, 6: 312). If in the state of nature I were bound to acquiesce to your interpretation of your own rights, I would become subject to your will, thereby contravening UPR. But if you were bound to acquiesce to my interpretation of my own rights, you would become subject to my will, contravening UPR. The moral incoherence emerges, then, from the fact that we are both entitled to enforce our respective interpretations of our own rights and that this enforcement is necessarily unilateral rather than reciprocal.²⁶

Kant also puts this point by characterizing the state of nature as a condition of savage and lawless freedom (*PP*, 8: 105; *TP*, 8: 301-2; *MM*, 6: 307-8, 343-4, 354).

The state of nature is a condition of lawless freedom because in it each ‘follows its own judgement’ about her own rights, rather than a public and universal judgement. But in so doing, each *unilaterally* imposes on the other her own interpretation of her rights, thereby contravening the reciprocal form of UPR.

Deploying once again Kant’s distinction between two forms of unity, we could say that the state of nature is lawless because the law here is at best a *compositum*, an aggregate of several private interpretations of a ‘common rule’. But as we have seen, this is not properly a law; it is the law’s absence. Hence, positive outer freedom is impossible in a state of nature. And that is the moral incoherence inherent to such a condition: my normative standing presupposes positive freedom in my relation to you, but such freedom is not possible.

So understood, the resolution to the moral incoherence intrinsic to the state of nature is the introduction of a *public authority* to a system of right. Kant calls this the *postulate of public right* (henceforth, PPR):

PPR: When you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition.²⁷

If in the state of nature the will of each is determined by its own (privately valid) judgement, the solution to the contradiction lies in determining the will of each by a public law. The defects of the state of nature are meant to help us see that

such laws are not available a priori.²⁸ The attempt to apply the abstract UPR to specific circumstances is itself what generates the contradiction characteristic of the state of nature. So a civil condition structured by public laws must be instituted.

PPR thus develops the reciprocal and directed second-personal UPR into a new normative form. This new form is distinctive because it is *non-reciprocal* and *omnilateral*. A public authority is *non-reciprocal* because it has *authority over* its subjects, while the subjects have no authority over it. Indeed, if the authority relationship were reciprocal, there would be no solution to the moral incoherence of the state of nature. Coordinated with the individual duty to establish a public authority is the public authority's right to rule. And lest the right to rule be unmoored from its normative principle, the legislation, enforcement and adjudication of law (the exercise of public authority) must itself have a public form. A public authority must be *omnilateral*, acting on behalf of *all* its subjects. Public law is not the supremacy of a single man's will. A public authority signals the supremacy of *law* in our interactions.²⁹

Following Arthur Ripstein, we may explain the non-reciprocal and omnilateral public form of the law in terms of status relations (Ripstein 2009: 192-3). The basic feature of status relations is that one party acts on behalf of another by fulfilling the mandate of her specific status. Thus, as a parent you can make arrangements for your child insofar as you follow your mandate of acting on

behalf of your child, respecting and promoting the child's independence. More generally, employers, doctors, flight attendants and teachers have authority over you so long as they act within the mandate of their specific status and that mandate is consistent with your innate right.

Similarly, a public authority has non-reciprocal authority over its subjects so long as it acts on behalf of all its subjects by fulfilling the mandate of its specific status. That mandate is making possible the interaction among its subjects on terms consistent with their reciprocal freedom. Thinking of a public authority as fulfilling its status relationship over its subjects requires distinguishing the mandate of the specific status (or office) from the person occupying that status, as Ripstein suggests (Ripstein 2009: ch. 7, §B). Thus when a public authority exercises its authority over you, it is the law that has authority over you rather than the specific person promulgating, adjudicating or enforcing it. And this authority is compatible with your status as an equal rights bearer because of its omnilateral form, that is, the public authority acting on behalf of all its subjects in making their reciprocal freedom possible.

