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**Self-Legislation in Kant's Moral Philosophy**  
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**Abstract:** Kant famously insisted that “the idea of the will of every rational being as a universally legislative will” is the supreme principle of morality. Recent interpreters have taken this emphasis on the self-legislation of the moral law as evidence that Kant endorsed a distinctively constructivist conception of morality according to which the moral law is a positive law, created by us. But a closer historical examination suggests otherwise. Kant developed his conception of legislation in the context of his opposition to theological voluntarist accounts of morality and his engagement with conceptions of obligation found in his Wolffian predecessors. In order to defend important claims about the necessity and immediacy of moral obligation, Kant drew and refined a distinction between the legislation and authorship of the moral law in a way that precludes standard theological voluntarist theories and presents an obstacle to recent constructivist interpretations. A correct understanding of Kant's development and use of this distinction reveals that his conception of legislation leaves little room for constructivist moral anti-realism.

Kant famously insisted that the autonomy of the will, “the idea of the will of every rational being as a universally legislating will”, is the supreme, in fact the only, principle of morality [G 4: 431].<sup>1</sup> As he explained, {258}

According to this principle, all maxims are repudiated that cannot accord with the will's own universal legislation. Thus, the will is not merely subject to the law, rather it is subject [to it] in such a way that it must also be regarded as self-legislating and precisely on this account, above all, as subject to the law (of which it can consider itself author). [G 4: 431]

This principle led Kant to his third formulation of the categorical imperative, the so-called “formula of autonomy”: “Act only on maxims through which the will could at the same time regard itself as universally legislating.” And the principle forms the core of Kant's conception of human dignity: the idea “of a rational being who obeys no law other than that which he at the same time legislates himself.” [G 4: 434]

Recently, it has become popular to associate this “Legislation Thesis” and Kant's conception of “autonomy as self-legislation” with what has become known as “moral constructivism”.<sup>2</sup> In *A Theory of Justice*, John Rawls famously suggested that in moral philosophy “Kant's main aim” was “to deepen and to justify Rousseau's idea that liberty is acting in accordance with a law that we give to ourselves.”<sup>3</sup> This aim, Rawls has suggested, led

Kant to develop “a distinctive method of ethics” which “is the leading historical example of a constructivist doctrine”.<sup>4</sup> One of the defining features of this alleged moral constructivism is its aspiration to account for objectivity without robust ontological commitments. Thus, the anti-realist contention that objective values do not possess validity independent of our beliefs, conceptions or activities; values are, instead, as Rawls puts it,

constituted by the activity, actual or ideal, of practical (human) reason itself. [... Kant’s constructivism] goes to the very existence and constitution of the order of values. [...] The intuitionist’s independently given order of values is part of the transcendental realism Kant takes his transcendental idealism to oppose.<sup>5</sup> {259}

Along similar lines, Christine Korsgaard has claimed that, on Kant’s view, “values are not discovered by intuition to be ‘out there’ in the world. [...] values are created by human beings [...] constructed {260} by a procedure, the procedure of making laws for ourselves.”<sup>6</sup> “The Kantian laws of autonomy are positive laws”; moral laws exist and possess their normative authority “because we legislate them.”<sup>7</sup> Andrews Reath has recently suggested that such a constructivist interpretation of Kant’s conception of self-legislation is supported by an analysis of the “ordinary” concept of legislation.<sup>8</sup> Our ordinary concept of legislation, Reath suggests, involves the idea of a sovereign legislator, a person with the authority to make a law, one who has control and discretion over the content of the law, and whose legislative action creates new reasons for his subjects to act in the specified way. Thus, Kant’s emphasis on the self-legislation of the moral law is naturally taken as a claim that the moral law is a positive law, thereby constituting apparently decisive evidence that Kant was a moral constructivist. The moral law, or, more generally, all values and normative standards for action, are the products of human rational construction, not part of a reality which is prior to our beliefs or constructions, a reality within which reason could discover them.<sup>9</sup>

In spite of the influence and apparent plausibility of such a constructivist interpretation of Kant’s conception of self-legislation, Kant’s moral theory contains an overlooked distinction between the legislation and the authorship of the moral law: while Kant maintains that the moral law is *legislated* by rational agents, he also insists that the moral law has *no author*. In this paper I will argue that a correct understanding of the development and use of this distinction within Kant’s moral philosophy clarifies Kant’s conception of legislation, a conception which leaves

little room for constructivist talk of “sovereign discretion”, “making positive law”, “creating” or “constituting values”, or dependence upon “our activity” or “conceptions.”<sup>10</sup>

There may be grounds, independent of his conception of self-legislation, to consider Kant a proponent of moral constructivism. It might be thought, for example, that Kant’s famous talk of a “Copernican revolution” in theoretical philosophy<sup>11</sup> implies global constructivist anti-realism or, short of that, that it implies moral antirealism because of the allegedly general limitations which Kant’s transcendental idealism imposes upon the validity of synthetic a priori judgments, of which the categorical imperative is supposedly one. While I believe such suggestions are mistaken, a satisfactory resolution of these issues is well beyond the scope of this paper.<sup>12</sup> However, if the argument of this paper is correct, any constructivist moral anti-realism in Kant would have to depend upon such allegedly general features of transcendental idealism, not specifically moral considerations surrounding his conception of self-legislation, sovereignty and moral autonomy, a result of significance in its own right.

The argument in this paper will proceed as follows. In Section I, I argue against a tempting “short” argument for moral constructivism. Section II offers an account of Kant’s conception of the legislation of the moral law in the light of Kant’s critique of theological voluntarism and the development of his distinction between the legislation and authorship of the moral law. It is argued that this critique appears to preclude straightforward moral constructivism as well as theological voluntarism. Section III rebuts recent attempts by Reath to articulate a more sophisticated version of constructivism that might seem to avoid this conclusion. I conclude with a final section, Section IV, devoted to a brief articulation of the significance of this non-constructivist conception of self-legislation to Kant’s moral philosophy.

## I

***The Rejection of Individual Sovereignty.*** There seems to be at least one extremely short route to a constructivist interpretation of Kant’s ethics. Kant’s claim that the *will is subjected to the moral law, above all, because it must be regarded as self-legislating* seems to ground the validity or authority of the moral law upon each individual agent’s self-legislation. Kant seems to be claiming that “some act of the individual’s will is a necessary condition of that individual having an obligation.”<sup>13</sup> Reath has called this claim the *Principle of Individual Sovereignty* (ISP).

On a quick read, declarations of “individual sovereignty” may seem to pervade this section of the *Grundlegung*. For example, Kant asserts that

man is subject only to his own, yet universal, legislation and that he is bound only to act in accordance with his own will, which, however, in accordance with nature’s end, is a will legislating universal law. [G 4: 432]

Kant also emphasizes “the idea of the dignity of a rational being who obeys no law other than that which he at the same time legislates himself ” [G 4: 434], and writes of a person “obeying only those laws which he legislates himself ” [G 4: 435]. In such passages, Kant may seem to insist that an agent is subject only to laws she has in fact legislated or {263} given to herself by an act of will.<sup>14</sup> Kant’s apparent endorsement of (ISP) would seem to imply that self-legislation is the act of the will which creates the moral law (or at least one’s obligation to it).<sup>15</sup>

Despite its initial plausibility, there are several reasons to think that Kant rejected ISP and the conception of self-legislation it represents. Since he is explicitly committed to the universal validity of the moral law, if he is committed to the claim that the primary basis for one’s subjection to the moral law is one’s own volitional commitment to it, then he must also maintain that each rational being is volitionally committed to the moral law.<sup>16</sup> As Reath has pointed out, this would make Kant’s assertions about the universal validity of the moral law quite vulnerable: they would rest upon the questionable, apparently empirical thesis that every rational agent has in fact willed it.<sup>17</sup> In addition to {264} pulling against the universal validity of the moral law, the idea that the validity of the moral law depends upon an act of each individual agent’s will seems to be inconsistent with Kant’s insistence on the *special status* of the moral law. Even if every will did perform the requisite act, this could not be known *a priori* and it would seem to be, at best, an interesting psychological fact, not a ground for a categorical imperative.<sup>18</sup>

There is a second reason to think that Kant rejected this supposed connection between volitional commitment and the validity of the moral law. Consider what such an interpretation would imply about the nature of actions performed contrary to duty.<sup>19</sup> To violate a duty, on this hypothesis, an agent would have to choose to obey the very same moral law he chooses to violate, since the former volition is, *ex hypothesi*, a necessary condition for the existence of the duty and the latter is required for the performance of the immoral action. On this interpretation, a will would have to be actually self-contradictory in order to violate duty. Kant, however, seems to reject such a characterization of immorality.

