

Sorin Baiasu

Right's Complex Relation to Ethics in Kant:

The Limits of Independentism¹

Abstract: The recent literature on the relation in Kant between duties of right and duties of virtue is dominated by a debate on whether duties of right can be derived from duties of virtue. According to one important argument, there is a tension or even a paradox in Kant between various claims concerning juridical norms, a paradox which can best be solved by assuming an "Independentist" position, that is, the view that the Universal Principle of Right is independent from the Categorical Imperative and, hence, that duties of right are normatively independent from duties of virtue.

My claim in this paper is that the paradox which supports the independentist reading affects Kant's claims only when the focus is on the subjective validity of duties. Once the focus is changed to objective validity, with which Kant is actually concerned, the paradox is dissolved and the Universal Principle of Right can appear as normatively dependent on the Categorical Imperative. In other words, in this paper, I argue that the scope of the paradox of juridical norms is confined to a specific focus and independentism (the view that duties of right are independent from duties of virtue) is confined in a similar way. Hence, the complexity of Kant's account makes it possible for him to accommodate both independentist and dependentist views of the relation between right and virtue.

1. Introduction

The recent literature on the relation in Kant between the doctrine of right and the doctrine of virtue displays a variety of positions, some of which are seemingly irreconcilable.² Given that supporters of these views are commentators versed in both Kant's ethics and his philosophy of law, the most plausible account of this diversity of views is that Kant's text is ambiguous or at least vague, if not downright inconsistent. Consider the following examples, which I think capture the major available positions.

1 Acknowledgements.

2 I will be using the translations listed in the Bibliography.

First, according to Jürgen Habermas,

He [Kant] starts with the basic concept of the moral law and obtains juridical laws from it by way of *limitation*. [...] This construction is guided by the Platonic intuition that the legal order imitates the noumenal order of a ‘kingdom of ends’ and at the same time embodies it in the phenomenal world.³

On this account, we seem to have a relation of simple dependence between the Categorical Imperative⁴ and the Universal Principle of Right⁵: if juridical laws can be derived from the moral law by limitation, given that juridical laws are also derived from the UPR, it seems the UPR itself can be derived from the CI by limitation.

On Habermas’s reading, we start with the CI and the maxims that we can derive as having a particular deontic status (permissible, impermissible and obligatory). We then limit the sphere of these maxims by imposing three conditions: first, juridical norms do not refer primarily to free will, but to the free choice of those to whom they apply; secondly, they pertain to the external relation of one person to another; and, third, they are enforceable through the coercive power that one person may exercise with respect to another, when legal norms are infringed upon.⁶ Through these three conditions, the CI and the maxims it justifies are limited, in order to obtain the UPR and the legal principles that can be derived from it.

Hence, as already suggested, Habermas’s reading of Kant seems to present a relation of simple dependence between the CI and the UPR, where the CI has normative priority over the UPR. The CI turns out to be a general principle, from which we can derive the juridical norms (usually justified by the UPR) by limiting

3 Habermas, Jürgen: *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*. Cambridge, MS. 1996, 105-106.

4 Henceforth, the CI. I adopt here the increasingly standard convention of using capitals (“Categorical Imperative”) to talk about the meta-principle which Kant suggests can test maxims of action and small (“categorical imperative”) letter to refer to maxims that have passed the test.

5 Henceforth, the UPR.

6 Habermas, Jürgen: *Between Facts and Norms*. op. cit., 105-106.

the application of the CI to actions characterised by free choice, externality and enforceability. On this account, therefore, the UPR depends on the CI.

Consider now Paul Guyer's view:

Strictly construed, the claim that Kant's principle of right is not derived from the Categorical Imperative, understood as the requirement to act only on maxims that can also serve as universal law, is correct because the principle of right [...] does not concern our maxims at all. [...] However, any broader claim that the principle of right is not derived from the fundamental principle of morality [...] is surely implausible.⁷

According to Guyer, a relation of simple dependence (such as that identified in Kant by Habermas) is not an accurate way of characterising Kant's position. For Guyer, the UPR cannot be derived from the CI, since, in addition to a limitation like the threefold qualification suggested by Habermas (free choice, externality and enforceability), in order to derive the UPR and juridical principles, we would need also to extend the CI and maxims so that they would no longer be strictly linked to ethical motivation, but they would allow both ethical and non-ethical motivation.⁸

That is, given that the CI is supposed to help us test maxims (which include a principle of action and the motivation with which the action is to be performed), and given that juridical principles are not linked to specific motivations, the CI needs to be both extended and limited, in order to yield juridical norms: extended by having the requirement of ethical motivation removed, and restricted by certain

7 Guyer, Paul: "Kant's Deductions of the Principles of Right". In: Timmons, Mark (ed.), *Kant's Metaphysics of Morals. Interpretative Essays*. Cambridge. 2002, 26.

8 I am assuming here the limitation is applied to the norm, rather than the motivation with which the norm is acted upon. This is what Kant seems to suggest in places (for instance, MS, AA 06: 220.8-10). If the limitation is applied to both norm and motivation, then the result will not be much different: we end up with a juridical norm and an exclusively non-ethical motive; yet, the UPR and the juridical norms that are justified on its basis are not simply supposed to be acted upon on the basis of non-ethical motives: ethical motives would be equally appropriate. Hence, we would still need an extension of the range of motivations, in addition to the initial limitation, to get to the UPR and juridical giving of norms. For the sake of simplicity, I am going to ignore this additional complication in what follows, given that it is not going to affect my argument here.

conditions, such as that of enforceability. Still, the result, according to Guyer, is that the UPR can be derived from the CI in a broad sense.

Therefore, Guyer's reading of the relation, in Kant, between the CI and the UPR rejects the simple dependence position offered by Habermas. When we apply the restricting conditions of free choice, externality and enforceability, we may indeed end up with juridical norms, but we are also left with the ethical motivation, with which the CI requires us to act, if our actions are to have moral worth. Because what distinguishes between ethics and right is not the norm, but the motivation with which one acts on a norm, the claim is that free, external and enforceable norms are still ethical, if we act on them with an ethical motivation. In short, by applying a limitation, such as that of enforceability, to the CI we do not yet obtain the UPR, since the requirement of ethical motivation, which is specific for maxims and the CI, will not be affected by the condition of enforceability. Hence, we cannot simply derive the UPR from the CI.

Yet again, according to Guyer, the UPR can be derived in a broader sense from the CI. Consider such a derivation, suggested by Arthur Ripstein:

The Universal Principle of Right extends the Categorical Imperative to take account of a type of incompatibility relation [namely, spatial incompatibility relations] that is not presupposed by it.⁹ [...] [O]nce spatial forms of incompatibility are introduced, only the formal principle of outer freedom – the Universal Principle of Right – could govern the exercise of free but spatially individuated persons.¹⁰

According to Ripstein, the CI does not presuppose spatial incompatibility relations. For him, “the *a priori* features of rightful relations between rational beings who occupy space cannot be derived from the Categorical Imperative”.¹¹

9 Ripstein, Arthur: *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, Mass. 2009, 358.

10 Ripstein, Arthur: *Force and Freedom*, op. cit., 371-372.

11 Ripstein, Arthur: *Force and Freedom*, op. cit., 358.

Ripstein's guiding idea is that the distinction between the CI and the UPR is given at least in part by the distinction between "the intellectual and the sensible".¹²

Thus, the CI rejects maxims when they are conceptually contradictory. By contrast, the UPR rejects principles, which make it possible that parts of space stand in a non-conceptual form of incompatibility relations.¹³ The principle of non-contradiction applies to our thoughts and is a form of inner incompatibility;¹⁴ by contrast, the non-conceptual form of incompatibility relations, which is introduced by the fact that distinct spatial entities cannot occupy the same location in space, is a form of outer incompatibility. Given the distinction between the intellectual (concepts) and the sensible (intuitions), we cannot derive the sensible consistency specific to the UPR from the intellectual consistency specific to the CI.

Yet, for Ripstein, there must be a way of deriving the UPR from the CI in a broad sense, something Guyer also asserts in the quotation above:

Kant says that all duties are indirectly duties of virtue, that is, that there is an obligation of virtue to act on the principle of right, to make them your own principle of action. If that is correct, however, there must be some way of bringing them within the reach of the *Doctrine of Virtue* that is not at the same time a way of making right depend on virtue.¹⁵

As we have seen, the UPR is brought within the reach of the CI by limiting the CI through the introduction of spatial incompatibility relations. This suggests that, both in Guyer's and Ripstein's accounts, in addition to a rejection of a simple dependence of the UPR on the CI, we can find the affirmation of a relation of relative dependence between the UPR and the CI. Since this relation of

12 Ripstein, Arthur: *Force and Freedom*, op. cit., 358.

13 Ripstein, Arthur: *Force and Freedom*, op. cit., 370.

14 "If we understand the Categorical Imperative in this way, then it locates the requirement of consistency in the will of the particular agent. The *subject matter* of this incompatibility often concerns the deeds and ends of others, but the *test* of its compatibility is purely internal". (Ripstein, Arthur, op. cit., 368)

15 Ripstein, Arthur: *Force and Freedom*, op. cit., 358.

dependence excludes a relation of simple dependence of the UPR on the CI, we can also call it a relation of relative independence of the two fundamental principles of Kant's moral theory.