Another way to put this point is in terms of Kant's distinction between the *public* and the *private* use of reason. Each use is characterized by a distinctive kind of *addressee* (O'Neill 1986: 528). While a public use of reason has an unrestricted (cosmopolitan) addressee, such as humanity at large, the private use of reason 'is that which one may make of it in a certain *civil* post or office with which one is

entrusted' (WE, 8: 37). The private use of your reason is restricted, then, by the relationship you have to your audience, a relationship institutionalized through a certain 'civil post or office' with which you are entrusted. In so exercising reason, you are 'carrying out another's commission' (WE, 8: 38). The thought, then, is that any official exercising public authority (making, enforcing or adjudicating the law) makes a *private use of reason* insofar as the official carries out another's commission: making possible a system of reciprocal external freedom. In one sense a public authority thus manifests a private use of reason, since officials are only permitted to act so as to constitute reciprocal freedom, but in another, a public authority manifests a public use of reason, since officials are entrusted with constituting the freedom of *all* subjects, regardless of any distinctions among them in terms of socio-economic status, religious or political beliefs, ethnicity, etc.

These reflections on *status* suggest that there is a trace of second-personal normativity in public law itself. The law's validity derives from its *source in a public authority*.³⁰ The law's normative structure consists of the special *status* relationship between ruler and ruled. Abstract away from the relationship of a public authority to its subject, the relationship between ruler and ruled, and the normativity of public law disappears from view.

Putting these thoughts together, Kant's contention is that you have a legal obligation to do the public authority's command, not in virtue of the law's justice, but rather in virtue of the law's source in a public authority. Kant's contention is

that the bindingness of the law does not stem from an independent moral standard, such as the independent value of autonomy or well-being, but rather from an a priori argument for a public authority (PPR) granting that public authority the right to rule through the promulgation, adjudication and enforcement of the law.

At the same time, the very idea of the omnilateral form of a public authority already contains the idea of the law's justice. Kant calls this normative dimension the *idea of the original contract* (henceforth, IOC):

[IOC] Now this is an *original contract*, on which alone a civil and hence thoroughly rightful constitution among human beings can be based and a commonwealth established ... It is instead *only an idea* of reason ... namely to bind every legislator to give his laws in such a way that they *could* have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will. For this is the touchstone of any public's law conformity with right. In other words, if a public law is so constituted that a whole people *could not possibly* give its consent to it (as, e.g., that a certain class of *subjects* should have the hereditary privilege of *ruling rank*), it is unjust; but if it is *only possible* that a people could agree to it, it is a duty to consider the law just, even if the people is at present in such a

situation or frame of mind that, if consulted about it, it would probably refuse its consent.³¹

While PPR represents the correlation of your duty to establish a condition of public right and the public authority's right to govern, IOC represents the correlation of the public authority's duty to govern justly to your innate right to freedom.³² IOC is an idea of reason, the '*state in idea*, as it ought to be in accordance with pure principles of right. This idea serves as a norm (*norma*) for every actual union into a commonwealth (hence serves as a norm for its internal constitution)' (*MM*, 6: 313). While PPR represents the *source* of the law in the will of a public authority, IOC represents the law's *constitutive function*. This is the duty on the legislator to make the exercise of public authority such that it can constitute the innate right to freedom of everyone subject to the law. Kant expresses this point by saying that IOC is the 'touchstone' of public right: the regulative idea that any exercise of public power could have arisen from the will of the people. And as Kant makes clear in this passage, IOC does not require your *actual* consent to the law for the law to be just.³³ Instead, as an idea of reason, it represents your *possible* agreement as a bearer of innate right. The law's justice, then, is a norm *internal to the law*.

So far, I take it that my articulation of Kant's argument for PPR and IOC is not particularly controversial. Notice, however, that the reading I have been suggesting uniquely supports the constitutive interpretation. As we saw in sec. 2,

Kant's generic idea of freedom is self-determination through law. Public law develops this model. IOC thus formulates the idea of reason immanent to any public law: in following public law you follow a law internal to your external freedom. Although public law *binds* you by the contingent choice of the legislator, in the ideal case the law *binding you* is equivalent to your thinking of yourself as the *author* of the law. IOC thus gives institutional form to the second-personal idea of self-legislation, where the normative positions of *legislator* and *subject* are in principle interchangeable. IOC is thus the regulative norm internal to the public authority introduced by PPR. For the law to take an *omnilateral* form is for that law to bind you as the possible legislator of said law. Indeed, public law introduces your status as *co-legislator* with every other subject to the law.