If we now attend to ourselves in any transgression of a duty, we find that [...] there is really no contradiction here but instead a resistance of inclination to the precept of reason (*antagonismus*), through which the universality of the principle (*universalitas*) is changed into mere generality (*generalitas*) and the practical rational principle is to meet the maxim half way. Now, even though this cannot be justified in our own impartially rendered judgment, it still shows that we really acknowledge the validity of the categorical imperative and permit ourselves (with all respect for it) only a few exceptions that, as it seems to us, are inconsiderable and wrung from us. [G 4: 424]

As Kant conceives of immoral action, *if* the agent's maxim were universalized it would yield a contradiction, but it need not be the case that the agent's actual maxim is in fact self-contradictory.<sup>20</sup> He thinks that, at least typically, the will qualifies its commitment to the moral law: it recognizes the moral law as a general but not universal principle, so that the immoral maxim it wills is but an exception to a general principle that the agent accepts. Kant emphasizes that the agent still has respect for the general principle. The point relevant for our purposes is that {265} when an agent chooses to violate duty he need not also will the moral law as a universal principle. This implies that an agent is bound by the moral law even though he may not, in at least one important sense, will it or acknowledge its validity in this particular case.<sup>21</sup>

While ISP would imply a form of anti-realism some constructivists might find congenial, there is little reason to believe it accurately represents Kant's conception of self-legislation. Such a quick argument for a constructivist interpretation fails.

## II

Once this quick argument for moral constructivism is set aside, matters become much more complicated. It is quite difficult to identify precisely what self-legislation is supposed to amount to. While Kant makes extensive use of the concept of self-legislation in the *Grundlegung*, a study of that work as well as the second *Kritik* reveals that Kant provides very little by way of clarification or exposition of the concept of self-legislation in either text. Attempts at a reconstruction of this concept are soon confronted with the fact that, while Kant does offer a detailed examination of the concept of moral obligation in those works, he never really elaborates upon the idea of legislation that is central to this analysis. In fact, in Kant's publications one of the only direct {265} clues about the meaning of moral "legislation" occurs

in a puzzling little passage from the introduction to the oft-neglected *Metaphysik der Sitten*, where Kant writes:

A (morally practical) law is a proposition that contains a categorical imperative (a command). The one who commands (*imperans*) through a law is the legislator (*legislator*). He is the author (*autor*) of obligation in accordance with the law, but not always the author of the law. In the latter case, the law would be a positive (contingent) and discretionary law. The law which obligates us *a priori* and unconditionally by our own reason can also be expressed as proceeding from the will of a supreme legislator, i.e. one that has only rights and no duties (hence from the divine will), but this only signifies the idea of a moral being whose will is a law for everyone, without his being thought of as the author of it. [MdS 6: 227]

Here Kant describes God as the supreme legislator of the moral law and he draws a distinction between two kinds of authorship: between the *author of obligation in accordance with a law* and the *author of a law*. A legislator of a law, he says, is an author of obligation in accordance with the law, but not necessarily an author of the law. However, as is often the case with Kant's writings, perhaps especially with sections in the *Metaphysik der Sitten*, in abstraction from Kant's context and presuppositions, the point of this distinction and its significance for Kant's conception of self-legislation is completely obscure. In spite of its apparent obscurity, I will argue that a thorough understanding of this passage is of signal importance to the comprehension of Kant's moral philosophy. It will reveal, among other things, why Kant's conception of legislation does not make him a moral constructivist.<sup>22</sup>

One thing that is clear in this passage is Kant's insistence that while God can be considered the legislator of the moral law, he cannot be the author of the moral law. One of Kant's obvious targets is theological voluntarist accounts of morality. Indeed, the point of Kant's distinction between legislation and authorship emerges clearly from a careful study of his reaction to theological voluntarism and some of his philosophical predecessors, first in his lectures on moral philosophy and *Reflexionen*, and then in his published works.

Before we proceed to a more detailed examination of Kant's lectures and their development, it will be helpful to clarify a bit of relevant terminology. As Kant saw things, there is an important distinction between two different ways that religion and morality could be related. "Moral theology [*Moraltheologie*]", which Kant endorsed, "ascends to a supreme intelligence, as the principle [...] of all moral order and perfection". It is "a conviction of the existence of a supreme being – a conviction which bases itself on moral laws". In contrast, theological morality [*theologische Moral*], which Kant rejected, "contains moral laws, which

*presuppose* the existence of a supreme ruler of the world” [KrV A632/B661].<sup>23</sup> One aspect of this distinction is quite apparent: moral theology is a theology, a more or less systematic presentation of the concept of God, whereas theological morality is a morality, a more or less systematic presentation of what the moral law is and requires. One thing both positions share is that each accepts that there is a necessary connection between religion and morality. This connection plays a different role in the two theories, however. Whereas moral theology bases beliefs about the existence and nature of God on knowledge of the moral law, theological morality reverses this order and insists that beliefs about the moral law be based upon a prior knowledge of the divine being. This leads directly into Kant’s epistemological criticism of theological morality: if, as Kant insists, theoretical reason is unable to establish the nature or even the existence of God, theological morality lacks its starting point. Another difference between theological morality and moral theology is less apparent. Theological morality, as Kant conceives of it, does not merely suggest that theology is *epistemically* prior to moral philosophy, it maintains that theology is *conceptually* prior to moral philosophy, that theology precedes moral philosophy because the content of the moral law depends upon God’s will.<sup>24</sup> That is, theological morality is committed to theological voluntarism. It is this theological voluntarism that is the object of Kant’s deeper, moral objection to theological morality. As we will see, one of the purposes of {268} the legislator-author distinction is to allow Kant to distinguish his theory from that of the theological voluntarist, and to more precisely identify his reasons for rejecting voluntarism.

In his extensive scholarship on the development and place of Kant’s ethics in the history of modern moral philosophy, J. B. Schneewind has argued that the early modern conceptions of obligation which culminated in Kant’s “invention of autonomy” may be best seen as improvements upon earlier, problematic theological voluntarist accounts.<sup>25</sup> In the process, Schneewind has persuasively detailed how Kant shared several fundamental convictions with other early modern opponents of theological voluntarism. First, Kant insisted, along with other anti-voluntarists, that God and humans must be recognized as members of the same moral community. As we have already noted, Kant repeatedly insisted that the moral law is applicable to the behavior of every rational being, God included.<sup>26</sup> Historically, this conviction generally led, as it did in Kant’s case, to the idea that the supreme principle of morality is a formal, *a priori* principle of practical reason.<sup>27</sup> Second, anti-voluntarists, including Kant, typically took the

universality of morality to imply that all rational beings (both God and humans) must share the same type of moral motivation. This supported the contention that moral motivation does not depend upon idiosyncrasies of human psychology; rather, the rational principle itself must be able to motivate action. In Kant's case, "respect for the moral law" is an *a priori* motive available to all rational beings.<sup>28</sup> Third, like other anti-voluntarists, Kant was committed to providing an "explanation of how God can be indispensable in sustaining morality even though he is not its creator", an account he attempted to provide in the second *Kritik* and *Religion*.<sup>29</sup> Moreover, Schneewind has properly emphasized Kant's passionate {269} opposition to human "servility", an affront to human dignity that he feared was a natural consequence of theological voluntarism.<sup>30</sup>

On Schneewind's reading, Kant's opposition to theological voluntarism is primarily rooted in his aversion to servility and is grounded in an argument based upon the conviction that the moral law must apply to the behavior of all rational beings, including God. If God's will were the basis of the moral law, the argument contends, the claim that the divine will conformed to the moral law would be trivial (since on this account it is the divine will that determines what constitutes the moral law.) No matter what God might do, it would be morally permissible because *he* willed it.<sup>31</sup> This would undermine the claim that the moral law meaningfully applies to the divine will, precisely what the assertion of universal moral community was intended to exclude.<sup>32</sup> And, if the moral law were established by God's will, human morality would appear to be reduced to a sort of servile appeasement or satisfaction of divine whims. Thus, Kant concluded that God cannot be the creator or author of the moral law.