Consider now Bernd Ludwig's view of the relation between the CI and the UPR:

This 'general principle' [the Universal Principle of Right] obviously stems in some way from the Categorical Imperative, the 'supreme principle of the doctrine of morals'.¹⁶ [...] [W]e have to take seriously Kant's numerous claims that the *Rechtslehre* is an inseparable part of his *metaphysics* of morals, and cannot be detached from the latter's foundations.¹⁷ (2002: 170)

Here Ludwig puts emphasis on a relation of dependence of the UPR on the CI. Yet, again, this is not going to be a simple relation of dependence. The derivation of the UPR from the CI will happen in "some way", and the UPR, the fundamental law of the *Rechtslehre*, is part of the metaphysics of morals, but the link will not be a direct link of simple derivation.

What we have here, I think, is another instance of the complex relation of dependence (or independence) between the UPR and the CI. As in the case of Guyer and Ripstein, Ludwig suggests that the UPR cannot simply be derived from the CI. Instead, we can think of an indirect derivation, which goes through a moral general principle, the moral law, for which a specific, ethical motivation is not required.

Indeed, as we will see also in more detail later in this paper, on Kant's account, insofar as it is not an imperative, the moral *law* is the law that perfectly rational beings follow as a matter of course. In the same way in which limited rational beings, like us, act in accordance with the laws of nature as a matter of course,

16 Ludwig, Bernd: "Whence Public Right? The Role of Theoretical and Practical Reason in Kant's Doctrine of Right. In: Timmons, Mark (ed.), *Kant's Metaphysics of Morals. Interpretative Essays*. Cambridge. 2002, 159.

17 Ludwig, Bernd: *Whence Public Right? The Role of Theoretical and Practical Reason in Kant's Doctrine of Right*, op. cit., 170.

perfectly rational beings act spontaneously in accordance with the moral law. Just as we do not need incentives to act in accordance with natural laws, the perfectly rational being will act in accordance with the moral law without being motivated in some way to do that.

It follows therefore that by limiting the moral law to specific motivations and conditions (such as that of externality), we can derive the UPR from the moral law. Moreover, we can derive the moral law from the CI by removing the motivational restriction associated with the CI and with the maxims of action. As Ludwig puts it:

The concept of ‘obligation [...] belongs to the (moral) *law* as such and not to a specific lawgiving. [...] It is the concept of a ‘ground for determining our choice’ [...] alone that can be classified as juridical *or* as an ethical [incentive] (*Triebfeder*).¹⁸

The picture seems now familiar from the discussion of Guyer and Ripstein: we cannot derive the UPR directly from the CI: we need to arrive first at the moral law and, then, by limitation, we can also obtain the UPR. The relation between the UPR and the CI is not one of simple dependence, and, yet, the UPR can be derived in some way and brought under the reach of the CI. Hence, we have here again a relation of relative dependence (or independence).

Finally, consider this very clear statement from Allen Wood: “Kant very explicitly discredits the whole idea that the principle of right could be derived from the fundamental principle of morality”.¹⁹

We may no longer understand this as before: Wood is not simply rejecting a relation of simple dependence, in order to accept a relation of relative dependence.

18 Ludwig, Bernd: “Whence Public Right? The Role of Theoretical and Practical Reason in Kant’s Doctrine of Right, op. cit., 169n10.

19 Wood, Allen: “The Final Form of Kant’s Practical Philosophy”. In: *The Southern Journal of Philosophy*, 36, 1997, 1-20, 6.

The rejection of the derivation of the UPR from the CI seems much stronger here. Wood seems to go further in the rejection of a relation of dependence: he also rejects a relation of relative dependence and supports simple independence:

It may be correctly said that Kant's theory of right falls under or can be derived from the principle of morality. That is, it may be said *insofar as juridical duties are regarded not merely as juridical but also as ethical duties*. Considered simply as juridical duties, however, they belong to a branch of the metaphysics of morals which is *entirely independent* of ethics and also of its supreme principle.²⁰

Wood makes here reference to the following claim, which Kant formulates in the Introduction to the *Metaphysics of Morals*, section IV:

Ethics has its special duties as well (e.g., duties to oneself), but it also has duties in common with right; what it does not have in common with right is only the kind of *obligation*. [...] So while there are many *directly ethical* duties, internal lawgiving makes the rest of them, one and all, *indirectly ethical*.²¹

On Kant's account, as we will see in more detail later in this paper, when a duty of right is acted upon with an ethical motivation (that is, because it is the right thing to do), then it becomes a duty of virtue too, and, hence, any duty of right is indirectly ethical. Wood notes therefore that the UPR may be derivable from the CI,²² but only insofar as the UPR is seen as justifying not simply juridical duties, but (indirectly) ethical duties. As issuing simply juridical duties, the UPR is supposed to be "*entirely independent*" of the CI.

We have, therefore, a reading of Kant, in which the relation between the UPR and the CI is viewed as a relation of simple independence, a view that contrasts clearly with the previous readings of the relation as of simple or relative dependence.

20 Wood, Allen: "The Final Form of Kant's Practical Philosophy", op. cit., 8.

21 MS AA 06: 220.18-221.02

22 He actually says the "principle of morality" and, insofar as he means by this the moral law, this can be problematic; but, if he means the CI, then he is right to point out that the UPR cannot simply be derived from the CI.

Moreover, the relation of relative dependence can be seen as one where the UPR is derived from the CI by two moves or as one whether the UPR and the CI are both derived from a more general principle.

My view is that ultimately all these positions can be made compatible and, hence, their distinctness does not raise the potential worry that only an ambiguous or inconsistent text can give rise to so many interpretations. To show this, however, is a much more extensive task than I can undertake here. In what follows, I will make a first step towards this more ambitious goal, by focusing on a more limited argument. According to this argument, there is a tension or even a paradox in Kant between various claims concerning juridical norms, a paradox which can best be solved by assuming that the UPR is independent from the CI. My aim in this paper is to undermine this argument.

Although more limited, the task of undermining this argument is particularly significant. The argument starts from an objection to Kant, which represents a strong critique: rather than trying to find a contradiction in Kant by identifying equally plausible, but opposed or even contradictory, readings of a particular claim, the objection starts by identifying a paradox between various claims Kant makes and, then, suggests that the solution would be to accept one of the three positions I presented above, more exactly an independentist reading similar to that presented by Wood; the other two competing readings would in this way be abandoned.

My claim is that the paradox which supports the independentist reading affects Kant's claims only when the focus is on a specific aspect of the UPR and the CI. Once the focus is changed, the paradox is dissolved, and the UPR can appear as dependent on the CI – whether in a relation of simple or complex dependence. In other words, the scope of the paradox is confined to that specific focus and the view of the UPR as independent from the CI is confined in a similar way.

In the next section, I will present the paradox of juridical imperative, as introduced by one of the strongest defenders of independentism, Marcus Willaschek. In Section 3, I will consider Jürgen Habermas's solution to a version of the paradox, Willaschek's objection to Habermas's solution, as well as Willaschek's own 'solution' and the link to independentism; although this is not meant to dissolve the paradox, it does "tame" it. Finally, I will evaluate Willaschek's position and will argue that it is correct if the focus is on the subjective validity of juridical norms; if, however, we keep the focus on objective validity, the paradox dissolves and independentism turns out to be a position of limited scope.

2. The Paradox

Briefly stated, the paradox is that, although it seems that the notion of a juridical norm implies prescriptivity, juridical norms cannot be prescriptive. As I have mentioned, the argument is offered by Willaschek, who, in a series of texts, defends imaginatively and persuasively the independentist position.²³ The argument for a supposed paradox of juridical imperatives in Kant is that:

juridical prescriptions would have to be either categorical or hypothetical imperatives; as it turns out, on Kant's conception of Right they can be neither.
(Willaschek 2002: 66)

23 I have in mind here mainly the following texts by Willaschek: Willaschek, Marcus: "Why the 'Doctrine of Right' does not belong in the 'Metaphysics of Morals'. On some basic distinctions in Kant's moral philosophy". In: *Jahrbuch für Recht und Ethik*, 5, 1997, 205-227; "Which Imperatives for Right? On the Non-prescriptive Character of Juridical Laws in Kant's Metaphysics of Morals". In: *Kant's Metaphysics of Morals*, op. cit.; "Recht ohne Ethik? Kant über die Gründe, das Recht nicht zu brechen". In: Gerhardt, Volker & Meyer, Thomas (eds.), *Kant im Streit der Fakultäten*. Berlin, 2005; "Right and Coercion: Can Kant's Conception of Right be Derived from his Moral Theory?". In: *International Journal of Philosophical Studies*, 17, 2009, 49-70; and "The Non-Derivability of Kantian Right From the Categorical Imperative". In: *International Journal of Philosophical Studies*, 20, 2012, 557-564. I cannot do justice to these rich and thought-provoking texts within the confines of this article. Apart from some references to some of these texts, here I will mainly focus on Willaschek, Marcus: "Which Imperatives for Right?", op. cit.