Kant's discussion of the idea of the original contract makes it particularly perspicuous that he has the constitutive model in mind. Consider another passage about IOC, now from the Doctrine of Right:

The act by which a people forms itself into a state is the *original contract*. Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of the state... And one cannot say: the human being in a state has sacrificed a *part* of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence

upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will. (*MM*, 6: 316)

This passage can be taken as evidence that Kant would have rejected both the freedom-based and the public law-based views. This passage uniquely supports the constitutive model. Let me explain by paraphrasing this passage.

For the freedom-based view, the human being in a state sacrifices a part of his external freedom for the sake of an end, namely, protecting one's independent interest in external freedom. But Kant here explicitly rejects that view, as one that favours the negative conception of external freedom as a 'lawless freedom'. Instead, Kant characterizes the transition to the civil condition in terms of positive external freedom. When you live under public law, you find your 'freedom as such undiminished, in a dependence upon laws'. That is precisely the claim of the constitutive reading: your external freedom is partly constituted by public law.

For the public law-based view, public laws are an end to which individual rights to external freedom are means. But if that were so, it would not be possible for one's dependence upon laws to be equivalent to a dependence that 'arises from one's own lawgiving will'. If external freedom rights could be subordinated to the higher collective aim of establishing the law, the law could not be an expression of external freedom. An arbitrary law could not arise from your own lawgiving will. That can only be so when the idea behind public law is constitutive: in

following public law you follow a law that makes your external freedom possible. Dependence upon public law can only be fully rightful when it institutes a system of reciprocal freedom and one in which subjects can regard themselves as co-legislators.³⁴

It emerges that the constitutive reading is uniquely poised to capture the normative structure of public law, as Kant expresses it through IOC. Public law is not a means nor an end as such. Public law develops Kant's general idea of the relationship between freedom and law. Freedom is not the power to choose for or against the law. Instead, positive external freedom is partly the power to follow public law.

5. Two Objections

The central thought I have been defending is that for Kant the relationship between external freedom and public law is not one of means-end (regardless of direction) but one of constitution. Before closing I want to consider briefly two objections to this line of interpretation. Defenders of public law-based views are apt to object that my second-personal interpretation fudges the line between individual and collective ends. Defenders of freedom-based views are apt to object that my second-personal interpretation is viciously circular. I will now argue that neither objection is forceful. Let me begin with the public law-based objection.

When briefly considering the possibility of a constitutive interpretation, Katrin

Flikschuh warns that such an exegetical possibility should be approached with caution, for ‘it is liable to fudge the difference between individualistic and non-individualistic ends in Kant’s morality of Right’ (Flikschuh *forthcoming*: 1). Flikschuh does not explain why this conceptual fudge is likely nor why it would be problematic. I suspect that her concern may be with reducing public lawgiving to a merely private or individualistic model or, alternatively, with inflating external freedom into a purely public model.

Nevertheless, neither reduction nor inflation need be feared on the constitutive model. The claim that public law is partly constitutive of external freedom does not reduce public lawgiving to a merely private end. This was precisely the point I have emphasized by pursuing the analogy between law and the idea of unity as a *whole* rather than as an *aggregate*. A private model of law would indeed reduce the normativity of law to the convergence of private judgements. Law would be an *aggregate* of private judgements about right. By contrast, on the proposed reading, public law develops the unity of a whole characteristic of UPR. Just as UPR is a universal law prior to any of the parts it determines, so too public law is a whole prior to the judgements of the individuals subject to it. That is precisely what distinguishes public law from mere generalizations in the state of nature.

The claim that public law is partly constitutive of external freedom does not inflate external freedom into a purely public end. That is because in UPR external freedom has an a priori dimension that functions as a regulative idea for

the evaluation of actual public law. This is the reason why, when formulating IOC, Kant claims that the *state in idea* ‘serves as a norm (*norma*) for every actual union into a commonwealth’ (*MM*, 6: 313). Although the innate right to external freedom is constituted by an a priori universal law, this law has yet to manifest itself into the truly public form of positive law. This distinction, then, preserves rather than fudges a distinction between private and public ends.