Interestingly, however, Schneewind has suggested that "[d]espite his opposition to voluntarism on these points, Kant is in many ways a voluntarist himself."<sup>33</sup> On Schneewind's reading, while Kant's concerns about servility and universality preclude him from being a theological voluntarist, these concerns motivate him to transform theological voluntarism into constructivism. As Schneewind writes,

Kant transposes onto human practical reason the relation he tried to work out earlier between God and the goodness of the outcomes of his choices. His astonishing claim is that God and we can share membership in a single moral community *only if we all equally legislate the law we are to obey*. [...] For Kant [...] it is not {270} knowledge of independent and eternal moral truth that puts us on equal footing with God in the moral community. *It is our ability to make and live by moral law*. The invention of autonomy gave Kant

what he thought was the only morally satisfactory theory of the status of human beings in a universe shared with God.<sup>34</sup>

The capacity that theological voluntarists ascribed and limited to God, the capacity to make the moral law, Kant's "invention of autonomy" allegedly ascribes to human wills as well. Here Schneewind takes Kant's conception of legislation to commit him to a "skeptical" or "constitutive method" of ethics according to which

Moral goodness [...] is not discovered by the moral faculty but constituted by it. The moral sense is then like the Pufendorfian divine will that creates moral entities. [...] It is a [morally] neutral universe and only our response to it makes it otherwise. [...] We can all determine what is right because our own feelings make it right.<sup>35</sup>

Schneewind takes Kant's idea of "legislation" to mean that we "make" or "create" the moral law or moral entities by testing our own maxims. Schneewind argues that these constructivist aspects of Kant's moral philosophy are consistent with (and even motivated by) Kant's concerns about human dignity and universal moral community. Humans and God can still be considered members of the same moral community in virtue of legislating the moral law together (or, perhaps more precisely, in virtue of legislating the same moral law).<sup>36</sup> If the moral law is not simply created by God, i.e., if *we* play a role in creating it, the asymmetry between the way the moral law relates to our will and the divine will is much reduced.<sup>37</sup> The universal applicability of the moral law could be upheld and there would be little place for servility in {271} a moral community composed of equals. It appears that if concerns about dignity and universal moral community are the basis of Kant's opposition to theological voluntarism, there is still plenty of room for constructivism.

There are problems with this interpretation, however. First, while the allegedly Kantian solution might solve the "servility" problem, its solution to the universality problem remains obscure. If theological voluntarism trivializes the applicability of the moral law to God's will, it would seem to follow that the ascription of legislative powers to all rational beings would threaten to make the moral law universally trivial, rather than uphold its universal significance.<sup>38</sup> Moreover, it remains unclear what the distinction between legislation and authorship could amount to on this interpretation. In the *Metaphysik der Sitten*, Kant appeared to be denying that God was the author of the moral law, not just that he was the *sole* author. What is needed is an examination of the origins and point of this distinction.

*Wolff, Baumgarten, and Kant's Lectures on Ethics.* Kant developed the seemingly obscure distinction between legislation and authorship as part of his ongoing engagement with Alexander Baumgarten's Wolffian ethics. From the early 1760s on and throughout his teaching career, Kant closely studied Baumgarten's *Initia philosophiae practicae primae* and *Ethica philosophica* and he regularly used them as textbooks for his courses on moral philosophy.<sup>39</sup> Notes from Kant's lectures on moral philosophy, when read in the light of his reactions to Baumgarten and Christian Wolff, shed considerable light on the development and significance of the distinction between legislation and authorship. They reveal a further objection to theological voluntarism, an objection that seems to preclude constructivist interpretations of self-legislation as well.

The first principle of Wolff's moral theory is the law of nature that requires us to promote the internal and external perfection of ourselves and others (and to refrain from actions that do not promote it). Whether or not an action is fit to promote our perfection is settled by the degree to which it (and its consequences) harmonize with our nature, a feature which is, in turn, determined by the nature of things, including our nature as humans. Now, as Wolff understood things, {272}

To obligate someone to do, or refrain from doing, something is nothing other than to connect to it a motive to will or refrain from willing it. [...] Whatever gives us the motive to will or not will an action obligates us to perform or refrain from performing it.<sup>40</sup>

Since Wolff thought that our nature was constituted in such a way that the perception of the perfection that will result from an action invariably gives rise to a desire to perform it, he thought that our moral obligations are natural obligations. Obligation is rooted in nature since the putative perfection is based in the nature of things (including our nature) and the motive that obliges us to perform the action because of this perceived perfection is based in our nature. This conception of obligation, Wolff argued, also allows us to consider natural obligations as divine obligations.

Because the divine understanding makes all things possible (§975. Met.), and the possible becomes actual through his will (§988. Met.); thus it is also possible through God's understanding that the perfection or imperfection of a human being's condition springs from his or her free actions, and according to God's decree it in fact becomes so (§977. Met.). Just as the representation of this perfection is the motive that we refrain from other actions (§422,426,496. Met.); so has God also connected motives with actions, and accordingly has he obligated human beings to perform actions that the law of nature demands, and to refrain from what it does not allow (§ 8). Thus natural obligation is simultaneously divine obligation, and

the law of nature is simultaneously a divine law (§ 17). It is also thereby clear, that God can give human beings no law other than the law of nature; in any event not a law that is contrary to the law of nature.<sup>41</sup> On this conception, God is the legislator and author of our moral obligations because he is the author of nature, i.e., God establishes the natural connections between actions and our inclination to perfection.<sup>42</sup> Wolff is careful to emphasize several important qualifications of this thesis. First, Wolff insists that an atheist would be unjustified in inferring from atheism that obligation is an illusion. Since natural obligation is grounded in the nature of things, even if God failed to exist, Wolff argues, humans would still have obligations (assuming that the nature of everything else could remain the same if God failed to exist).<sup>43</sup> {273} Second, Wolff also defends his commitment to the necessity of the moral law (a commitment revealed earlier in his suggestion that God cannot give people any law other than the law of nature), rooting it in God's nature and broader issues of necessity:

Since the motive of the divine will is the greatest perfection, (§ 981) thus God cannot desire any action, except insofar as it results in the perfection of humanity and the human condition, and he must prefer those that result in the greatest perfection. Thus is it clear, that God does not desire to alter the law of nature, indeed, by virtue of his nature it is not possible that he alter it. Accordingly, it is also clear from what has been proven, that *the law of nature does not spring from the divine will, rather, human actions are good or evil, or better or worse, before one can say that God wills or does not will them. Indeed this is also clear from the universal principle, that God's will does not make truths* (§ 976. Met.), and is already proven above (§ 5).<sup>44</sup>

Through the law of nature, God directs us to our greatest possible perfection, and by his nature, God chooses to actualize perfection, so it would be contrary to his own nature for God to command us to act in violation of the law of nature. In this respect, God's understanding controls his will.<sup>45</sup> And Wolff alludes to the traditional Leibnizian rejection of theological voluntarism in morals and metaphysics when he appeals to "the universal principle that God's will does not make truths."<sup>46</sup> {274}

In the context of this Wolffian position, Baumgarten asserted that God is the legislator and author of all natural obligations (simultaneously *legislator* and *autor*), because he is the author of the world.<sup>47</sup>

The author of the obligation that a law states is said to make that law. And the one who has the authority [*ius*] for making laws, the legislator generally so-called, is also the legislator of that [particular] law that he makes. Now God is the author of the whole of nature (Met. § 940, 466) and of all the real things that occur in it. (Met. § 959) But natural obligations are something real and positive (§12. Met. 36) and they have a

sufficient reason in that same [nature]. (§ 39) Therefore, God is the author of obligations, and so also of natural laws. (Met. § 940, 317). Since he has the ultimate authority [*ius*] for the making of those obligations, he is the legislator in the general sense of natural laws and of the whole normative structure [*ius*] of nature. Obligation, right [*ius*], and the divine law are things that have God as their author and legislator. Therefore, the normative structure [*ius*] of nature, as well as the individual laws and natural obligations, are divine, although they can at the same time be called human on account of their personal object, namely, the obligations [obliging human persons], and they are known through divine natural revelation (Met. § 986) to the extent they are natural. If either [they are known] simultaneously through revelation more strictly called (Met. § 986), or [they are known] through revelation altogether most strictly called (Met. § 989), then to that extent they are divine positive [laws and obligations]. (§ 63)<sup>48</sup>

Baumgarten considers two distinct issues here: one focusing on who obligates whom, the other focusing on how one becomes aware of an {275} obligation. Both nature and God obligate us (as, in many cases, do human authorities as well), he tells us; we may become aware of obligations through special revelation (revelation in the strict sense) or through God's general revelation (when we discover it through our own use of reason.) We are concerned primarily with the former issue.<sup>49</sup> On this point, Baumgarten moves rather quickly to his claim that God is the author and legislator of our moral obligations: God is the author of everything real, obligations are real, therefore God is the author of obligation.<sup>50</sup>

In spite of the commitment of Wolff and Baumgarten to the necessity of the moral law, their claim that God is the author of the moral law concerned Kant greatly. In fact, Kant's *marginalia* to his personal copy of Baumgarten's *Initia* reveal that his distinction between legislator and author first emerges in response to this specific passage (§ 100) of Baumgarten's *Initia*.<sup>51</sup> Kant was particularly concerned by the account of obligation that underlay Baumgarten's claims about God's authorship of the moral law. Kant considered that account of obligation to be inconsistent with his distinction between obligations to moral and pragmatic laws, i.e., between categorical and hypothetical imperatives.<sup>52</sup> If the moral law were binding only because a motive is provided by the connection of an action with our inclination for perfection (or any other inclination for that matter), moral obligation would be reduced to a hypothetical, rather than a categorical imperative.<sup>53</sup> Moreover, since {276} voluntarists might plausibly maintain, contra Wolff and Baumgarten, that God could connect virtually any type of action with a motive for its performance, Kant was concerned that Baumgarten's account of obligation might

lend credence to the extreme voluntarist conclusion, repudiated by Wolff and Baumgarten alike, that what is prohibited or required is ultimately contingent upon God's will.