On the one hand, juridical norms are prescriptive. They tell us what we ought, or ought not, to do. Willaschek calls this claim the “Prescriptivity Thesis”. Yet, on the other hand, as prescriptivity puts juridical norms in the category of imperatives or commands, they must be imperatives of some sort; however (and to show this will be the main task of Willaschek’s argument leading to the paradox), juridical norms cannot be imperatives at all. A paradoxical claim is therefore implicit here: juridical norms are prescriptive, although they cannot be prescriptive. To begin with, let me present in more detail the conceptual background of Willaschek’s argument.

As I have briefly mentioned above, in the discussion of Ludwig’s reading, one way in which Kant presents the notion of an imperative is by contrasting it with a law.²⁴ Whereas imperatives prescribe actions for imperfect beings like us, laws refer to the principles purely rational beings necessarily follow.²⁵ In the case of purely rational beings, there is no need to *prescribe* actions through moral laws, since purely rational beings spontaneously follow moral laws: their actions are *actually* (and not simply morally *necessarily*) determined by these laws.

Insofar as moral laws are the principles which actually determine a purely rational person’s actions, laws cannot *prescribe these* actions, since the purely rational will performs them as a matter of course. We can prescribe a particular action, if there is a possibility that the action be not performed; but, if the action will necessarily be performed, there is no semantic space for the idea of a prescription and, hence, of a command or imperative.

A second important distinction in the argument’s conceptual framework is, as I have already mentioned, Kant’s distinction between hypothetical and categorical imperatives. Kant draws this distinction by reference to the imperatives’

24 For example: “...imperatives are only formulae expressing the relation of objective laws of volition in general to the subjective imperfection of the will of this or that rational being, for example, of the human will [...] [S]ind Imperativen nur Formeln, das Verhältniß objectiver Gesetze des Wollens überhaupt zu der subjectiven Unvollkommenheit des Willens dieses oder jenes vernünftigen Wesens, z.B. des menschlichen Willens, auszudrücken]“. (GMS, AA 04: 414.5-6) An (objective) law is an imperative in relation to the imperfection of the will.

25 Willaschek, Marcus: “Which Imperatives for Right?”, op. cit., 67.

respective validity. Hypothetical imperatives express a command conditionally or under a specific hypothesis.²⁶ One example of such a hypothetical imperative Kant offers is that one must work and save in one's youth in order not to want in one's old age.²⁷ The validity of the command to work and save in one's youth, Kant says, depends on the desire to live to old age, on the fact that one does not foresee other resources than the means acquired by oneself or that one does not think in case of future need one can do with little.²⁸ The validity of the imperative depends therefore on such conditions' being met.

By contrast, categorical imperatives assert that a particular action is right unconditionally, whether or not persons have such particular feelings, desires or beliefs. Kant's example is the maxim of never making a lying promise.²⁹ This imperative, he says, only has to do with her will, regardless of whether the purposes the person may have can thereby be attained.³⁰ It is unconditional, since its validity and prescriptive power are not conditioned by the factors presupposed by a hypothetical imperative.

There is no third type of imperative – if the imperative is not hypothetical, then its validity is not dependent on any condition and, hence, it is unconditional and, thus, categorical. If it is not categorical, then its validity is not unconditional and the condition or set of conditions on which it depends represents the hypothesis which is part of the hypothetical imperative.

Recall that Willaschek is supposed to support the idea of a paradox in Kant by demonstrating that juridical norms cannot be prescriptive, since they can be

26 Kant distinguishes further between hypothetical imperatives of skill and of prudence. The former refer to possible ends or purposes, the latter, to actual ones. (GMS, AA 04: 415.06f.) A purpose is defined as “what is possible only through the efforts of a rational being [was nur durch Kräfte irgend eines vernünftigen Wesens möglich ist]”. (GMS, AA 04: 415.04) On his account, there is one purpose which is not only an actual purpose for human beings, but which is a necessary purpose “by a natural necessity [nach einer Naturnotwendigkeit]”. (GMS AA 04: 415.19) This is happiness.

²⁷ KpV, AA 05: 20.18-19

²⁸ KpV, AA 05: 20.20-22

²⁹ KpV, AA 05: 21.02-03

³⁰ KpV, AA 05: 21.03-04

neither categorical nor hypothetical imperatives. Together with Kant, Willaschek regards juridical norms as *categorical* imperatives, or at least he suggests that juridical norms share the categorical imperatives' unconditionality. Thus, he calls the Unconditionality Thesis the claim that juridical norms "hold unconditionally", that is, that "they do not bind only those who share certain ends, but everyone".³¹

Given the Prescriptivity Thesis, juridical norms must be imperatives. Given the Unconditionality Thesis, they must be categorical imperatives. If they are categorical imperatives, then they cannot be hypothetical imperatives. Hence, if there is a paradox of juridical imperatives, it must be in virtue of a feature of juridical norms, which is in conflict with the Prescriptivity and Unconditionality Theses, and for which we have clear textual evidence in Kant. This additional feature, which is in tension with the Prescriptivity and Unconditionality Theses, is given by what Willaschek calls the "Externality Thesis".

Two further distinctions presented by Willaschek must be introduced at this point. The first one is the distinction Kant draws between the domains of right and ethics within moral theory, which I have simply assumed so far. On Willaschek's account, the main difference between these domains concerns the relationships between their respective incentives and norms.³² Juridical norms only require that we act in accordance with them or, in other words, they require 'legality'. Ethical norms require legality, but, in addition, also require 'morality'. This means that ethical norms prescribe not only that we perform certain types of action, but also that we perform them with the appropriate incentive. The idea here is that, in the case of ethical norms, but not in that of juridical norms, we need to be prompted

31 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 71.

32 I talk about *norms*, rather than laws or imperatives, because Willaschek argues that the expressions 'juridical imperative' and 'imperative of right' are misnomers. (Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 71 n11) He argues against Otfried Höffe's use of the notion of a categorical imperative of right and he himself prefers to talk about juridical laws. Given the distinction between law and imperative, I avoid the use of 'law'. Instead of 'law' (which seems to me inappropriate) or 'imperative' (which Willaschek regards as a misnomer), I use 'norm'.

in our actions by the norms' rightness. The claim that juridical norms only require legality is called by Willaschek the "Externality Thesis".³³

The name "Externality Thesis" comes from a feature of juridical norms, namely, the fact that they can be externally enforced. This is why, for Willaschek,

juridical laws can only require external behaviour, but not motivation, since external coercion (as the specific incentive connected with juridical laws) does not (reliably) affect the inner attitude or motive.³⁴

I take it that Willaschek has in mind here the fact that external coercion is unlikely to bring about in the agent the motivation which is appropriate for ethical norms.³⁵ In other words, by being externally coerced, it is unlikely the agent will get to develop the appropriate motivation for an ethical norm, in particular, to understand the norm's rightness. Perhaps an even stronger argument would be that, no matter how effective a method of bringing about a particular kind of motivation would be, external coercion should still not try to bring it about, since there is no reliable way of publicly monitoring motivations.

Assuming that coercion cannot determine inner attitude or motive, then nor will it be able to determine inner actions. This is why Kant does not see an imperative, like the omission of self-deception (which enjoins us to perform an inner action) as a juridical norm, although it may well be performed for other motives than the norm's rightness. It may seem, therefore, that the condition of enforceability excludes as possible candidates for the status of juridical norm all ethical imperatives, because of their requirement for appropriate motivation. Yet, from the example of the maxim of self-deceit, we can see that some maxims, which do not presuppose that they be performed with a specific motivation, can also be

33 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 69.

34 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 68.

35 This, however, is not altogether unproblematic. One could perhaps reliably condition persons to form motivations through some form of brainwashing or by similar methods. See Newey, Glen: "How Not to Tolerate Religion". In: Mookherjee, Monica (ed.), *Toleration and Recognition in an Age of Religious Pluralism*. London, 2011.

excluded, since they are not publicly accessible actions. Since they are not publicly accessible, or, at any rate, not completely accessible in this way, they cannot be enforced.

There are, however, rules which forbid the performance of *publicly accessible* actions, and which, because of specific circumstances, cannot be enforced, since no punishment can be a sufficient source of incentive for the omission of the action. The case presented by Kant refers to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself.

According to Kant, there is no legal authorisation to do anything which endangers the life of the person on the plank and, if the shoved dies as a result of the shover's taking him off the plank, the shover is legally accountable for the consequence of his action. And, yet, this law is not enforceable, since it is not punishable.³⁶ For Kant, a law is punishable if the action or omission it prescribes can admit an incentive (usually through the threat of punishment) just sufficiently strong to outweigh any incentive a person would have to break the law.