Defenders of the freedom-based view may object that the proposed constitutive interpretation is viciously circular. The second-personal idea of external freedom I have proposed is thoroughly normative and constituted by law: partly by a priori law and partly by a posteriori law. The objection is that if external freedom is constituted by law, the proposed notion of external freedom would move in a circle. Let me paraphrase Valentini’s formulation of the problem (Valentini 2012: 454). External freedom is not just any freedom, but that warranted by a universal law of justice. But how are we to get a grip on the idea of a universal law of justice? We appeal to the specific rights to external freedom warranted by such a norm of justice. Nevertheless, if this norm of justice is to stay within the strict formal parameters of Kant’s philosophy of right (e.g. refusing to ground rights and justice in considerations of well-being), we can only get a grip on these specific rights by appealing to the generic idea of external freedom. This reveals that we have moved in a circle: from external freedom to norms of justice to specific rights and back to external freedom. The only way out of this circle is to abandon a normative concept of external freedom and to begin, instead, with a

pre-normative one, such as the freedom to move my body about as I please.

I want to concede that on the constitutive account there is an internal relationship between external freedom and law, such that neither can be fully understood independently of the other. Nevertheless, this does not entail a problematic circularity. The charge of circularity supposes that the only way to get a grip on the idea of external freedom is to ground normative concepts in pre-normative ones. From that perspective, Kant's account will surely look circular.

What these critics miss is that Kant's argument is not circular but *developmental*.³⁵ Kant begins with an original idea of freedom and law, namely, UPR. In the order of justification, this idea functions as an axiom, for it is not grounded in any further considerations. Nevertheless, as the argument about the incoherence of the state of nature makes explicit, the original norm is too abstract and indeterminate to offer normative guidance by itself. Kant argues that we must develop UPR into two further a priori norms, namely, PPR and IOC. These norms are more specific than UPR because they introduce a novel normative form concerning the relationship between a public authority and its subjects. These norms represent the duty of individuals to establish a rightful condition and the duty of a public authority to exercise its mandate in agreement with the original right to freedom of each of its subjects. Still, these norms remain too abstract and indeterminate. This does not betray a hidden circle. And it does not call for ultimate grounding in a pre-normative value. Instead, Kant's argument is

that it calls for the *activity of a public institution*. Through legislation, adjudication and enforcement of law, a public authority must render more specific and determinate the abstract metaphysical principles of right.

This is an instance of Kant's approach to the generality of concepts. The universal form of any concept means that the concept by itself cannot determine its own application to specific empirical circumstances. Further, more determinate concepts can help, but eventually concepts run out. Judgement is required, relating the universal concept to the particular circumstance, for if a rule were required for the application of rules, an infinite regress would ensue (*CPR*, A133-4/B172-4; *CPJ*, 5: 169). Similarly, in a system of right, a public authority enacts *public judgement* through its laws and through the enforcement and adjudication of said laws, thereby relating the abstract metaphysical principles of right to concrete empirical circumstances.

In short, what the objection appears to miss is that for Kant the activity of a public authority is not an accident to the metaphysics of right but its necessary embodiment. Kant, as it were, defends an 'institutional hylomorphism', the view that the metaphysical principles of right are incomplete and imperfect without embodiment in an institutional setting. But this is just another way of putting the main thesis of the constitutive interpretation, namely, that your external freedom is partly constituted by public law.

This view may strike some readers of Kant as surprising, for it seems to bring

Kant closer to the Hegelian view that freedom is essentially a social and institutional achievement. On the contrary, a close reading of Kant's Doctrine of Right seems to reveal that Hegel's celebrated social view of freedom may not have been as novel as it is often thought to be.