In addressing these problems, Kant agreed with them that moral obligation must lie "in the nature of things", but rejected the apparently broad Wolffian sense of this term; he maintained that moral obligation cannot simply be rooted in our inclination, or in God's will, or in a connection between them. According to his students' notes, in the mid-1770s, Kant taught his students that:

The one who declares that a law, which is in accord with his will, obligates another, he gives [legislates] a law. The legislator is not simultaneously an author of the law, except when the law is contingent. When the laws are necessarily practical and he only declares that they are in accord with his will, he is the legislator. Thus no one, including God, is the author of the moral laws, since they do not spring from the will, but are practically necessary. Were they not necessary, it would be possible that lying be a virtue. The moral laws can only stand under a legislator; it can be a being that has all power and authority to execute the laws and to declare that the moral law is simultaneously a law of his will, and obligate everyone to act in accordance. Thus, this being is a legislator, but not an author. Precisely as God is not the author of the fact that triangles have three angles [...].<sup>54</sup>

Here Kant transformed the Wolffians' talk of God's legislation and authorship of morality into a substantive distinction in order to challenge their account of obligation. Kant's distinction between a legislator and an author in this lecture is relatively clear: an author *makes* a law through his will; whereas a legislator declares that a law is in accord with his will, whether or not it is something he makes. The significant thing is the reason why Kant distinguishes between the legislator and author of the law, and why he rejects theological voluntarism: he rejects voluntarism in general because it conflicts with the categorical necessity of moral obligations.

When Kant insists that it is a necessary truth that lying is a vice, that this is as necessary as the proposition that triangles have three angles,<sup>55</sup> {277} we hear clearly the echoes of the Leibnizian attack on theological voluntarism mentioned above, even down to the type of example: the geometry of triangles. Kant borrows the comparison with geometrical truths from the tradition and, as Schneewind has emphasized, he is certainly interested in defending a universal or "common concept" of morality applicable to all rational beings. But rather than emphasizing the threat that theological voluntarism poses to the meaningfulness of God's moral perfection or the universal scope of the moral law, Kant seems most concerned with how it threatens the "directness" or "immediacy", i.e., the *categorical necessity* with which *our* moral

obligations bind us, and the implications it would have for moral motivation. This emerges in Kant's explanation of the difference between positive obligations and natural obligations.

Obligation is divided into *positiva* and *naturalis*. Positive obligation arises from a positive and voluntary declaration; natural obligation from the nature of the action itself. All laws are either natural or arbitrary. If the obligation springs from the *lex naturalis*, and has this as the ground of the action, it is *obligatio naturalis*; but if it has arisen from *lex arbitraria*, and has its ground in the will of another, it is *obligatio positiva*. Crusius believes that all obligation is related to the will of another. So in his view all obligation would be a necessitation *per arbitrium alterius*. It may indeed seem that in an obligation we are necessitated *per arbitrium alterius*; but in fact I am necessitated by an *arbitrium internum*, not *externum*, and thus by the necessary condition of universal will; hence there is also a [natural] obligation. All *obligatio positiva* is not directed immediately to the action; rather, we are obligated to an action which is in itself indifferent. Hence all *obligatio positiva* is *indirecta* and not *directa*. For example, if I am not supposed to lie because God has forbidden it, but he has forbidden it because that pleased him, then he could have not forbidden it, had he not wanted to. But *obligatio naturalis* is *directa*: I must not lie, [not] because God has forbidden it, but because it is [bad] in itself.<sup>56</sup> {278}

While Baumgarten distinguished between natural and positive law to mark an epistemic distinction, Kant draws a different contrast, a distinction in origin and immediacy. On Kant's conception, positive obligations are grounded in the will of the lawgiver-author and this makes them indirect, external, and at least *prima facie* contingent and hypothetical (since the interposition of an author's will leaves room for contingency and needs to postulate that the agent has an interest in compliance).<sup>57</sup> If the obligation not to lie depended upon God's will, then it would be indirect, external and contingent, rather than categorically necessary.<sup>58</sup> To preserve the categorical necessity of our moral obligations, Kant insists that they must be natural, rather than positive obligations. Since our moral obligations must be categorically necessary, they are not positive obligations, or in the language of the earlier passage, they cannot have an author.<sup>59</sup> Indeed, God could not be the {279} author of the moral law, Kant concludes, not because he is theoretically uncognizable, not because he is omniscient, omnipotent, or omnibenevolent, but rather because the moral law cannot have any author whatsoever.<sup>60</sup>

What makes Kant's objection to Baumgarten particularly cogent is that Wolffians like Baumgarten were supposed to be the closest heirs of this Leibnizian anti-voluntarist legacy and certainly were not theological voluntarists. Moreover, Baumgarten himself acknowledged the foundational importance of the concept of obligation. Baumgarten and Wolff certainly agreed with Kant that the moral law is supposed to be necessary and grounded in the nature of things, in

what is good or bad “in itself”, but their account of obligation yields only indirect, external and hypothetical obligation and in this context, it inadvertently lends plausibility to theological voluntarism. By directing attention to God’s will and our inclinations, they fail to properly focus on the part of “the nature of things” relevant to the fundamental nature of categorical obligation: the nature of actions and the nature of the (practical) intellect or will (the “*arbitrium internum*”).<sup>61</sup>

To summarize the conception of legislation articulated in Kant’s lectures: the essence of legislation is the giving or “declaration” of a principle or law with which someone shall or is obliged to comply, a declaration that the principle expresses the legislator’s will, a declaration typically backed up with sanctions and/or rewards.<sup>62</sup> In these lectures, Kant distinguishes legislation from authorship in order to defend the necessity of the moral law and to preclude the voluntarist suggestion that the moral law is made or created by God’s will. Kant insists that natural, non-positive laws can have a legislator, but they do not have an author.

***The importance of Kant’s Reflexionen.*** Of course, there are many reasons to proceed cautiously with the “notes” of Kant’s lectures. These documents are based upon student notes taken during Kant’s lectures, certainly not manuscripts from which Kant lectured nor are they verbatim transcripts of entire lectures. In fact, it is almost certain that Kant did not read his lectures from a manuscript; rather, he spoke freely, commenting on the Wolffian textbooks from notes, especially the marginal notes he made in his own copy of the text.<sup>63</sup> In any event, in the case of Kant’s lectures on ethics from a semester in the mid-1770s, the manuscripts we have seem to stem from the notes of a student or group of students, probably revised or corrected outside of class, and then only as these were transmitted by an extensive process of copying and {281} recopying, a process which often involved the work of less reliable “professional” copyists. This process seems to best explain the textual variations among the thirteen closely related sets of notes going back to Kant’s lectures on ethics from that semester in the mid-1770s.<sup>64</sup> Unfortunately, the extant and published manuscripts from this semester’s lectures (“Collins” which served as the basis of the Akademie edition of *Kants gesammelte Schriften*, along with the sources of Paul Menzer’s edition) appear to have been the least reliable and among the most distant descendants of the original source or sources.<sup>65</sup> Thus, it is important to

corroborate the contents of the lecture notes with evidence from Kant's own hand, both published and unpublished.<sup>66</sup>

One of the best sources of corroboration for the substance of Kant's lectures on ethics are the marginalia Kant jotted in his personal copy of Baumgarten's *Initia*. When we examine these marginalia we find strong confirmation for the lesson we drew from the lecture notes. We find evidence that Kant was developing the rudiments of a distinction between legislator and author as early as 1762 and that he was working out this line of thought throughout the late 1760s and into the 1770s. Probably in 1762–63, Kant wrote,