For instance, in the case of the shipwreck, the person who is not on the plank is not legally authorised to take the second person off the plank, since the latter is there without interfering with any of the former's rights; and, yet, given that we would need to find an incentive for obeying the law stronger than the incentive the first person has to break the law and given that there is no such stronger incentive (since, without a plank, a person would die), the law is not enforceable and a person's breaking the law is not punishable.

The second distinction that must be mentioned in order to understand the paradox of juridical imperatives is Willaschek's distinction between obeying, and merely

36 For discussion of this case, see Uniacke, Suzanne: "The Limits of Criminality: Kant on the Plank". In: Tam, Henry Benedict (ed.), *Punishment, Excuses and Moral Development*. Aldershot, 1996; "Responsibility and Obligation: Some Kantian Directions". In: *International Journal of Philosophical Studies* 13, 2005, 461-475.

acting in accordance with, an imperative. This is no longer simply part of the conceptual framework of Kant's philosophy, but it is the crucial element in Willaschek's argument in support of the existence, in Kant, of a paradox of juridical norms. Obeying an imperative implies that one acts as one does "*because* this is what the imperative demands"; by contrast, acting in accordance with an imperative may even be an accidental occurrence.³⁷ To obey an imperative, Willaschek adds parenthetically, does not mean that no other motives may be present, but only that, in the absence of such motives, the imperative would be sufficient to motivate compliance. With these two distinctions in mind (ethics/right and obeying/merely acting in accordance with an imperative), in the next section we will see why, on Willaschek's account, juridical norms can be expressed by neither categorical nor hypothetical imperatives and, hence, why, although they are prescriptive, they cannot be.

In other words, the conceptual background presented so far seems to lead quite straightforwardly to the paradoxical claim that juridical norms, which have an imperatival character (according to the Prescriptivity Thesis), are nevertheless non-prescriptive (they can be expressed neither as categorical nor as hypothetical imperatives).

This leads to the first step of the argument for the paradoxical character of juridical norms. Since, Willaschek claims, obeying a categorical imperative out of fear of punishment or because of some further end is a conceptual impossibility, categorical imperatives can only be obeyed unconditionally:

At first glance, it may perhaps seem possible to obey a categorical imperative not for its own sake, but for some other reason – for instance, out of fear of punishment. But in fact, this is a conceptual impossibility: since *obeying* a categorical imperative means that one would have followed its prescription

37 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 70.

anyway, even if no threat of punishment were connected with it, complying with it *exclusively* out of fear of punishment precisely means not to *obey* it.³⁸

Therefore, since it is impossible to act on a categorical imperative out of fear of punishment, juridical norms (which may be acted upon from non-ethical motives, including fear of punishment) cannot be expressed by categorical imperatives. Since juridical norms are imperatives and since imperatives can either be categorical or hypothetical, if juridical norms cannot be expressed by categorical imperatives, the only possibility left is that they be expressed by hypothetical imperatives.³⁹

And, yet, (and this is the second part of the argument leading to the paradox) according to the Unconditionality Thesis, juridical norms cannot be expressed by hypothetical imperatives either, since they would then bind only those for whom the conditions associated with the imperatives would be valid. To say, for instance, that a policy of taxation must be observed, since it is going to benefit those who need public medical services, implies that those who use private hospitals need not observe the policy, although the policy is intended as valid and applicable to all.

Now, if juridical norms can be expressed neither as hypothetical nor as categorical imperatives, then they cannot be seen as imperatives. Yet, since imperatives are commands or prescriptions, it should be possible for them to be expressed in imperatival form. Otherwise, they turn out to lack precisely a feature which, according to the Prescriptivity Thesis, should be defining for them.

Not only does the argument seem convincing, but Willaschek also argues that this tension in Kant's moral philosophy can explain some difficult claims we find in

38 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 70.

39 In his 1997 paper, Willaschek uses a different argument to show a juridical norm cannot be a categorical imperative. He relies mainly on a distinction between two accounts of normgiving in Kant and a claim that Kant prefers one of them. The conclusion is, however, similar: the focus is moved from the objective necessity of the norms to their subjective validity.

Kant's texts.⁴⁰ Moreover, the paradox is not only supported in these two ways – namely, by the conceptual reconstruction leading to a paradox and by the textual confirmation of the difficulties the paradox seems to bring about in Kant's texts; Willaschek also considers one possible solution to the paradox and, then, goes on to show that the problem is much deeper than the considered solution suggests. I will briefly present this solution and Willaschek's further objection in the next section. I will conclude the section with a discussion of Willaschek's own 'solution' and its link to independentism.

3. A Solution, an Objection and a Compromise

On Willaschek's account, in *Between Facts and Norms*⁴¹, Habermas puts forward a possible solution to a paradox, which is "essentially the same" as the paradox of juridical imperatives formulated by Willaschek; the paradox is the following:

The moral acceptability of juridical laws is a necessary condition for their normative validity; but still, they differ from moral norms in that compliance with them does not require a moral stance and thus can, and may, be enforced by coercion. This is paradoxical in that the reason why juridical laws are normatively valid seems to be unconnected to the only motivation for compliance the law itself supplies.⁴²

Habermas's solution makes appeal to a distinction between two perspectives from which we can regard a juridical norm. We know that juridical norms can both be coercive and express freedom, depending on the perspective from which they are

40 It is beyond the scope of this paper to discuss these innovative responses to the difficulties Willaschek thinks we can find in Kant's texts. I mention only that they relate to Kant's claims concerning coercion, necessitation and strict right, as well as to his dynamical model of right.

42 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 73.

regarded.⁴³ From one perspective, the same juridical norm can be regarded as a factual constraint and, hence, can be observed out of prudential reasons. In this case, we perform actions which are legal, but do not have morality or ethical worth. From a different perspective, however, the norm is regarded as a law which can be freely observed in virtue of its rightness or out of respect for its rightness.

Habermas's solution has the following implications for Willaschek's formulation of the paradox. First, what Habermas says suggests that the Unconditionality Thesis (that juridical norms do not bind only those who share particular ends, but everyone) concerns normative validity, not motivation, and, hence, that juridical norms do not depend for their validity on empirical motivation or "material ends". Moreover, what Habermas says would suggest that the Externality Thesis (juridical norms only require legality) does not concern normative validity, but motivation; the claim here is that juridical norms do not require obedience for some specific reason, whether ethical or prudential. Finally, on Habermas's account, the Prescriptivity Thesis (juridical norms tell us what we ought/ought not to do) would also refer to normative validity. The three Theses are reconciled because they refer to different perspectives: Unconditionality and Prescriptivity, to normative validity, Externality, to motivation. Thus, as Willaschek puts it,

While the Unconditionality and Prescriptivity Theses express a normative perspective on the law, the Externality Thesis expresses the possibility, and legitimacy, of a purely 'strategic' perspective on the law. By distinguishing between these two perspectives, it is possible to combine the three theses in question.⁴⁴

43 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 73. It is important to emphasise here that Habermas's paradox is that between freedom and coercion. It is, in fact, the paradox on which *Between Facts and Norms* centres, for the paradox between coercive laws and laws of freedom is that between the facts and norms in the title. (Habermas, Jürgen: op. cit., 28ff) In the context to which Willaschek refers, Habermas actually talks about a "paradox of rules of action". (Op. cit., 29) Given the importance of the paradox for Habermas's book and given the significance of the book itself, a separate study of Habermas's attempt to solve the various formulations of this paradox would be worth undertaking; however, this would go beyond the scope of this paper. For more on Habermas's paradox and how his solution is different from the solution I defend here, see Section 4 below.

44 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 74.

However, Willaschek argues further, the problem is that the distinction between the two perspectives (normative validity and motivation) is simply that between the ethical and juridical perspectives. There is indeed an available perspective from which it is possible to obey juridical norms out of respect for the norm's validity. This is the ethical perspective. From the juridical perspective, however, the thought that the validity of a norm might motivate someone to act on the norm is not available. If the norm is legitimate, one is obligated to obey it, but not from some specific type of motive. The norm cannot *require* one to obey it for its own sake. Nor can the norm *require* one to obey it under the condition that one pursue some material end or other (since it is of unconditional validity).⁴⁵ Hence, juridical norms are not prescriptive, the Prescriptivity Thesis notwithstanding.

The argument against Habermas's solution is supplemented by the claim that Kant is an "internalist" about moral obligation, in the sense that to be morally obligated to do something implies the existence of a corresponding motive (namely, the motive of respect for the moral law).⁴⁶ Since juridical norms seem to impose an obligation without requiring the corresponding motive, we still have a tension between the need for the motive, as given by the Prescriptivity Thesis, and the impossibility of requiring this motive, as imposed by the Externality Thesis.

In other words:

Of course, Kant wants to be able to say that one is obligated to obey the law in any case. But, since this obligation, as such, does not provide a motive to act accordingly, [...] it cannot be understood as *prescribing* or *requiring* something, but merely as indicating what, according to the law, would be the right thing to do.