Conclusion

What, according to Kant, is the relationship between external freedom and public law? The two dominant interpretations think of either term as a means to the other. Freedom-based views justify public law as a means to securing external freedom rights. Public law-based views see external freedom as a means to securing a system of public law. I have offered an alternative interpretation. The relationship between external freedom and public law is not one of means to end. Rather, public law is partly constitutive of external freedom. This claim requires conceiving of external freedom as irreducibly second-personal. The right to external freedom does not protect a first-personal value, such as the value of exercising one's capacity to set ends. Rather, in a system of right the relational right to external freedom is normative bedrock. Second-personal external freedom is constituted by law. On the proposed reading, public law develops this model. Public law is justified not because it secures an independent end, but rather because it constitutes and makes possible a system of external freedom.

This alternative interpretation avoids the interpretative difficulties of its competitors. In comparison to freedom-based readings, by treating the right to

external freedom as a second-personal norm, it respects Kant's claim that this norm functions as an 'axiom'; by treating the relationship between law and freedom in constitutive terms, it avoids instrumentalizing the significance of public law; and by conceiving of external freedom as essentially positive, it coheres better with Kant's more general moral views about the nature of practical freedom. In comparison to public law-based views, it preserves Kant's claim that, in the ideal case, in following public law I follow a law internal to my lawgiving. Furthermore, if this reading is correct, it supports rejecting the caricature of the Kantian agent as a disembodied spirit inhabiting a supernatural realm, for the bearer of rights is firmly planted in an embodied, institutional setting.³⁶

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Notes

¹ I am indebted to Katrin Flikschuh for framing the interpretative alternatives along these lines. See Flikschuh forthcoming.

² Ebels-Duggan 2011 and 2012, Hodgson 2010, Korsgaard 2008, Pogge 2004, Sangiovanni 2012, Uleman 2004, Williams 1983.

³ I will develop this point below. For now, see *MM*, 6: 316. All references to Kant's writings are given by abbreviated title – *CPJ* (*Critique of the Power of Judgement*); *CPR* (*Critique of Pure Reason*); *CPrR* (*Critique of Practical Reason*); *G* (*Groundwork for the Metaphysics of Morals*); *MM* (*Metaphysics of Morals*); *PP* (*Perpetual Peace*); TP ("On the Common Saying: "This May be True in Theory but It Does not Apply in Practice"); *R* (*Religion within the Limits of Bare Reason*); and WE ("What is Enlightenment?") – and by the page numbers of the appropriate volume of *Kants gesammelte Schriften, herausgegeben von der Deutschen [formerly Königlich Preußischen] Akademie der Wissenschaften* (Berlin: de Gruyter [and predecessors], 1902–). For *CPJ* see Kant 2007; for *CPR* see Kant 2007; for *R* see Kant 2005; and for the rest see Kant 2006.

⁴ Flikschuh is perhaps the clearest proponent of this view. See Flikschuh forthcoming. Uleman endorses some strands of it, see Uleman 2004. For an explanation of Uleman's apparent ambivalence, see below, n. 13. Jeremy Waldron may be read as proposing this view as well. See Waldron 1996.

⁵ Flikschuh acknowledges the possibility of a third alternative interpretation along these lines, but warns that it should be approached with caution, for it is 'liable to fudge the difference between individualistic and non-individualistic ends in Kant's morality of Right' (Flikschuh forthcoming). Flikschuh also notes that this elusive third interpretation has not been articulated in the recent literature. In her estimation, Arthur Ripstein's reading, which may appear to offer a version of this third alternative, is more likely simply 'ambivalent between either the freedom-based view or the public law-based position'. I will have more to say about the difference between Ripstein's position and my own below.

⁶ *G*, 4: 446-7; *MM*, 6: 214; and *CPrR*, 5: 33.

⁷ On this ‘descriptive’ conception of external freedom, see Ebels-Duggan 2011, Sangiovanni 2012 and Valentini 2012. For the distinction between ‘descriptive’ and ‘normative’ conceptions of external freedom, see Ebels-Duggan 2011 and 2012 and Valentini 2012.

⁸ Two exponents of this ‘normative’ conception are Hodgson 2010 and Ripstein 2009 and 2012. Although Hodgson does seem to endorse an essentially negative conception of external freedom, Ripstein does not.

⁹ Hodgson: ‘I have argued that Kant views the right to freedom as grounded in our humanity, that is, in our capacity to set ends according to reason. I am now suggesting that the right to freedom protects a rational agent’s ability to make choices in general – that is, her ability to set and pursue ends for herself’ (2010: 800).