By necessitating universally with respect to this law, [he?] declares the law. Edict. He makes the law inviolable; he does not create the obligation, but imposes it.<sup>67</sup> {282}

He wrote, most likely in 1769:

There are arbitrary [*willkürliche*], there are natural laws. The former have an author, the latter a legislator.<sup>68</sup>

In 1772 he added:

The author of an external compulsion according to the law is the legislator. He is not always the author of the law, and where he is, the law itself is contingently binding [...].<sup>69</sup>

In about 1776 he wrote:

God does not make the moral law or obligation <he gives [legislates] them>, rather he only says that they are the conditions of his good will [...].<sup>70</sup> Only the legislator of arbitrary [*willkührlicher*] laws is an author.<sup>71</sup>

Kant's *Reflexionen* even hint at a positive characterization of the relation between God's will and the moral law when he suggests that

God is not author of the moral law through his will, rather the <divine> will is the moral law, that is to say, the archetype of a perfect will [...].<sup>72</sup>

On the substance of the author-legislator distinction, then, Kant's marginalia corroborate what we saw in the lecture notes: since the moral law is necessary, no one, not even God can be its author.

***Two types of authorship.*** At this point, we must address a problem that has, no doubt, been troubling some readers. Recall that, in the passage from the *Grundlegung* with which we began this paper, Kant wrote that, according to the principle of autonomy,

all maxims are repudiated that cannot accord with the will's own universal legislation. Thus, the will is not merely subject to the law, rather it is subject in such a way that it must also be regarded as self-legislating

and precisely on this account, above all, as subject to the law (of which it can consider itself author). [G 4: 431] {283}

In this passage, Kant connects the rational agent's will with the roles of *both* a legislator and an author. Regardless of the exact nature of the role distinction between legislator and author, Kant seems to reject his earlier claim that the moral law has no author. His insistence that God may be the legislator but not the author of the moral law might remain, but he appears to insist that each agent regard his or her own will as author of the moral law. Rather than precluding constructivism, Kant's language here would appear to demand it.<sup>73</sup>

In response, it is worth noting the slight asymmetry between Kant's ascriptions of the two roles: he maintains that the will *must* be regarded as self-legislating, while only claiming that the will *can* consider itself author. On its own, however, this is of little help. It would surely seem pointless to maintain that the moral law cannot have any author whatsoever while conceding that the will can (legitimately) regard itself as author.

At this point, we must return to the puzzling passage from the *Metaphysik der Sitten* with which we began section II. As we noted above, in this passage, Kant draws a distinction between "the author of the law" and "the author of obligation in accordance with the law", a distinction which we have not yet explicitly illuminated. Student notes from some of Kant's later lectures on ethics reveal that this distinction between two kinds of authorship begins to emerge right around the time that Kant composed the *Grundlegung*. Kant was trying to find a way to concede to Baumgarten at least a loose sense in which God can be considered "author" of the moral law (i.e., in so far as he legislates it) while still guarding the conviction that morality is not positive law and has no author in the strict sense.

In the fragment of lecture notes referred to as "Moral Mrongovius II", apparently generated by Christian Mrongovius in connection with a course on ethics Kant taught in 1784–85 (as he was completing work on the *Grundlegung*), Kant is recorded as having taught his students:

*Legem ferre dicitur, qui dat obligationem; quam lex pronunciat et qui potestatem habet legem ferre est legislator.* The legislator is not the author of the law, rather he is the author of the obligation of the law. The two can be different. God is to be regarded as the moral legislator; but he is not the author of the laws, since these lie in the nature of things and all that is added to them is a new obligation that comes from God. [...] God is not the author of morality, since otherwise it would come through his will and we would not come to know it through nature as well. It lies in the essence of things. Likewise, God is not the author of the relation between mathematical figures through his will.<sup>74</sup>

Here Kant makes all the familiar points about God not being the author of the moral law and includes the analogy to geometrical figures. He also emphasizes a distinction between the legislator and the author of the law: a legislator can be the author of the obligation of the law, but is not always the author of the law. The distinction between the two kinds of authorship is even clearer in the “Metaphysik der Sitten Vigilantius” notes stemming from Kant’s lectures in 1793–94. Vigilantius records Kant’s teaching as follows:

Baumgarten, in § 100, explains a legislator as *auctor obligationis quam lex enunciat*, a definition which Professor Kant amends as follows: an *auctor legis* can be supposed only of a law that has no binding power of its own, but possesses it merely *ex voluntate vel arbitrio alterius*. Since an *auctor* is *causa per arbitrium liberum*, and therefore everything depends on his choice, [this term] can only be applied to a *lex statutaria*. Were one to understand under ‘Legislator’ an *autor legis*, this would merely concern statutory laws. But for laws that are recognized through reason from the nature of things, when an *auctor* is ascribed to them, he could only be the *autor* of the obligation that is contained in the law. In this way too is God *autor legis* through the declared divine will, precisely because the natural laws were already in existence, and are commanded by him. [...] under ‘*autore* of a natural law’ only the author of the obligation in accordance with the imperative of the law can be thought [...].<sup>75</sup>

In short, the idea is that, while all laws may have an *author of obligation*, only positive laws have an *author of the law* (in the strict sense). The legislator or the author of ob-<sup>{285}</sup> ligation declares a correspondence of the law or principle with his will and may connect sanctions with its observance. In essence, Kant has found a way to concede to Baumgarten at least a loose sense in which God is author of the moral law (he is author of the obligation in accordance with it) while still guarding his conviction that morality is not positive divine law. Kant continues to maintain that the moral law can have no author in the strict sense.

The apparent timing of this development is significant since it suggests not only that Kant continued to hold the core of the position he began developing in the 1760s and 1770s, but also that he was continuing to develop this non-constructivist conception of legislation at the same time as he was formulating his conception of autonomy. It is not clear exactly what Kant meant when he wrote in the *Grundlegung* that the will “can consider itself author,” but it seems likely that he had the looser sense of authorship in mind, the very conception he was working out at the time.<sup>76</sup> In any event, the best evidence suggests that Kant consistently wrote and taught his students that the moral law could have no author in the strict sense, a view he did not hesitate to explicitly, though cryptically, express in the *Metaphysik der Sitten*.

***Self-legislation in the Grundlegung.*** What we have then is a variety of sources that clarify Kant's discussion of legislation in the *Metaphysik der Sitten* and suggest that, from the early 1760s through at least the mid-1790s, Kant developed and deployed a distinction between the authorship and legislation of a law. Kant consistently maintained that since the moral law is not contingent and is not a positive law, it has no author (in the strict sense). As he told his students in the mid-1780s, as he was completing work on the *Grundlegung*, moral laws "are not positive laws"<sup>77</sup>.

In the *Grundlegung*, Kant develops several implications of his claim that the moral law is supposed to apply directly and necessarily to each and every rational agent. He insists that the law cannot be imposed "externally" by God, by the civil state, by our embodiment, by our natural needs or "feelings," or some peculiar feature of human reason or human activity, because if it were, it would not apply directly and necessarily to all rational beings.

Whatever is derived from the special natural constitution of humanity, from certain feelings and propensities, or even, if such were possible, from some special tendency peculiar to human reason and not holding necessarily for the will of every rational being – all this can indeed yield a maxim valid for us, but not a law. [...] {286}

[It] cannot yield an objective principle according to which we would be directed to act even though every propensity, inclination, and natural tendency were opposed to it. [G 4: 425]

Kant famously (and controversially) argues that his general concept of a categorical imperative is sufficient to yield its formulation and to exclude rival principles, including those of Wolff and Baumgarten.<sup>78</sup>

If I think of a categorical imperative, I know at once what it contains. For since, other than the law, the imperative contains only the necessity that the maxim be in accord with this law, but the law contains no limiting conditions, nothing remains for the maxim of action to accord with other than the universality of law as such. The only thing the imperative actually represents as necessary is this conformity. [G 4: 420–421]

This analysis yields Kant's first formulation of the supreme principle of morality, the universal law formulation of the categorical imperative: "Act only according to that maxim through which you can at the same time will that it should become a universal law" [G 4: 421]. And this principle is intended to serve as one formulation of the supreme principle for moral judgment: if you can simultaneously will a maxim and its universalization, it is a morally permissible maxim.<sup>79</sup>

More important for present purposes, the analysis of categorical normativity is also supposed to bring out something in particular about the authority of the moral law and the very nature of obligation. The moral law must be

known by reason and authoritative with respect to divine, and of course to human, will. [...] It is not dependent upon our knowledge of it, nor on our will; it is prior in that it is necessary and immutable, eternal and universal. In particular, it is independent of the distinctive constitution of human nature and of the special features of our psychology.<sup>80</sup> {287}

Put more positively, Kant insists that if there is a moral law, “it must already be connected (completely a priori) with the concept of the will of a rational being in general” [G 4: 426]. The moral law must be grounded immediately in the nature of a rational will, which is proper to our nature, our “true self” [G 4: 457]. It must be given by or “spring from” “pure reason” or the nature of the will “as intelligence” [G 4: 431, 461].