45 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 74f.

46 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 75. As an aside, I mention references are made here to two of Mark Timmons's articles. (Timmons, Mark: "Kant and the Possibility of Moral Motivation". In: *The Southern Journal of Philosophy* 32, 1985, 377-398; "Motive and Rightness in Kant's Ethical System". In: *Kant's Metaphysics of Morals*, op. cit.) I find the second reference puzzling. The section Willaschek refers to in Timmons's article only claims that Kant requires ethical norms, insofar as they are *ethical*, to be performed for the sake of their rightness. If, as Willaschek acknowledges, the moral domain for Kant includes the ethical and the juridical spheres, then, strictly speaking, what Timmons confirms is that, for Kant, ethical duties require a certain motive, namely, the rightness of the norm.

Again, we end up with the paradoxical result that, once we abstract from motivation in the way the Externality Thesis demands, juridical laws, as such, cannot be prescriptive.⁴⁷

Habermas's distinction between the normative perspective and the motivational one solves the paradox by retreating in the ethical domain, where the Externality Thesis does not hold. In other words, Habermas explains that juridical norms are prescriptive, because we can act on the motivation of their rightness, but this only means to regard them as *ethical* norms. The paradox of *juridical* imperatives remains a paradox. Juridical norms cannot be prescriptive, if they are taken to be unconditional and if they must be enforceable coercively.

Willaschek's 'solution' to the paradox takes as its starting point Kant's account of legitimate coercion and introduces further complexity into the discussion so far. On Kant's account, actions which limit rightful freedom can be coerced legitimately, since coercion in this case is a "*hindering of a hindrance to freedom*".⁴⁸ In other words, given a situation of freedom, where actions performed by individuals are rightful, any deviation from a juridical norm will be an infringement on the freedom of others. Stealing, for instance, implies a hindrance to the rightful owner's freedom to make use of her property as she pleases (barring of course a situation in which she would interfere with the others' rightful freedom). To enforce rightful juridical norms, although coercively, is legitimate on Kant's account, since it only represents the hindering of an initial hindrance to freedom.

This implies that coercion needs to be sufficiently strong to oppose the hindrance to freedom and restore the rightful situation. Hence, on Willaschek's reading, legitimate coercion will elicit in the wrongdoer only that degree of inclination which corresponds to the degree of inclination the wrongdoer already has to break the law. From this, Willaschek concludes that:

47 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 75.

48 "[...]Verhinderung eines Hindernisses der Freiheit [...]" .MS, AA 06: 231.18-19

under a legal system in which coercion really equals the hindrance of rightful freedom, the idea of prescriptions or imperatives does not apply; just as, according to Kant, the idea of a moral 'ought' is not applicable to a holy will, since such a will necessarily conforms with the moral law, the idea of a juridical 'ought' would not be applicable to a people under a perfect legal system, since they are forced to obey its laws anyway.⁴⁹

The suggestion is that a perfect legal system can do without prescriptivity, and this is the additional complexity I announced above. We have now the following alternatives: obeying a juridical norm with an ethical motivation, obeying a juridical norm with a non-ethical motivation or obeying it without any motivation, spontaneously. As we have seen, on Willaschek's account, the first is the ethical perspective; the second is impossible for the conceptual reasons Willaschek provides; finally, the third possibility implies that juridical norms need not be prescriptive.

If, in the perfect legal system, prescriptivity is superfluous, why would one think it essentially characterises juridical norms? The starting point of Willaschek's solution is the observation that a juridical system in which coercion is calculated to match exactly the inclination people have to break the law is an idealisation, in the strong sense of an endeavour which is "humanly impossible".⁵⁰ As Willaschek acknowledges, "all actual juridical systems leave much room for juridical deliberation and free choice as to whether one wants to obey the law or not", yet, Kant would regard these as "empirical imperfections that do not concern the *concept of strict Right*".⁵¹

49 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 84f.

50 If we take Willaschek to be talking about idealisation in the sense he suggests, namely, as something which it is humanly impossible to realise, then Kant's claim that the problem is related to empirical imperfections seems much weaker. On this sense of idealisation and the distinction from abstraction, see, for instance, O'Neill, Onora: "Constructivisms in Ethics". In: O'Neill, Onora (ed.), *Constructions of Reason: Explorations of Kant's Practical Philosophy*. Cambridge, 1989.

51 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 85.

It is precisely in these empirical imperfections that a partial solution to the paradox of juridical imperative can be found. They make room for ethical considerations, which are always mingled with juridical considerations in real life.⁵² Insofar as punishment cannot always exactly match the degree of strength with which persons may be inclined to break the law, persons are actually free to decide whether they want to engage in criminal activities or not. At this point, ethical considerations may come in and may tip the balance in favour of observing the law. At this point as well, prescriptivity becomes present.

Hence, although juridical norms become prescriptive, their prescriptivity is given by ethical motivations. Therefore, Willaschek's solution takes us back to Habermas's solution, but, in contrast with Habermas, Willaschek readily acknowledges that we can regard juridical norms as prescriptive only from the ethical perspective; from the strictly juridical one, they are non-prescriptive – either because the incentive exactly matches the inclination to break the law or because, as unconditional juridical norms, they cannot be obeyed for non-ethical reasons: “juridical laws indeed are prescriptive, but only *when* considered from an ethical perspective. [...] The law as such, considered as strict Right, would still not be prescriptive”.⁵³

From the ethical perspective, people can ask for ethical reasons to obey a juridical norm. Since the juridical norm is unconditionally valid, there is a reason to obey the norm for its own sake. Without this motive, if the Externality Thesis is applied, the prescriptive character of the juridical norm will become invisible. There remain authorisations to coerce others into rightful behaviour, but no prescription.⁵⁴ Hence, through Willaschek's solution, the paradox does not go away in principle, but it is ‘solved’ through a compromise – by abandoning either the Externality Thesis (when we are ethically motivated to follow juridical norms) or the Prescriptivity Thesis (when we are coerced to follow the norm and are in this way incentivised to the same extent to which we are inclined to break the law)

52 Willaschek, Marcus: “Which Imperatives for Right?”, op. cit., 86.

53 Willaschek, Marcus: “Which Imperatives for Right?”, op. cit., 86.

54 Willaschek, Marcus: “Which Imperatives for Right?”, op. cit., 87.

or the Unconditionality Thesis (when we act on the juridical norm in order to avoid punishment). The best we can do is to keep two of the theses and abandon the third one, for instance:

We *can* have both externality and prescriptivity of the law, but [...], unless we give up the idea that the law must be valid unconditionally, we cannot have them at once from one and the same perspective.⁵⁵

This shows clearly that the paradox survives more or less unscathed – in principle, we cannot have all the Theses together at the same time and from the same perspective. According to Willaschek’s account, given imperfections in the design of law, we may sometimes tame the paradox by allowing situations where certain juridical norms may be acted upon initially out of non-ethical reasons and, when the non-ethical incentive is no longer sufficient, we may follow the norm’s prescriptivity. This does not solve the problem in principle, but offers a dynamic model on the basis of which we can explain why we need the three Theses.

Is this the best solution for the paradox? I will discuss this question in the next section; before this, however, I will conclude this section with a note on the link between Willaschek’s paradox and independentism.

Recall Wood’s view of the link between the UPR and the CI as a relation of simple independence; according to him, if the UPR and the juridical norms derived from it are not understood as indirectly ethical duties, then they are entirely independent from the CI. This is not very far from one of the implications of Willaschek’s paradox. Thus, as we have seen, if a juridical norm is not acted upon as an indirectly ethical duty (that is, acted upon with an ethical motivation), then we follow the norm motivated non-ethically or without a motivation.⁵⁶ If the

55 Willaschek, Marcus: “Which Imperatives for Right?”, *op. cit.*, 87.

56 There is another option: we follow a juridical norm without a particular motivation or non-prescriptively, when the incentive to break the law is exactly matched by an incentive to observe the law, and the exact balance between the incentives means that the agent’s action will not be against the law. I do not put much emphasis on this alternative, although it is central to Willaschek’s account, since it seems to me to be in tension with a basic account of agency,

two properties that apply to the CI and the practical principles justified on its basis are those of unconditionality and prescriptivity, then we cannot derive from them the UPR and juridical norms, since the latter either lack unconditionality or prescriptivity.⁵⁷

This shows that the relation between the UPR and the CI is a relation of simple independence. For recall also that, in discussing the relations of simple and relative dependence in the first section of this paper, the issue was not that of deriving conditionality from unconditionality or non-prescriptivity from prescriptivity;⁵⁸ that such derivations were not possible was taken for granted. Having clarified the link between the paradox and independentism, we may now return to the previous question concerning the value of Willaschek's approach.

