KANT’S CHALLENGE
AND RELEVANCE TODAY

1.1. The More Fundamental Theory

Kant’s relevance to the philosophy of right and law and to political philosophy was first shown not by the four innovations mentioned in the preface. It had already become evident in three dimensions of the fundamental character of his theory, although these in turn are partly responsible for the innovations. Compared with most alternatives, Kant’s thought on right and law and on the state is more extensive and substantial in its inquiry, more finely nuanced in its conceptual relations, and at once more adroit and radical in its argumentation.

Among the reasons for this precedence is the “measured respiration” of Kant’s development. Already as a young philosopher, he was concerned with questions of law and right; in the early 1740s, he attended lectures by Martin Knutzen (1713–51), a follower of Wolff. In the 1760s, he began to study works on juridical science and the philosophy of right and law. In the summer semester of 1767, he also began to lecture on “natural law.” But Kant did not consider his philosophical reflections on right and law and on the state as sufficiently matured for publication until after he wrote the *Groundwork* as a prolegomenon to practical philosophy and the second *Critique*. Because he saw the foundation of his political philosophy in morals, he exposed the former to the public only after he gained reasonable clarification on the grounding of the latter.

(1) To begin with, his inquiry covers a great deal of ground. Critics still like to contend that Kant’s moral philosophy amounts to a “single-principle-ethics” (*Ein-Satz-Ethik*; Marquard 1987, 111), that it is mere formalism (Scheler 2000), and that it falls victim to “the impotence of ought” (Hegel, *Werke* II 444, 460 f., 464; III 448; VII 252f.). If one takes
a look at Kant’s systematic moral philosophy, *The Metaphysics of Morals*, these objections prove to be unfounded, rendering their broad influence inexplicable. Within the first part of the book, the *Doctrine of Right*, Kant begins by elucidating the foundational concepts of practical philosophy in general, namely, freedom and the faculty of choice, person, accountability, guilt, and crime (“Introduction to the Metaphysics of Morals”). He then presents the foundational concepts of the philosophy of right and law in particular: right and law, natural and positive law, the authorization to use coercion, private and public right, along with separate phenomena such as equity and the right of necessity (“Introduction to the Doctrine of Right”). But even this diverse array of issues is only preliminary to the larger project of developing a theory of fundamental legal institutions. These include a primitive right to which all human beings are entitled by virtue of their humanity, along with property and its various basic forms; further, the division of power, forms of government, penal law, and the right to resist, although Kant repudiates the latter.

Unlike other modern legal and political philosophers, Kant divides public right into its only three conceivable areas: state law, the right of nations, and cosmopolitan law. With respect to the right of nations, he concedes to both the right to peace and to war and distinguishes in the latter among the right to go to war, right during a war, and right after a war. The domain of public right also comprises specific questions concerning public duties (taxes, customs duties), the statute of limitations, amnesty, and the right to emigrate, along with authorship rights (copyright), state liability toward the poor and orphanages, and the relationship between church and state. Finally, we may discern a scathing criticism of colonialism in Kant’s writings.

These observations provide a first reason for the challenge and relevance of Kant today. Both compared with prominent predecessors such as Hobbes, Locke, and Rousseau, and with many successors, including Hegel and particularly contemporary legal and political philosophers, the scope of Kant’s thought is decidedly more substantial. The “application” of the categorical imperative to right and the state and to their specific tasks leads to a legal and state ethics that recognizes the authorization to use coercion as an integral element of right and law, develops the principle of human rights, and grounds the basic institutions such as property and criminal punishment. Above all, it overcomes the prevailing tendency to restrict legal and political philosophy to the “national” level, and responds to its concentration on single communities with a
global and cosmopolitan perspective. Two further innovations lie within Kant’s expanded horizon of inquiry: the expansion of a legal and state ethics by an ethics of peace and by the theory/practice debate surrounding his democratic revision of Plato’s principle of the philosopher-king.

(2) The conceptual precision of Kant’s arguments with respect to all of these issues is, for a thinker of his caliber, self-explanatory. An example may be singled out to begin with: Without harping on conflicting views, Kant demonstrates that the contract consists in a relationship between persons and not between persons and things. The nevertheless subsisting relationship with things is mediated by the personal relationship: “By a contract I therefore acquire another’s promise (not what he promised), and yet something is added to my external belongings” (VI 274).