In fact, in the *Grundlegung*, it is precisely this sort of reflection upon the nature of categorical obligation and its connection to the nature of a rational will that leads to the idea of self-legislation: “the idea of the will of every rational being as a universally legislating will.”<sup>81</sup> This idea is enshrined in the third formulation of the categorical imperative: “Act only such that the will can at the same time regard itself, through its maxim, as universally legislating” [G 4: 434; cf. 440]. But more than being simply another formulation of the categorical imperative, the idea of self-legislation is intended to capture a crucial feature of the ground of all moral principles.

The first thing that Kant notices about this idea of self-legislation is that it articulates something only implicit in his earlier formulations of the categorical imperative: it makes explicit the fact that the authority of the categorical imperative itself, of the moral law, must be immediate and unconditional.<sup>82</sup> To have the authority that it does, Kant claims, {288} the moral law must be grounded in the nature of the faculty of practical reason. Moreover, its grounding in the nature of practical reason cannot simply consist in the fact that it is reason’s nature to recognize the nature or laws of or truths about various kinds of things.<sup>83</sup> The authority of the moral law cannot be grounded in reason’s recognition of the nature of something *else* or even in contingent facts about itself. Rather, the supreme principle of morality must itself be the law *of* practical reason. And Kant’s analysis is itself supposed to manifest this: the various formulations of the moral law and this feature of its authority were discovered by rational reflection, and

specifically by reasoning *about* duty and the nature of rational volition itself. Reasoning about practical reason yields the supreme principle of morality and the fact that its authority must be grounded in the nature of reason itself. If there is an unconditional practical principle such as the moral law, Kant concludes, it must be given by the nature of reason itself, given in and not simply given to reason. Such a principle demands that practical reason, by its nature, must itself contain and declare, in this way, the supreme principle of its own nature, with which it should comply. Since, according to Kant, the essence of legislating is the giving or declaring of a law or principle to be complied with, he can express his claim about the authority of the supreme principle of morality by saying that that principle must be “legislated” for the rational will by the rational will itself, that is, it must be “self-legislated”<sup>84</sup>.

As Reath has put it, in so far as “the nature of rational volition is sufficient to yield the principle that authoritatively governs its own exercise”, the rational will can be said to be *autonomous*, i.e., a law to itself.<sup>85</sup> Yet, the categorical imperative is discovered in and given by the nature of “*the* rational will” and we “simply find that we have wills with this nature.”<sup>86</sup> Neither we nor God have discretion about the content or authority of this principle; neither depend upon our activity. Neither {289} the binding force of the categorical imperative nor its formulation is dependent upon or need await any psychological act of willing by any individual.<sup>87</sup>

In the *Grundlegung*, this idea of autonomous self-legislation, by making explicit the immediate and non-hypothetical authority of the supreme moral principle, facilitates Kant’s critique of a wide-range of alternative moral principles and “heteronomous” accounts of obligation [G 4: 440 f.]. In particular, as we have seen in his lectures, Kant’s conception of legislation and self-legislation is intended to limit the role of possible divine legislation, contra theological voluntarism, and it demands a clarification or re-focusing of anti-voluntarist demands that obligation must be grounded “in the nature of things”. The principle of autonomy makes explicit the demand that the supreme principle of morality must be grounded in the very *nature of the rational will*.<sup>88</sup>

When Kant insists in the *Grundlegung* that the “will is subject [to the law] in such a way that it must also be regarded as self-legislating and precisely on this account, above all, as subject to the law” [G 4: 431], we should understand him to be primarily reinforcing the claim that a {290} philosophically adequate account of moral obligation requires that the law must be

grounded in the nature of the will. At the same time, the exclusion of all contingent and mediating volitions, contained in and emphasized by the *Grundlegung*'s idea of self-legislation, makes clear that the self-legislation of the moral law excludes the possibility of "authorship" (in the strict sense) and seems to preclude, thereby, a constructivist assimilation of the moral law to a divine or a human positive law, or a dependence upon our conceptions or constructive activity. Yet, as we will see in the next section, a more sophisticated version of moral constructivism may appear to escape this conclusion.

### III

Up to this point I have argued that Kant vigorously opposes theological voluntarism as an account of the content or validity of the moral law and that he does so because of the threat this poses to the idea that our moral obligations are categorically necessary. Kant argues that the problem with theological voluntarism is one instance of a general problem confronting voluntarist accounts of moral obligation: the moral law cannot be a positive law, cannot be something we, or anyone else, including God, could make, since it can have no author (in the strict sense) but, rather must be grounded "in the nature of things", specifically in the nature of practical reason or the rational will. Though the details of Kant's position on this matter did change over time, he seems to have held these convictions in some form or another from at least the early 1760s through at least the mid-1790s. This neglected feature of Kant's account of legislation seems to preclude the alleged transposition of theological voluntarism into human constructivism.

Andrews Reath has proposed a sophisticated interpretation of Kant's conception of self-legislation, however, that might seem to evade this conclusion. In ordinary usage, Reath suggests, an act of legislation involves a genuine display of legislative sovereignty: the authority to create law, an exercise of significant discretionary power with respect to the law's content, and ultimately, the creation of binding reasons for subjects to conform to such laws.<sup>89</sup> Going beyond a simple gloss on the ordinary concept of self-legislation, Reath argues that Kant's use of this concept is appropriate because "legislative sovereignty" plays an important role {291} in the structure of Kant's theory. A correct understanding of this legislative sovereignty, he suggests, preserves the objectivity, universality and categorical necessity of the moral law while

precluding the existence of an independent order of values. Thus, Reath's interpretation would appear to demonstrate Kant's commitment to moral constructivism. In this section, I will argue that Reath's interpretation, while instructive, fails to demonstrate the presence of sovereign discretion in Kant's theory and thus does not create a genuine opening for the anti-realist claims of a Kantian moral constructivism.

To identify legislative sovereignty, Reath draws upon an analogue from legal and political theory. Under a political constitution, Reath notes, "positive law is created when (and only when) the legislative process is properly carried out, and what makes something a law is that it has been duly enacted in accordance with this procedure." Reath argues that, to the extent that it expresses a formal procedure for the evaluation or testing of maxims, the universal law formulation of the categorical imperative can be understood "as the 'constitution' of the rational will".<sup>90</sup>

Drawing out the analogy, Reath proposes a distinction between two levels of moral principles: on the first, higher level, is the general formal principle: the Categorical Imperative; on the lower level, are "substantive moral principles and requirements that are arrived at (or as we might say 'enacted') by deliberation guided by" the general formal principle.<sup>91</sup> On the higher level, the formal principle is supposed to be grounded in the very nature of rational volition. The general form of the categorical imperative is given by "*the* rational will" and we "simply find that we have wills with this nature". If this grounding is successful, the necessity, universality and objectivity of the moral law are secured: neither the binding force of the general categorical imperative nor its specific formulation is constructed or created; they are not supposed to depend upon or need await any individual's act of will.