4. Evaluating Willaschek's Compromise and Independentism

Recall the first step of Willaschek's argument leading to the paradox: given the distinction between obeying an imperative and acting in accordance with one (acting as the imperative prescribes, even when the action is performed in this way accidentally, and acting in accordance with the imperative, because this is what the imperative demands),⁵⁹ Willaschek claims that there is a *conceptual* impossibility in obeying a juridical norm for non-ethical reasons. Once again, obeying an imperative excludes an accidental performance of an action which happens to be in accordance with the imperative, since obeying the imperative means precisely acting in a particular way, because that is demanded by the

according to which to perform an action the agent has at least to implicitly acknowledge that the action is to be performed (and not to be avoided or is not indifferent). In other words, unlike mechanical systems, where a principle of inertia means that an object continues its trajectory if its movement is not affected by other forces, for agents, actions need at least an implicit endorsement in order to be performed.

57 When we follow juridical norms non-prescriptively, the norms will lack prescriptivity, and this makes the UPR and the juridical norms it justifies impossible to derive from the CI and the maxims it justifies as practical principles. In this case, the juridical norms are descriptive.

58 Nor was the issue one of deriving non-prescriptivity from prescriptivity, as it would be required in the case of juridical norms which lead to action non-prescriptively.

59 See Section 3 above.

imperative. Recall that this does not exclude a situation where one acts in a particular way, because this is what the imperative demands, but one acts with a non-ethical motive, say, out of fear of punishment. The only thing which is required is that, when non-ethical motives are *not* present, the imperative suffice to provide a motive of compliance.

Yet, to understand juridical norms as categorical imperatives, we would need to accept that we can obey a categorical imperative for non-ethical motives, because, in accordance with Kant's definition, a juridical norm may be obeyed for non-ethical motives. Yet, for Willaschek, to obey a categorical imperative for some non-ethical reason is a conceptual impossibility: "since *obeying* a categorical imperative means that one would have followed its prescription anyway, even if no threat of punishment were connected with it, complying with it *exclusively* out of fear of punishment precisely means not to obey it".⁶⁰

Moreover, recall also the second step of Willaschek's argument: given the unconditionality of juridical norms, we cannot understand them as hypothetical imperatives. The implication is that juridical norms cannot find expression in an imperative – whether categorical or hypothetical:

Juridical laws [or norms] do *not* require obedience for their own sake. According to the Externality Thesis, the juridical rightness of an act does not depend on whether it has been done out of respect for the law or for some other reason. But neither can juridical laws issue in merely hypothetical imperatives, perhaps of the general form: 'If you want to avoid (the risk of) coercion and punishment, do X', since in this case they would bind only those who in fact want to avoid coercion and punishment.⁶¹

In other words, given that juridical norms do not require (although, of course, they do permit) ethical motivation, it should be possible to act upon them with a non-ethical motivation – yet, in this case, they are no longer unconditionally valid,

60 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 70.

61 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 70f.

and, hence, cannot be understood as categorical imperatives. Nor can they be understood as hypothetical imperatives, since, in this case, they are no longer unconditionally valid (although they should be).

This offers additional support for the first step of Willaschek's argument: the reason why we cannot obey a juridical norm for non-ethical reasons is not only *conceptual*; in addition, if we do act on a juridical norm out of fear of punishment, then, on Willaschek's account, the validity of the juridical norm becomes conditional, since it is obeyed only to the extent the agent wants to avoid the risk of punishment. Hence, we have a normative ground for the impossibility of obeying a juridical norm for non-ethical reasons in addition to the conceptual one already presented.

I do not think, however, that this conclusion and the paradox actually follow from Willaschek's argument. That is, if I am right, even on Willaschek's definition of obeying an imperative, we can obey a categorical imperative on a non-ethical motive. Moreover, the additional argument from the conditional validity of a norm on which an agent would act out of fear of punishment turns out to be evidence for the limited scope of independentism. Recall, once again, the definition of obeying an imperative: to obey an imperative is to follow it even when no other motive, apart from the motive of duty, is present. An imperative which can provide on its own motivation for compliance is a categorical imperative. If a juridical norm is prescriptive and unconditional, then it should be possible to express it in the form of a categorical imperative.

Imagine now that a categorical imperative, such as a prohibition not to lie, is in a certain instance accompanied by a non-ethical motive, let's say fear of repercussions, if caught lying. According to the definition of obeying an imperative, the presence of such a motive is not excluded as long as the imperative can provide on its own a motive of compliance, which the imperative of not lying can clearly do (at least according to Kant). The imperative is unconditionally valid, since it can be justified to all rational agents, independently

of whether they share any material ends (again, at least according to Kant). Yet, any of these agents may have non-ethical motives to comply with it. For instance, as a particular variation on the example above, one may be afraid to lie in court, because the punishment would be harsh. And, yet, because the imperative could provide a motive of compliance on its own in the absence of any non-ethical motive, according to the definition of obeying an imperative, one could obey this categorical imperative out of fear of punishment and even *exclusively* out of fear of punishment. There is no conceptual impossibility here.

Consider now the following claim by Willaschek:

By insisting that imperatives are meant to ‘necessitate’ the will of those who may possibly be tempted to violate the laws, Kant makes it clear that the whole *point* of imperatives, as opposed to their corresponding practical laws, is to be *obeyed*.⁶²

Together with my conclusion above, namely, that juridical norms can be obeyed even when one acts on them out of some non-ethical motives, it follows that juridical norms can necessitate the will of those who may be possibly tempted to engage in criminal activity and, hence, it follows that they are prescriptive. Moreover, the further implication is that juridical imperatives can be expressed as categorical imperatives.

At this point, the defender of the non-prescriptive character of juridical norms can go back to Willaschek’s reply to Habermas. Recall that Willaschek acknowledges that there is indeed an available perspective from which it is possible to obey juridical norms out of respect for the norm’s validity. But this is the ethical perspective. How is what I am saying different from Willaschek’s answer to the paradox of juridical norms and, if it turns out to be different, how does my answer differ from Habermas’s?

62 Willaschek, Marcus: “Which Imperatives for Right?”, op. cit., 70.

Let me first focus on the notion of motivation with a comment which already begins to distinguish my view from Willaschek's. Thus, I take it that the differences between ethical and juridical norms stem from the requirement that the latter be enforceable. Enforceability requires externality and, hence, legality. We cannot enforce norms the observance of which is not public or capable of being publicly monitored. Hence, nor can we enforce norms which require that they be observed from a particular motivation. What can publicly be monitored is the action, not the motivation with which I perform the action.

Hence, I disagree with Willaschek's claim that "we often can tell what kind of action has been done only by considering its motivation".⁶³ He illustrates this with the following example: "whether something is a successful murder or a mistaken attempt at cooking a nice mushroom dinner depends, among other things, on what the agent wanted to achieve".⁶⁴ I agree that "what the agent wanted to achieve" is necessary in order for us to understand which action has been performed by the agent, but I think it refers to the purpose or end of the action, not to its motive.

I take the motive of the action to be the reason with which the agent tries to achieve her purpose, and I think it reveals a goal an agent finds attractive for its own sake.⁶⁵ In Willaschek's example, what the agent wanted to achieve by

63 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 68. In fairness to Willaschek, it is often the case the notions of intention and motivation are not distinguished and may be used interchangeably to refer to the technical sense of 'intention' that I identify here. So it may well be that Willaschek has here in mind 'intention', rather than motivation. In email correspondence he has actually confirmed he does not disagree with my comments on the distinction between motivation and intention. I should add, however, that he makes a very similar claim in his earlier 1997 article: "In which sense, for instance, do duties of right concern 'external actions' only? 'External' here cannot just mean 'physically characterized behavior, regardless of motivation', since motivation often is legally relevant, as Kant himself implicitly acknowledges by appealing to maxims in the 'Universal Principle of Right'". (Willaschek Marcus: "Why the 'Doctrine of Right' does not belong in the 'Metaphysics of Morals'. On some basic distinctions in Kant's moral philosophy", op. cit., 206 n4) I think motivation is not legally relevant and Kant's appeal to maxims in the UPR indicates that it is at least unclear he sees motivation as necessarily included in maxims. But this discussion goes beyond the scope of my argument here.

64 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 68 n6.

65 In MS (AA06), Kant distinguishes between maxims of actions and maxims of ends. (MS, AA 06: 390f) For him, every action has an end (MS, AA 06: 385.01) and maxims can be formulated either by specifying the action or the end. Obviously, since several actions can have the same end, specifying a maxim by the end of the actions under it will lead to a principle of action which contains more rules of action under it than a maxim of action. I agree with Timmons's

cooking a mushroom dinner was to kill or treat the guest. Either of these will be a motive, if the agent finds killing or treating guests valuable for its own sake. Some may do, but some may also want to kill or treat because they hate/love the guest or for some other motives.