¹⁰ This point is orthogonal to the debate about whether Kant’s philosophy of right is ‘separable’ from his moral philosophy. For an illustrative example of this debate, see Guyer 2004 and Wood 2004. For an argument to the effect that this debate may be hide more agreement than disagreement, see Ebels-Duggan 2012.

¹¹ *G*, 4: 446-7; *MM*, 6: 214; and *CPrR*, 5: 33.

¹² For an illuminating and unusual defense of the view that external freedom is a genuine species of practical freedom, see Uleman 2004. Where my view differs from hers is that, if I have understood her argument, Uleman never proposes a constitutive interpretation of the relationship between practical freedom and practical law. She does not address this question thematically and appears ambivalent. Sometimes, as when she claims that ‘protecting external freedom is, indeed, the proper aim of juridical law’, she seems to endorse a freedom-based view (2004: 586); at other times, as when she claims that external freedom is the ‘product’ of public law, she seems to endorse a public law-based view (2004: 581)

¹³ For excellent discussion of this point, see Ludwig 2004.

¹⁴ Gregor translates *Vermögen* here as ‘ability’ but I think the term ‘power’ is more apt. Whereas an ability may be pre-normative and may not require a power-constituting law, the idea of ‘power’, at least as Kant understands it, makes necessary reference to the law that constitutes something as a power.

¹⁵ Elsewhere I develop this distinction in more detail and raise some difficulties for Darwall’s conception of second-personal reasons. See Zylberman 2015 and *unpublished*. For the purpose of characterizing external freedom as an irreducibly second-personal norm the distinction drawn here should suffice.

¹⁶ In what follows I shall develop this thought for one branch of the division of the *Metaphysics of Morals*, namely, that organized by the idea of outer freedom. I must leave it as an open question whether a kind of second-personal structure also governs the idea of inner freedom.

¹⁷ Of course, as is well known, Kant argues that the forms of determination of the will by a practical law are different in the juridical and ethical cases. In the ethical case, the moral law must be the incentive to my action; in the juridical case it suffices that my action be in agreement with the moral law – in the guise of UPR (*MM*, 6: 218-20). Both, I am arguing, are species of practical freedom: one is internal, the other external, since the moral law retains a degree of externality in the juridical case, such that it need not be the incentive to my act for it to determine my action.

¹⁸ A power to bind another is juridical in the sense that the correlative duty is enforceable. For Kant’s famous argument for the analytic connection between a juridical power and the authorization to coerce, see *MM*, 6: 231. See also *MM*, 6: 383.

¹⁹ See also *MM*, 6: 255-6, where Kant explicitly describes the universal rule governing property claims in terms of the *reciprocity* (*Reziprozität*) of the obligation on others.

²⁰ For discussion see Weinrib 1996, Thompson 2004 and Darwall 2013.

²¹ Of course, this assumes that morality brings within its purview our relationship to the natural environment and that this relationship can be understood in terms independent of our wronging one another.

²² Reath 2004: 349-70.

²³ Ripstein uniquely captures the embodied character of the right to external freedom by characterizing this right in terms of the exercise of one's embodied purposiveness free from wrongful dependence on others. See Ripstein 2009: ch. 2. Although Ripstein explains external freedom in terms of an agent's purposiveness, he struggles to keep Kant's idea of external freedom relational – or, in my terms, second-personal. Flikschuh has recently criticized Ripstein for grounding external freedom in the non-relational value of purposiveness. I think Flikschuh's criticism misses its mark insofar as Ripstein does not ground UPR in a further, non-relational value. Nevertheless, Flikschuh's criticism is not completely off target, for Ripstein continues to insist that the right to external freedom presupposes 'non-relational capacities' (Ripstein *forthcoming*: 12). A concern with this move is that it grounds the relational right to external freedom in a non-relational and empirical capacity. As such, this capacity would then be understood independently of the law, leading to a conception of the law as an aggregate. By contrast, on the second-personal reading I develop here, Kant's very idea of a power of purposiveness must itself be construed in relational, second-personal terms. This is an instance of my earlier point that for Kant a power is not prior to law, but, conversely, a normative power in general is law-conferred and thus law-constituted.