Our examination of these issues in exemplary fashion (chapter 5) will not address this particular example, since it has – unfortunately – migrated from philosophy to the merely juridical theory of right and law. We will address the relationship between morals and right or law, as it is still discussed by philosophers (albeit rarely with the same discrimination and keen awareness of the problem as in Kant). (a) From a legal standpoint, Kant distinguishes between law that has positive validity (“what is laid down as right?”) and law that has moral validity (“what is right”: natural law). (b) He acknowledges two groups of duties within morals: the legal duties that each owes to one another under authorized coercion, and those duties that go beyond what is owed and are not enforced, namely, the duties of virtue. The latter do not belong in the province of right and law or of the state. (c) At least two components belong to legal duties: the mere conformity with duty or legality and the recognition of duty for its own sake, acting from duty or morality. Armed with this twofold distinction, Kant is able to avoid two forms of moralizing: both a philanthropic concept of law that aims at enforcing duties of virtue, such as beneficence, and a disposition-based concept of law (Gesinnungsrecht) that is not satisfied with legality even with respect to genuine legal duties, but additionally demands inner recognition.

It is tempting to apply the distinction between legality and morality not merely to legal duties, but also to duties of virtue. The Groundwork confirms this conjecture, for it spells out in exemplary fashion the difference between “in conformity with duty” and “from duty” for those four types of duties (perfect and imperfect duties, both to oneself and to others) that cover the entire scope of moral duties. Whereas the Groundwork acknowledges that such uncontroversial duties of virtue as
beneficence may be the product of incentives such as “the inclination to honor” (IV 398), the “Introduction to the Metaphysics of Morals” calls the lawgiving involved in duties of virtue ethical. In contrast to juridical lawgiving, ethical lawgiving makes “duty the incentive” (DR VI 219 l. 46). This leads to the following problem: If ethical lawgiving is to correspond to the duties of virtue, then duty will be made an incentive, thus leading to morality and, ab ovo, excluding legality. Only a thorough interpretation of the text can show whether Kant indeed infringes on his own criterion from the Groundwork, that of the “common idea of duty” (IV 389). For beneficence apparently does not always follow from duty; it can also result from inclination, as when there is an interest in honor. (3) The radicalism of Kant’s questions and the thoroughness of their elucidation have more bearing philosophically than the broad scope and conceptual precision of his theory. This provides a second reason for the provocation and relevance of Kant today. Under the influence of Critical Theory, the idea of “freedom from hegemony” or from “domination” (“Herrschaft”) held sway for a long period of time – admittedly in German more than in Anglophone debates. Since then, social philosophy has again opened up to legal and state theories and has already turned to normative speculation on justice and liberal democracy. However, the preliminary question of why people should at all be regulated by law, that is, subject to authorized enforcement, is still not fully acknowledged. Kant evidently provides a more thorough legitimation of the existence of the state and is therefore a more radical thinker (chapter 6). Many theories today limit themselves to a hermeneutics of Western democracy in a gesture of modesty. They thereby overlook the specific task of legitimation that has arisen in an age of globalization and of growing sense of identity among non-Western cultures: the justification of a form of social self-organization that is valid for all people of all cultures. The third reason for Kant’s provocation and relevance today lies in the Kantian perception that neglecting this task of legitimation cannot be defended on philosophical or political grounds.