Motives make a difference in the understanding of actions only when they also reveal the ends of actions. Otherwise motives are relevant ethically and make a difference in the understanding of the actions' and agents' moral worth. Whether I give the right change to my customer because I think this is the right thing to do or because I am risk-averse and I am too scared I would be caught will make no difference to the police officer who is in the shop (unless she also happens to be the moralist in that neighbourhood). Similarly, whether I commit murder, because I (mistakenly or not) think this to be (in some sense) for the good of the person, will not make a difference to the prosecution. To be sure, if I dispute that it was my intention to commit murder, then, of course, it does make a difference for the prosecution, but then what I dispute is my end or purpose, not my motive. To put it differently: what is juridically important to establish is the end or purpose of the action, because this is what shows which kind of action has been performed. But whether or not this reveals anything about the motive with which the action has been performed is not juridically relevant.

And this is how it should be. The motive with which I perform my action cannot in principle be publicly monitored. My intention of killing a person can be doubted, if, for example, the person who sold me mushrooms can testify that I asked her twice whether mushrooms were tested against toxic content and only then bought them (and also took them home and cooked them, rather than going to another shop to buy mushrooms which had not been tested). But my motive is

account of motives as “revealing some goal or end that the agent finds attractive or desirable for its own sake and in terms of which the agent’s interest in or attraction to some course of action can be explained”. (Timmons, Mark: “Motive and Rightness in Kant’s Ethical System”, op. cit., 264) It might be worth noting that, although I generally subscribe to Timmons’s analysis of motives, I do not subscribe to the conclusions of his discussion.

much more difficult, perhaps even impossible, to ascertain with sufficient degree of confidence.⁶⁶

The view of motivation that I defend has an important implication for the way in which we should regard ethical and juridical norms and, hence, also the difference between them. This will lead to a second important difference between my account of juridical norms and Willaschek's. The enforceability of a norm implies externality and legality. Juridical norms have to be enforceable, hence, they cannot require a particular motive. By contrast, ethical norms necessarily require that they be performed for the sake of the norm's rightness, otherwise actions performed on them have no moral worth. Since, for an ethical norm, being acted upon requires a specific (ethical) motive (my reason for acting is that this is the right thing to do), I take acting for the sake of the norm's rightness as an essential part of ethical norms.⁶⁷ By contrast, I take as an essential part of juridical norms the fact that they can be acted upon *either* for the sake of their rightness *or* out of empirical incentives (for example, fear of punishment).

Yet, if juridical norms consist *essentially* of principles of actions on which we can act either for the sake of their rightness or for some empirical incentive, then, if we act on a juridical norm with an ethical motive (the norm is right and doing what is right is valuable for its own sake), then the norm does not thereby become an ethical norm. My action has indeed both legality and ethical worth, just like an action performed on an ethical norm, but actions performed on a juridical norm can also have both of these, given the way in which juridical norms are defined.

⁶⁶ As is well known, Kant suggests this impossibility in the *Groundwork*. I discuss this claim further in a different text: Baiasu, Sorin: "Kant's Account of Motivation: A Sartrean Response to Some Hegelian Objections". In: *Hegel Bulletin*. 31, 86-106.

⁶⁷ I make haste to add that, when I talk about juridical and ethical norms, I merely refer to what Kant calls juridical and ethical normgiving. Hence, each of these normgivings will include an objectively valid norm and the motivation with which an agent will act on the norm; Kant says explicitly that there are no specific features which would make a norm ethical or juridical; moreover, he says that the ethical and the juridical are distinguished by motivation. I think it is acceptable to talk about ethical and juridical norms in this sense, because maxims are also supposed to be principles which include the motivation with which the agent is to act on them – so I see no reason why we could not talk about ethical and juridical norms as including the motivation specific to their respective normgiving. It is in this sense that I talked about juridical norms throughout this article.

Recall that the norms of juridical and ethical normgivings are in fact principles which have proved to have objective validity. Principles are policies of action.⁶⁸ Hence, while the action which I perform now may turn out to be an action with legality and ethical worth, precisely because my policy is a juridical norm, the next action I may perform on the same juridical norm may have mere legality and no ethical worth; nevertheless, both actions are the result of acting on the same juridical norm or as part of the same juridical normgiving.

Hence, when I am acting on a juridical norm from the motive of duty, this does not transform my normgiving into an ethical one; I can still say that I successfully acted on the norm of my juridical normgiving. By contrast, if my policy of action is given by a norm of an ethical normgiving, then, if one of my future actions has only legality, it may mean that I did not act on the norm of ethical normgiving, for to act on such a norm means to act from the motive of duty. If this is so, then Willaschek can no longer argue that, by acting with ethical motivation on the norm of a juridical normgiving, an agent is actually involved in ethical normgiving. Moreover, this seems to imply that, after all, Habermas's solution is a genuine answer to the paradox of juridical norms.

These conclusions would, however, be hasty; although I have shown that Willaschek's conceptual argument against the possibility of obeying a categorical imperative from a non-ethical motive is unsuccessful, I mentioned that there is a second ground for Willaschek's claim. Consider again his evaluation of Habermas's solution:

68 My talk of policies of action may suggest that I have in mind maxims. The literature on maxims is fortunately growing. Here are some good examples: Höffe, Otfried: "Kants kategorischer Imperativ als Kriterium des Sittlichen", in *Zeitschrift für philosophische Forschung* 31, 1977: 354-384; O'Neill, Onora: "Consistency in Action", *op. cit.*; Herman, Barbara: "Mutual Aid and Respect for Persons". In: Herman, Barbara (ed.), *The Practice of Moral Judgement*. Cambridge, MS., 1993; Moore, Adrian: "Maxims and Thick Ethical Concepts". In: *Inquiry*, 19, 2006, 129-147. Disagreements exist on various issues, but the fact that maxims are policies of action on which the agent will act in various (appropriate) situations has not been disputed, as far as I am aware. For Kant's discussion on maxims, see KpV, AA 05: 19f. However, if we include in the notion of a maxim the motivation with which a norm is to be acted upon, then, given that this motivation will be ethical, we do not have maxims in the juridical realm – hence my talk of principles of action.

Habermas is correct that there is a perspective available from which it is possible to obey juridical laws out of respect for the law. But, according to Kant, this perspective is an ethical one, from which we do not only require that people in fact obey the law, but also require a specific motive. When it comes to law, strictly speaking, however, we must abstract from people's motivation for acting rightly. Therefore, from this perspective, the thought that the legitimacy of a given law might motivate someone to obey is not available.⁶⁹

I have already discussed the second part of this quotation above, when I presented Willaschek's objection to Habermas's solution to the paradox of juridical norms. Recall that, according to Habermas, there is a sense in which a *juridical* norm can be acted upon as unconditionally valid and, hence, a sense in which the theses of Prescriptivity, Unconditionality and Externality would co-exist; thus, Habermas says, we can act with an ethical motivation on a juridical norms. To this, Willaschek simply objects that, as acted upon from an ethical duty, the norm is no longer juridical, but becomes ethical; in this case, however, we only have two theses co-existing (Unconditionality and Prescriptivity), the third one (Externality) having been excluded by the specification of motivation. If we bring the Externality Thesis back, then we can no longer expect to be able to specify the motivation with which the action is performed, in which case, again, only two theses survive as compatible (Externality and Unconditionality), the third one (Prescriptivity) being excluded precisely because the ethical motivation can no longer be assumed.

I have already mentioned the additional ground for the first step of Willaschek's argument (namely, the step which shows that it is impossible to act on a categorical imperative from non-ethical motives); this ground relies on a particular normative aspect of juridical norms, and this is the focus of discussion for both Habermas and Willaschek. Thus, they both argue by focusing on the subjective validity of the juridical norm – namely, the validity reflected by the

69 Willaschek, Marcus: "Which Imperatives for Right?", op. cit., 74.

way in which the norm is actually followed by the agent. From this common standpoint, when the agent acts on the norm because it is the right thing to do, then the actual principle which informs the action of the agent is an unconditionally valid principle; by contrast, when the norm is followed because of a non-ethical motive (the threat of punishment following the breaking of a law), the actual norm informing the action of the agent is conditional, even when objectively it is necessary – the agent actually takes the norm to be valid only conditionally on the value of avoiding punishment.

From this perspective, Habermas thinks we have a way of following a juridical norm for the sake of the norm's rightness. By contrast, Willaschek rightly points out that the norm's validity is the ethical one – not only because the norm has legality and morality, but because once we assume the ethical motivation as determining the person's action, we can no longer regard the principle as enforceable and, hence, external. Willaschek's claim about Habermas in the first part of the quotation above confirms this – both Habermas and Willaschek assume the standpoint of the agent who is about to act, and the agent can act on the norm for the sake of its rightness.