Yet, Reath claims that this interpretation still allows "for objective necessity without presupposing an external source of reasons or {292} value".<sup>92</sup> The supreme principle or "constitution" is taken as given, but since it is given by the nature of the will itself, it is not "externally imposed". Moreover, on Reath's interpretation, the supreme principle functions primarily to ground the legislative procedure which is used for the adoption of substantive principles on the lower level, which is analogous to the "enactment of positive law".<sup>93</sup> The supreme principle is construed as a law that "creates, rather than limits, the sovereign authority of the moral agent".<sup>94</sup> Thus, the categorical imperative is to function like what H.L.A. Hart has called a "power-conferring" law: it is constitutive, rather than restrictive of, the legislative power

it confers.<sup>95</sup> Substantive universal law is made “by showing that [a] maxim can be willed as a universal law and adopting [the maxim] on that basis”. When adopted in this way, the procedure “confers the status of law on those maxims (or their generalized versions) which it passes”<sup>96</sup>. Reath suggests that this sovereign legislation of substantive principles involves the creation or construction of values and substantive principles, rather than the discovery or identification of them. By properly “placing value” on things or “adopting” principles, sovereign legislators construct values and confer the status of law on principles. Substantive values and moral principles are seen as the products of procedurally correct actual adoptions, upon which they are dependent. The presence of sovereign discretion precludes the existence of an independent order of values or a set of principles independent of their construction. Reath argues for the presence of such sovereignty and, by extension, for this constructivist conclusion in two ways. {293}

First, Reath argues that Kantian legislators are sovereign legislators because they exercise significant discretion over the content of the substantive principles. Reath notes that practical problems do not necessarily have unique solutions. There is room for creativity and discretion about which maxims an agent will entertain and thus, which maxims are brought to the procedure. Since substantive principles result from the process of running maxims through the procedure and subsequently adopting them, he argues, the content of substantive principles “will depend largely upon the maxims which individuals bring to [the procedure]. [...] Since one cannot say what can result from this procedure of deliberation in advance of carrying it out, the question of content is settled by the application of this procedure.”<sup>97</sup> In essence, Reath claims, the exercise of discretion in the choice of maxims is tantamount to discretion over the content of the resulting substantive principles. Moreover, Reath argues, if the content of substantive principles is a result of exercises of discretion, it seems to follow that the substantive principles themselves are established by the discretionary acts themselves: the legislator’s settling on a particular maxim and running it through the procedure.

Second, Reath argues that this interpretation also reveals that rational agents are sovereign legislators because their volitions create binding reasons for other rational agents, reasons which the latter did not have prior to the former’s willing. “A legislative enactment is taken to settle the shape of the normative landscape for the issue in question.” As Reath explains, carrying out the Categorical Imperative procedure resolves the question of what choices are justified in a given situation. When I reason and act from the Categorical Imperative, I have followed the deliberative

procedure which makes a normative principle or conclusion valid, and my reasoning binds others to recognize its validity. Since my volitional state is given by the process of reasoning that confers validity on its conclusions, I give others reasons through my willing.<sup>98</sup>

Reath's discussion of legislative discretion certainly calls our attention to an important, though often forgotten point: Kantian moral deliberation and judgment must {294} be more than a simple exercise in uniformly applying a set of rigid and fully determinate rules. The universality of Kantian ethics must be complemented with context sensitive moral judgment that is responsive to and reflects certain contingencies of practical life. We must take into account anthropological facts about human needs, characteristic desires and vulnerabilities, and such things as social meanings, power relations, "thick" conceptions of personal and group identity, and the like, all of which are more or less contingent and dependent upon (a certain background of) human activity. While the supreme principle of Kantian morality is supposed to be universal, it is intended to apply to a wide variety of different cultural, social, historical, and anthropological contexts in their own particularity. As Barbara Herman has argued, "the Kantian deliberative framework is [...] able to conjoin contingent local institutions and principles of judgment in a way that preserves local value without sacrificing objectivity."<sup>99</sup> In Kantian theory the morally salient features of specifically human nature and the contingent social and historical contexts in which agents act can and should be reflected in agent's maxims.<sup>100</sup> Kantian morality can remain connected to the context precisely because maxims are the focus of moral deliberation, and maxims are context sensitive. Particular moral judgments, even judgments made in terms of "thick", culturally specific moral concepts, can be made at the same time that they can be seen as applications of and criticized in terms of universal and objective moral principles.<sup>101</sup>

The problem is, such observations, as important as they are, fail to support Reath's claims about the legislative construction of value. While Kantian moral judgment may be context sensitive, this does not imply that the content of substantive moral principles or the validity of specific moral judgments is subject to anyone's discretion. Kantian moral judgment can be context sensitive because the supreme principle engages the context as it is represented in the agent's maxim.<sup>102</sup> While it is true that the content of an agent's maxim typically involves significant discretion, it is not clear that this entails discretion over the content of substantive moral principles.

Contra Reath's first suggestion, it is not clear that discretion over the content of one's maxims entails discretion over the content of substantive moral principles. Without resolving important disputes about the precise contours of moral deliberation and important questions about {295} the reducibility of Kantian moral judgment to a formal procedure, several observations may provide strong support for this claim.<sup>103</sup> First, the background conditions and contingencies that constitute the social context of action are generally fixed relatively independently of the individual agent, and even when the agent has contributed to the shaping of a context in a significant way, from his present deliberative standpoint, those salient features of the situation are typically already fixed, not subject to exercises of present discretion. Likewise, while Kant's account allows most of the details of an agent's action in a given context to be left up to the agent, it is not a matter of discretion which features of the situation are morally salient nor is it a matter of discretion what a morally acceptable response to such a situation amounts to.

Without a doubt, moral agents have some discretion as to how they will carry out their obligations. If I owe a friend \$10, I may pay him back in cash, or write him a check, or buy him lunch. But, it is not true that I get to determine which form of payment is *required* of me – rather I have discretion because there are equally acceptable ways of discharging my debt. When I borrowed money from the friend, I did assume a new obligation and he or I may have stipulated (or implicitly agreed) which modes of repayment were or were not acceptable. But the permissibility or impermissibility of assuming such an obligation is not up to me, and once it is assumed (absent sufficient justification for modifying it), I cannot decide which form of payment is required. The determinate content of some moral obligations can and should vary according to the context – the concrete legacy of racial discrimination in our country, for example, may have culturally specific implications for the ways in which we ought to show respect for one another. But there is little reason to think that the obligatory features themselves are generated by exercises of our discretion. Such variability does not reveal legislative sovereignty over the content of our obligations. It seems to be the relation between the context and the supreme principle that determines the content of context sensitive substantive principles.

Within Kantian theory, then, context sensitive substantive principles might be represented as the product of running a particular agent's {296} maxim through the "CI-procedure", but there does not appear to be any discretion about how any such particular maxim fares under the procedure. What about the role played by discretion over the content of maxims? Whether a

maxim is fit to serve as a substantive principle and which substantive principles can result from a given maxim are determined by the supreme principle, and discovered by deliberation employing that principle. Even in the case of context sensitive substantive principles, the legislative declaration of an obligatory principle does not involve sovereign discretion or authorship.

It may seem that an idealistic theory of the ontology of principles offers a way of avoiding this conclusion. If we suppose, for the sake of argument, that purported substantive principles only come into being or are created when a particular maxim is actually conceived of or entertained (or, more austere, when it is actually adopted in accord with the procedure), then the existence of any substantive principle will be contingent upon the formulation of the relevant maxim (or, on the more austere version, the running of it through the procedure.)<sup>104</sup> On such an idealistic account of the ontology of substantive principles, until rational beings conceive of a certain form of behavior, or begin to employ certain concepts in their maxims, there could be no substantive principles involving such concepts, and thus, the corresponding actions, strictly speaking, would not be right or wrong. While this might appear to suggest that the content of authoritative substantive principles is subject to legislative discretion, it does not really support such a conclusion. The ontology of the principles must be distinguished from the account of their validity or truth conditions. Regardless of the contingent, mind-dependent existence of specific maxims and putative principles, the Kantian account requires that questions about what can be legitimately included or excluded from valid substantive principles are still settled by the supreme principle; there is no indeterminacy or individual discretion involved. On an idealistic ontology of principles, which substantive principles *exist* may depend upon how agents exercise their discretion (which maxims they entertain), but this is not discretion over which actions can be right or wrong; it is not discretion over the content of substantive principles. Just as a nominalist-conceptualist theory of propositions does not itself entail global metaphysical anti-realism, so an idealist theory of the ontology of substantive principles does not, by itself, support the sovereign discretion alleged to be a part of Kant's theory.<sup>105</sup>

Thus, I conclude that, while Reath is correct to note that, on Kantian theory, the results of moral deliberation, that is, the choice of a particular action, will involve sensitivity, creativity, and discretion, this does {297} not support the constructivist suggestion that the content of the moral law or of substantive moral principles is a product of sovereign discretion.

There are also problems with Reath's suggestion that the Kantian moral legislator exercises sovereign authority by giving subjects reasons for action that they did not have prior to the sovereign's legislative enactment. Reath carefully notes how a legislative enactment reveals the presence of a reason all other rational agents can recognize. This is because, as he points out, a legislator must follow the "CI-procedure" to validate her own maxim. Since the results of the procedure will be the same for all rational agents with that maxim, they all have the same reason to act that she does.<sup>106</sup> (This fact seems to confirm our earlier skepticism about discretion over content.) In fact, as Reath himself suggests, in the case of any substantive principle the distinction between the principle's subject (the person bound by it) and the principle's legislator collapses because each is in a position to carry out the very same deliberative procedure.<sup>107</sup> The problem is, this seems to undermine the claim that the legislator is giving, through her will, reasons to other agents that they did not have prior to her enactment.