Kant often gives more radical answers to his more radical questions. Arthur Schopenhauer, otherwise an admirer of Kant, sees Kant’s whole theory of law to be “a strange tangle of errors, one leading to the next,” which he can explain only by “Kant’s feebleness through old age” (The World as Will and Representation, book 4, sec. 62). He criticizes in particular Kant’s general principle of external acquisition. In truth, however, Kant’s Doctrine of Right is generally more finely grained in its concepts and more sensitive to the issues at hand than his earlier
works, so that possible errors cannot be explained as the product of the author’s enfeeblement due to old age. In other respects, precise reflection is conjoined with well-thought and convincing argumentation through extended passages of Kant’s text. Paragraphs 15 (VI 265) and 17 (268f.), for example, contain a wholesale attack on the theories of property grounded in evolutionary formation and labor relations advocated by Locke and later reprised by Schopenhauer. Kant’s more radical thought is demonstrated most clearly in his novel interpretation of the three (pseudo-)Ulpian legal rules [Rechtsregeln]: honeste vive, neminem laede, and suum cuique tribue (236f.). Kant’s understanding is deeper than that of common interpretations and reveals an unusual, possibly contradictory duty. A fourth challenge of Kant’s theory lies in the question of whether the justification of right and law presupposes a notion of duty that has systematically been driven out of philosophies of right and law and that seems to exceed the scope of the concepts of right and law: This is the notion of a duty to oneself that nevertheless signifies a legal duty (chapter 7).

1.2. Natural Law and Metaphysics

It is widely understood today that Kant advocates a cognitivist ethics of right and law and of peace that does not concern facts (“Is”: “It is/is not the case, that p”), but rather obligations (“Ought”: “It is right/wrong that one should do/refrain from a”). But even the latter do not comprise subjective attitudes or convictions to the extent that they imply contingent approval or disapproval, but rather demand rigorous objectivity. Within the large family of cognitivist (legal) ethics, Kant explicitly rejects the family of meta-ethical naturalists prominent today (e.g., Brink 1989 and Schaber 1997). He does not agree that the capacity for truth in moral assertions can be taken in an empirical or general descriptive sense. For Kant, moral principles cannot be traced back to assertions about the world alone, neither to those concerning the eternal world nor to those about the “inner world.” The latter describe needs, interests, and their optimal fulfillment, happiness, along with their minimal fulfillment, self-preservation. Equally insufficient are assertions about the serviceability of the external world for the internal world or any combination of these three categories of descriptive assertions.

The plausibility of “antinaturalistic cognitivism” is immediately apparent if one considers the Is/Ought fallacy, a component of theories of argumentation according to which a moral Ought does not
follow from a mere descriptive Is. Kant’s antinaturalism, however, rests on two assumptions that, from a contemporary viewpoint, pay much too high a cost: It binds a legal ethics to metaphysical and natural law theories. This contemporary verdict is perhaps the unavoidable result of presupposed concepts that are overly narrow and demanding. Be that as it may, more emphatically modest concepts do not entail that Kant’s metaphysical (concept of) natural law is “already a priori a failure,” as will become clear in the following.

In the seventeenth and eighteenth centuries, natural law was viewed as the nonempirical counterpart to empirical political science. This leads us to refute a first skeptical worry that natural law is committed to religious or theological assumptions not shared by secular and pluralistic societies. In the Enlightenment, natural law was a discipline grounded exclusively on reason and independently of doctrinal elements. As a section of practical philosophy and a propaedeutic to positive juridical science, it belonged both to the faculty of jurisprudence and to that of philosophy. It was also advocated by members of both faculties, both by philosophically competent jurists, such as Hugo Grotius, Samuel Pufendorf, Christian Thomasius, Gottfried Achenwall, and Gottlieb Hufeland, and by philosophers versed in jurisprudence such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. In Kant’s time, a generation of “intellectual leaders” in natural law migrated from jurisprudence to philosophy. Kant’s legal philosophy of natural law, as presented already in the “Idea” and the “Common Saying,” is followed by the publication of Fichte’s *Foundations of Natural Right* (1796), then by *Kant’s Doctrine of Right* one year later, and at the start of the next century, by Hegel’s work on *The Scientific Ways of Treating Natural Law* (1802). Hegel’s subsequent work entitled *Elements of the Philosophy of Right* (1821) carries the subtitle “Or Natural Law and Political Science in Outline.” Not long after Hegel, however, the “opinion leaders” of the philosophy of natural law and legitimacy theories of right and law came to their demise. Inspired by Kant’s *Critique of Pure Reason*, and even before his publication of the *Doctrine of Right*, Gustav Hugo, in the *Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts* (1789), advocates the view, still widely supported today, that natural law cannot be separated from positive law. One generation later, in the 1820s, the historical school of law, led by Friedrich Carl von Savigny, gained victory over the philosophical school of law. And around 1840, it became commonplace in Germany to speak of the “nullity of natural law.” One aim pursued by the present study is to confront this commonplace still
in force today with a theory that upholds natural law in the sense of rational law.