Consider, however, Kant's idea of normgiving; in Section IV, "On the Division of a Metaphysics of Morals", of the *Metaphysics of Morals*, Kant says:

In all lawgiving (whether it prescribes internal or external actions, and whether it prescribes them a priori by reason alone or by the choice of another) there are two elements: *first*, a law, which represents an action that is to be done as objectively necessary, that is, which makes the action a duty; and *second*, an incentive, which connects a ground for determining choice to this action subjectively with the representation of the law. Hence, the second element is this: that the law makes duty the incentive. By the first, the action is represented as a duty, and this is a merely theoretical cognition of a possible determination of choice, that is, of

practical rules. By the second, the obligation so to act is connected in the subject with a ground for determining choice generally.⁷⁰

Kant says explicitly that each lawgiving [*Gesetzgebung*] or normgiving⁷¹ has two parts: a norm and an incentive. The norm represents an action, which, as represented by the law, is objectively necessary and, hence, a duty. The incentive connects a ground for determining choice with the representation of the norm and the connection takes place *subjectively*. Without the incentive, the norm presents a theoretical cognition of a possible determination of choice (practical rule). That is, without a motive to perform the action represented by the norm, the norm formulates a duty, which presents itself to me as a possible action and, hence, as a possible rule of action.

At the beginning of the quotation, Kant notes that the norm represents an action as *objectively* necessary and, hence, as a duty. He then says, however, that this action represented as a duty is a merely theoretical cognition of a possible determination of choice. Kant calls this possible determination of choice a possible practical rule. This suggests that the first element of lawgiving, the norm, merely describes a possible practical rule. A practical rule refers to a possible action. Usually, for the performance of an action we also have an incentive; yet, the first element of normgiving is a rule, which describes a possible action, and, hence, for which I have no incentive yet. I may, for instance, think of a situation and formulate a principle of not lying as a possible principle on the basis of which to act. I may even claim that the principle and the particular action corresponding to it in that specific situation are objectively necessary, and I can in principle do this without expressing a commitment to the objective necessity of the principle and action.

It may seem paradoxical to claim that a person may say about a principle of action that it is objectively necessary and, yet, that she is not committed to acting on the principle. If I know that a principle has objective practical necessity, then this

⁷⁰ MS, AA 06: 218.07-13

⁷¹ See footnote 27 above.

must give me at least some reason to act on it and, hence, I must be committed to acting on it at least to a certain extent. The claim is, however, compatible with motivational externalism, for which having a reason to perform a certain action is not sufficient for being motivated to act in that way.

Nevertheless, assuming an interpretation of Kant's practical philosophy along the lines of judgement or motivational internalism, it follows that, within the constraints of the Kantian framework, I cannot both claim that a person knows a principle is valid and that she is not committed to that principle at least to some extent. It follows that, when Kant claims that a norm, as the first element of normgiving, "represents an action that is to be done as objectively necessary",⁷² he does not mean that we represent the action and are committed to its objective necessity. We represent the action, as Kant puts it later, as "a possible determination of choice",⁷³ which does not yet imply objective necessity too.

This is not counterintuitive: before we assert a norm as valid in some sense (and I will distinguish, following Kant, two such senses next), and, hence, before we get to give a norm to ourselves or to others, (in our search for an objectively necessary principle) we may consider a particular principle as representing a particular action without being yet committed to its objective necessity. Once we realise it has objective necessity, we also have a reason for making it the object of normgiving. According to Kant, depending on the kind of norm we have in this particular case, we can end up with the following types of normgiving or lawgiving:

All lawgiving can therefore be distinguished with respect to the incentive (even if it agrees with another kind with respect to the action that it makes a duty, e.g., these actions might in all cases be external). That lawgiving which makes an action a duty and also makes this duty the incentive is ethical. But that lawgiving which does not include the incentive of duty in the law and so admits an incentive other

72 "[...] die Handlung, die geschehen soll, objectiv als nothwendig vorstellt [...]". MS, AA 06: 218.12

73 "[...] möglichen Bestimmung der Willkür [...]". MS, AA 06: 218.12

than the idea of duty itself is juridical. It is clear that in the latter case this incentive which is something other than the idea of duty must be drawn from pathological determining grounds of choice, inclinations and aversions, and, among these, from aversions...⁷⁴

Kant's point here is quite clear: if a norm, as an element of normgiving, is acknowledged by an agent as objectively necessary, then it can be given as a norm to be followed either solely in virtue of its objective validity or not solely in virtue of its objective validity or necessity (for instance, in virtue of an aversion, presumably to punishment). In the former case, that is, when the norm is given as to be followed because this would be the right thing to do, Kant identifies an ethical type of normgiving. In the latter case, that is, when norm is not given as to be followed solely with the ethical motivation (but, say, in order to avoid punishment), Kant talks about juridical normgiving.

This helps us identify at least the following two foci for the discussion of norms. We have, first, the subjective validity of norms, as presented above as a common background for Habermas's and Willaschek's arguments. Secondly, we have the objective validity of norms, independently from motivation, and Kant talks about the objective necessity of the norms involved in normgiving precisely in this sense. At this level we can distinguish between categorical and hypothetical imperatives – only the former can play the role of a norm with objective necessity as part of a potential normgiving. When we talk about normgiving, we add motivation to the objectively valid norm.

In my objection to Willaschek in Section 3, I argued that, from the perspective of the second type of focus, juridical normgiving is only reducible to ethical

74 “Alle Gesetzgebung also (sie mag auch in Ansehung der Handlung, die sie zur Pflicht macht, mit einer anderen übereinkommen, z.B. die Handlungen mögen in allen Fällen äußere sein) kann doch in Ansehung der Triebfedern unterschieden sein. Diejenige, welche eine Handlung zur Pflicht und diese Pflicht zugleich zur Triebfeder macht, ist ethisch. Diejenige aber, welche das Letztere nicht im Gesetze mit einschließt, mithin auch eine andere Triebfeder als die Idee der Pflicht selbst zuläßt, ist juridisch. Man sieht in Ansehung der letztern leicht ein, daß diese von der Idee der Pflicht unterschiedene Triebfeder von den pathologischen Bestimmungsgründen der Willkür der Neigungen und Abneigungen und unter diesen von denen der letzteren Art hergenommen sein müssen [...]“MS, AA 06: 218.14-219.05

normgiving or to the following of a hypothetical imperative when the focus is on subjective validity. When the focus is on objective validity, juridical normgiving stands for a disjunction. This disjunction is exclusive only from the perspective of a particular action, which is either the result of acting on the norm with an ethical motive or the result of acting on it with a non-ethical motive, but not both.

From the perspective of legality, that is, of the deontic status of the norm, juridical normgiving stands for an inclusive disjunction, since this normgiving will have legality whether we act on the norm with an ethical or with a non-ethical motive. The reason why, for instance, an instance of juridical normgiving is not reducible to ethical normgiving when I act on my norm with an ethical motivation is that, by acting on the norm with an ethical motivation, I do not exclude the possibility of producing legality for my action when I would act on the norm with a non-ethical motive. This is, however, excluded in the case of ethical normgiving, where acting on the norm with the ethical motivation is required.

5. Conclusion

The relation in Kant between the UPR and the CI is very complex. As we have seen in this paper, there are at least two aspects which constitute the foci of attention in the consideration of the normative relation of dependence between the UPR and the CI – that of subjective and that of objective validity. My argument in this paper has been that Willaschek's paradox of juridical imperatives has a limited scope, which is restricted to a focus on the subjective validity of norms and meta-norms (such as, the UPR). I have shown that, with a focus on subjective validity, Willaschek's paradox of juridical norms indeed raises a serious problem, namely, that juridical norms cannot meet the conditions of prescriptivity, unconditionality and externality. The paradox survives even Willaschek's attempt to "tame" it. In this respect, the UPR is indeed entirely independent from the CI.

Nevertheless, this should be not surprising, for, after all, when we focus on the subjective validity of a norm, we focus on the agent's view of the validity of the norm as reflected by her action. Yet, an agent's action can only be determined by one type of motivation – when this motivation is ethical, we end up with an ethical lawgiving; when this motivation is non-ethical, we end up either with an action lacking prescriptivity or with an action determined by a hypothetical imperative. In the first case (of ethical motivation), the question of the relation in Kant between the UPR and the CI evaporates; in the second case, the UPR and the juridical norms justified on its basis become independent from the CI and the practical principles which are derived from it.

If we focus on the objective validity of norms, then the objective necessity of juridical norms does not lose its unconditionality even when the norm is followed with a non-ethical motivation. Moreover, if the norm is observed with an ethical motivation, the normgiving does not simply become ethical – the fact that the norm happens to be followed with an ethical motivation leaves untouched the fact that it is part of juridical normgiving, since the legality of the juridical normgiving remains the same, whether we act on an ethical or on a non-ethical motivation.

I have said that this argument is a first step towards a more complex case that can be constructed to support the view that the positions of simple dependence, relative in/dependence and simple independence concerning the relation between right and ethics in Kant are compatible and do not reflect some confusion or inconsistency in Kant's thought. But, if my argument is correct, a more specific implication can be drawn: namely, that the paradox of juridical norms in Kant only holds for the norms the agent actually follows. Assuming Kant's moral ontology can distinguish between the norms we actually follow and objectively valid norms, the paradox has a limited scope and so has independentism. Whether Kant's moral ontology can actually distinguish between these norms (and I see no reason why it could not) is, however, a question that must be left for another occasion.