²⁴ Strangely, in denying that the innate right to freedom can admit of empirical instantiation, Flikschuh hints at this view (*forthcoming*). Yet Kant's discussion of the innate right to freedom as necessarily embodied sits oddly with such a view. See Kant's remarks on the difference between that which is 'internally' mine or innate and that which is 'externally' mine or acquired (*MM*, 6: 237, 247-8).

²⁵ This reading is indebted to Ripstein 2009: ch. 6. For a similar reading, see Pippin 2006. For a prudential justification of the transition to the civil condition, see Pogge 2004.

²⁶ I should emphasize that the incoherence at play here is strictly practical, rather than theoretical. The incoherence turns on the practical form of our relationship to one another as bearers of the innate right to external freedom. The unilateral form of enforcing rights in a state of nature is inconsistent with the reciprocal form of our relationship as equal bearers of the right to freedom. The a priori argument for the transition into a civil condition is meant to be, then, through and through practical rather than theoretical. I am grateful to an anonymous referee for prompting me to clarify this.

²⁷ *MM*, 6:307. Cf. *PP* 8: 349.

²⁸ For excellent discussion of this fundamental point, see Pippin 2006.

²⁹ *MM*, 6: 341: 'This is the only constitution of a state that lasts, the constitution in which *law* itself rules and depends on no particular person. It is the final end of all public right, the only condition in which each can be assigned *conclusively* what is his.'

³⁰ Cf. Thomas Hobbes, *Leviathan*, ch. xxvi: ‘And first, it is manifest that law in general is not counsel, but command; nor a command of any man to any man, but only of him whose command is addressed to one formerly obliged to obey him. And as for civil law, it addeth only the name of the person commanding, which is *persona civitatis*, the person of the commonwealth.’ Hobbes is acutely aware here of the second-personal structure of law. And Kant follows Hobbes in this regard. The normativity of the law stems from its source in the public authority (the *commanding* role) addressed to somebody (a private subject) bound to obey the public authority. Where Kant arguably departs from Hobbes is in his more robust conception of a *public authority* and its limits. For Kant’s criticism of Hobbes, in his first political treatise, see TP, 8: 303-4.

³¹ TP, 8: 297. For presentations of the idea of the original contract, see also TP, 8: 295; PP, 8: 344, 349; MM, 6: 315-16.

³² I am grateful to Jacob Weinrib for helping me to put the point this way.

³³ This may give us some reason to depart from Reath’s claim that a self-determining will requires the *actual* agreement of others. See Reath 2004: 359.

³⁴ As Kant puts it in TP, the idea of your status as a *co-legislator* is the synthesis of two previous aspects of your status, your freedom and your equality (TP, 8: 290). The law constitutes you as a free being by making you a *co-legislator*, thus realizing your *equal freedom*. Although I cannot show this here, I think this political structure of thought organizes the development of the categorical imperative in Kant’s *Groundwork*. The first formula (universality) concerns your *freedom* in relation to the law; the second formula concerns your *equality* to others; and the third (Kingdom of Ends) concerns your status as *co-legislator* of the moral law. For a similar progression, see PP, 8: 348-9.

³⁵ Here I am in agreement with Ripstein's response to Valentini's charge of circularity. Ripstein calls Kant's argument 'sequenced'. Although I cannot articulate the point fully here, I prefer the term 'developmental' because it captures Kant's continuous invocation of biological images of development in representing the activity of reason.

³⁶ This article was written while I was a SSHRC Postdoctoral Fellow in the department of philosophy at McGill University. For help and criticism, I am extremely grateful to Jim Conant, Stephen Engstrom, Wolfram Gobsch, Matthias Haase, Adrian Haddock, Ben Laurence, Sasha Newton, Robert Pippin, Arthur Ripstein, Sebastian Rödl, Martin Stone, Owen Ware, Jacob Weinrib, Daniel Weinstock, and two anonymous reviewers. I also thank Arthur Ripstein and Katrin Flikschuh for allowing me to quote from their unpublished material.