Prior to Kant, natural law was developed by philosophers and jurists in such a way that it was grounded in reason, but not exclusively in pure reason. Kant here forges ahead with a methodically decisive improvement indebted to the critical turn. Hence, we may refute the second critical worry that Kant’s ethics of right and law and his ethics of peace belong to a pre-critical theory of natural law. This view is already weakened by the fact that Kant dealt with natural law at an early date but refrained from publications on this matter before he succeeded in providing a new, critical-transcendental foundation of philosophy. The systematic legal and peace ethics presented in the *Doctrine of Right* is, as a section of the *Metaphysics of Morals*, no longer a critique of practical reason, but it presupposes the insights achieved by the latter. With respect to content, Kant adopts two insights from his predecessors: “Hobbes’ Ideal that it is necessary to leave the state of nature” (Reflections XIX 99; cf. DR p. 44) and to establish a legally and politically instituted state, and Rousseau’s criterion necessary for reaching this state: the “ideal of state law” (XIX 99). With respect to the methodical determination of these and other elements of his theory, however, he proceeds on the level of his new critical foundation of morals and in this way overcomes the precritical, dogmatic notion of natural law.

The novel notion of critically examined natural law becomes manifest in two ways: First, it opposes the frequent conflation of heterogeneous Biblical and rational arguments or of empirical and historical arguments. Second, it instead follows the principle of the “Preface” to the *Groundwork*; it “[carefully separates] the empirical part . . . from the rational part” (IV 388) and reduces the ethics of right and law and the ethics of peace to their pure constituents. The leading concept of these ethics, namely, right as a “pure” concept, can be accommodated only by pure reason (VI 205). Now such a concept has a metaphysical character, thus providing the grounds for the fifth challenge: Kant questions a (common) dogma of contemporary philosophy and commits a foundational ethics of right and law to a certain degree of natural law and metaphysics.

The argument Kant presents for his case is not prima facie implausible. Moral obligations that are binding “for everyone” cannot be derived “from observing [man] himself and his animal nature” nor “from perceiving the ways of the world, what happens and how we behave” (VI 216). Since experience is disqualified as their ultimate source,
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this – *e contrario* – leaves only what transcends experience, namely, metaphysics. Moreover, Kant’s natural law and metaphysics turn out to be agreeably modest.

First, Kant places a supreme normative-critical criterion on all positive legislation. But contrary to an inflated rationalism that aims at deriving positive law from reason, he reduces the domain of philosophy to that small division of “first principles” mentioned in the title, the concepts of which must first be determined. At the same time, this defuses yet a further worry. As a science independent of experience, natural law replaces not the legislator nor the judge nor the legal expert. However, all three rely on the justification of legal principles, for otherwise they could not demonstrate that the constitution and the legal system are reasonable and just.

As elements of pure practical reason, the principles do have metaphysical characteristics, yet they turn out to be modest to the extent that only their practical aspects are pertinent, not their theoretical aspects. Since the ultimate concern is the overcoming of natural drives and not the human drives themselves, namely, inclination or the desire for happiness, the theory does contain a supernatural or metaphysical element: an element of pure reason. This deflationary metaphysics nevertheless covers a great deal of ground. Kant does not rest content with the fundamental concept of right, but shows its indispensability for basic institutions such as those of external objects that are yours or mine. The fundamental institution of property can in fact be conceived as a legal claim only independently of physical possession. Stolen goods do not belong to their factual possessor, the thief, but rather to the person bearing a legal entitlement. Kant thus reasons that legal possession is not physical, but intellectual; it consists in a nonsensory, noumenal, that is, metaphysical relationship. The moral foundation of all legal contracts, namely, the obligation to keep one’s promises, is similarly independent of “all sensory conditions of space and time” and is in this sense metaphysical. By the same token, the state can be justified only by an original contract, that is, a purely rational and, contrary to Locke and Hume, nonempirical element.

According to Kant, the basic institutions of property, state, and criminal penalty cannot be derived from the human experience of oneself or of the world. For experience is not only variable, but also highly disputable. If one attempts to derive moral principles from experience, one “run[s] the risk of the grossest and most pernicious errors” (VI 215). The blunder is thus twofold: at once theoretical (“grossest errors”) and
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moral (“pernicious errors”). Whoever like Hume takes right and law to consist solely in rules of instrumentality and convention falls victim to the theoretical deficit of failing to perceive their claim to binding validity, and thus likewise stumbles into the moral problem of simply wishing away such binding validity.

However, Kant’s metaphysical theory of natural law does not venture beyond the basic institutions of law and right. It does not, for example, specify an order of ownership, let alone a complete system of private right. On the contrary, the basic institutions and their principles are open to individual and cultural differences and for this very reason call upon the faculty of judgment; they give ample leeway to the legislator and to diverse cultures. The self-limitation of philosophy inherent in its focus on basic institutions and principles is appropriate not only philosophically, but also in the face of cultural diversity.

1.9. False Estimations

A circumspect assessment of Kantian ethics of right and law cannot overlook major false estimations. Three already merit our attention here.

1) The Right to Resist. Although Kant’s metaphysical elements carry conviction “in principle,” isolated cases may invite suspicion. In particular, the “General Remark” of the Doctrine of Right and its elaboration on the right to resist (section A) raise doubts as to whether the boundary line is drawn correctly between the metaphysical (noumenal) and empirical (phenomenal) realms. Kant here is concerned no longer with the idea of reason itself, but rather with a person’s empirical use of reason; he thus already broaches on the phenomenal sphere. In §51 of the Doctrine of Right, Kant himself distinguishes between “the idea of a head of state” and a “physical person,” who “represent[s] the supreme authority in the state and make[s] this idea effective on the people’s will” (VI 338). If this person distorts his or her assigned task and acts counter to the idea, instead of contributing to its realization, then this weakens the moral legitimacy of his or her action. It does not in any way mean that he or she has carte blanche, but rather amounts to a normative criterion that bears the power of legitimation. Moral invulnerability, the fulcrum on which Kant’s refutation of the right to resist rests, is primarily granted only to the noumenal (metaphysical), not to the phenomenal (empirical) head of state. Therefore, the abuse of its
power by a physical person is not unrestrictedly rightful to the extent that every resistance is eo ipso illegitimate.

One can also articulate this criterion as a question. How tyrannical may a despot be to still count as an authority that knows no resistance and obliges a people “to put up with even what is held to be an unbearable abuse of supreme authority” (VI 320)? Without doubt, Kant’s counterarguments should be taken seriously. On the one hand, the person who claims the right to resist acts as a judge of him- or herself, thereby contravening a fundamental demand of public right, namely, the impartial arbitration of disputes. On the other hand, the concept of the sovereign power would involve a contradiction, for its dependence on the judgment of those concerned would run contrary to its sovereignty. Both arguments draw attention to grave difficulties that must be solved by a theory of the right to resist. However, they do not invalidate the claim that the empirical personification of the idea of reason does not have the same moral status as the moral idea itself.

According to Kant’s own understanding of right and law, the status of an end-in-itself is not bestowed on the state or its ruler. Right and law merely serve toward the realization of private right concerning what is internally and externally mine or yours, which otherwise remains provisional and is not law in the full sense. As long as private demands still rely on individual interpretations and on private capacities to execute them, they lack reality. This can be remedied only by powers that are no longer private, but public. The sum total of these powers, the state, is nevertheless a secondary and subsidiary institution in comparison with private right, and it dissolves its own legitimacy by severely violating its tasks over a long period of time. The philosophical social contract still commits the state to the consent of those affected, albeit not to their factual consent but to the worthiness of consent. The state undeniably forfeits the worthiness of consent in the event of continued massive infringement of the law.

(2) Human Rights in the Plural. Kant began thinking about right and law during the period of the Prussian king Frederick II the Great (1740–1786). This prominent advocate of enlightened absolutism resumed what his predecessor, the soldier king Frederick William I (1713–1740), had initiated: the development of an authoritarian welfare state. Its objective was to maintain a strong army in accordance with a mercantile economic policy and to introduce a modern bureaucracy on the basis of both a rigid tax system and a highly commendable legal code at