In another, more recent article, Reath has elaborated the Kantian model of sovereignty in a way that inadvertently confirms this observation. While continuing to maintain that an autonomous agent "has the capacity, through the (proper) exercise of one's will, to create reasons that are binding on other agents, which those agents did not have prior to the exercise of one's will"<sup>108</sup>, Reath presents the following argument: "If the legislator's *willing* of a principle is to create reasons, it must carry immediate authority in itself, without depending on anything outside the legislator's will to give the 'subjects' reasons to acknowledge its normative force."<sup>109</sup> This kind of authority cannot be based in sanctions or the contingent desires of subjects, since then the legislator's willing would fail to be authoritative and reason-giving in itself. Likewise, this authority cannot be based in the authority of the legislator's office. A legislator's act of will has authority in itself in virtue of her reasoning. In sum, {298}

A legislator creates authoritative reasons for others when her willing is guided by reasoning that any rational agent can recognize as authoritative. The reasoning underlying the legislator's adoption of a law must be sufficient to lead anyone to regard it as a good law to enact. But that is to say that the reasoning leading to the adoption of the law does not depend for its validity on any private or subjective conditions of the reasoner [...].<sup>110</sup>

But basing the authority upon universal reason is inconsistent with Reath's insistence that an agent can give other agents *new* reasons to act, reasons which they could not have had prior to her reasoning and enactment. If the legislator were to promise rewards for compliance with a law, or were the others aware that, by virtue of the legislator's position, her will binds them

without them having to consider the reasoning leading up to her volition, then her volition could clearly be seen as providing them with reasons they did not and could not have had prior to her act. But on Reath's account it is the legislator's reasoning, not her volition that is or is not authoritative; her reasoning, if it does anything, simply *reveals* compelling reasons for others to act. What the legislator wills is unconditionally authoritative because of its unconditional basis in reason, not because *she* has reasoned it out or chosen it. *She* does not give the agent any additional reason to act. While it is true that when the legislator's reasoning is unassailable, another agent's reasons for action will not be entirely independent of such reasoning, this does not entail that she gives others new binding reasons. The subject's reasoning is not independent of the legislator's because, in terms of content, the reasons of the legislator and subject will be identical. Both subject and legislator recognize the law as a rational requirement and need not depend upon the reasoning of the other. In this respect, subject and legislator are identically situated in relation to the law.<sup>111</sup> Since subjects, on their own, can engage in the same process of reasoning as legislators, "the law-following subject and the law-giving sovereign will display the same volitional state."<sup>112</sup> But this fact undermines rather than supports the element of sovereignty Reath seeks to establish: if the legislator's will and the subject's will generate the same binding reasons, neither really creates reasons for anyone else to act that they would lack on their own. The unconditional authority Reath finds in reason seems to suggest that all may recognize a pre-existent law based in reason, rather than that each gives others novel reasons for action.

So far, I've argued that the elements of Reath's reconstruction that were intended to reveal a robust conception of sovereignty at the level of substantive principles fail to do so.<sup>113</sup> Now we can diagnose the problem with Reath's analysis. In political legislation the constitution can be seen as power-conferring and the content of (at least many of) one's legal obligations depends to a great extent upon legislative discretion precisely because the constitution and social context radically underdetermine the content of statutes. Legislative procedure and social facts might in itself impose few constraints upon the *content* of laws that may be passed; the content of the law depends upon what legislators choose to propose and adopt. The analogy between moral and political legislation fails because in Kantian moral legislation, the obligatory content of one's moral obligations *is* settled by the categorical imperative and the salient features of the context. It should not be denied that there is significant room for discretion in how one permissibly carries out a moral obligation or exercises one's

freedom in the absence of moral obligations, but this discretion is not discretion over the content of one's obligations, and certainly not sovereign discretion.

If this analysis is correct, it seems that Reath's reconstruction fails to manifest the sovereignty he claims is central to the "ordinary" concept of legislation he tries to find in Kant's theory. In the light of the results of section II, however, this should not be surprising, since Kant's conception of legislation is anything but an "ordinary" positive law conception. In fact, our examination of the details of Reath's interpretation serves to confirm this earlier conclusion. On Kant's theory, legislating the moral law does not seem to involve the exercise of "norm-creating powers" and need not, in this respect at least, be seen to entail constructivism. While not revealing the presence of sovereign discretion, an analysis of Reath's interpretation does draw attention to the way in which practical deliberation and the "legislation" of substantive moral principles involves connecting the supreme principle, grounded in the nature of practical reason, with other aspects of the "nature of things", people and societies, and with contingent aspects of specific contexts. {300}

#### IV

In this paper, I have argued that Kant's critique of theological ethics and of Baumgarten's conception of obligation reveals an important and persistent feature of Kant's conception of legislation: his insistence upon the "self-legislation" of the moral law is coupled with a denial that the moral law can have a genuine author. This implies that his conception of self-legislation does not support, indeed presents a formidable obstacle to, interpretations of the moral law as a positive law, as something constructed or created by us. Moreover, I have rebutted two sophisticated attempts to locate room for constructivist "sovereignty" within Kant's conception of legislation. This paper, then, has emphasized the negative and deflationary aspects of Kant's conception of legislation in order to show that this conception does not lead him to adopt moral constructivism. It would be a mistake, however, to infer from this negative conclusion that Kant's conception of self-legislation is without significance. In conclusion, I will briefly highlight a few ways in which Kant's non-constructivist conception of self-legislation continues to play a central role in his theory.

First, we should recall how the concept of self-legislation emerges from Kant's argument in the *Grundlegung*. Kant begins the first section of the *Grundlegung* with the idea that a good will is the only unqualified good.<sup>114</sup> His analysis of the concept of duty suggests that a good will is one that acts from objective practical laws, rather than out of inclination. In the case of a being with needs, this means that a good will acts from duty, according to an "ought". Our duties appear to us as categorical, rather than hypothetical imperatives, and they bind us directly, not through our contingent ends. As we noted earlier, Kant argues that analysis of the concept of categorical obligation yields the first formulation of the supreme principle of morality, the universal law formulation of the categorical imperative: "Act only according to that maxim through which you can at the same time will that it should become a universal law" [G 4: 421]. A good will is a will that acts only upon such "universalizable" maxims. As we also noted earlier, reflection upon the nature of categorical obligation also leads to the principle with which we began this paper: "the idea of the will of every rational being as a universally legislating will". This idea is enshrined in the third formulation of the categorical imperative: "Act only such that the {301} will could at the same time regard itself, through its maxim, as universally legislating" [G 4: 434]. But more than being simply another formulation of the categorical imperative, the idea of self-legislation captures something crucial about the ground of all moral principles.

This idea makes explicit the fact that the authority of a categorical imperative, of the moral law, is immediate and unconditional.<sup>115</sup> Rather than being grounded in material motives, interests, or contingent volitions, its unconditional authority presupposes an independence from and can require abstraction from such interests, motives or volitions. The moral law must be rooted in the nature of practical reason, and applies to me because reason is essential to my true nature. It must be a law not just given to the will, but must be given *by* the very nature of a rational will; that is to say, it must be self-legislated. This idea of self-legislation drives Kant's critique of a wide range of alternative moral principles and "heteronomous" accounts of obligation, in particular, as we have seen, in a way that limits the role of possible divine legislation and refocuses attention on "the nature of things" to the nature of the rational will in particular. When Kant insists that the "will is subject [to the law] in such a way that it must also be regarded as self-legislating and precisely on this account, above all, as subject to the law", we should understand him to be primarily reinforcing the claim that a philosophically adequate account of moral obligation requires that the supreme principle must be grounded in the nature of

the will. The consequent exclusion of contingent and mediating volitions precludes the assimilation of either the supreme moral principle or its subsidiary, substantive moral principles to either a divine or a human positive law.

When choosing how to act, a will whose fundamental principle is to act only upon maxims which he could simultaneously will to be universal law is able to imagine itself, implicitly or explicitly, as a legislator of universal law. He can regard himself as legislator of universal law, as we have seen, in at least two senses: first, in so far as the supreme principle of morality is grounded in and given by the very nature of his will; and second, in so far as the maxims he wills in accord with that law are themselves fit to be universal laws. In both cases, he may be considered their legislator because his will declares a law to be fit for compliance; though in neither case does he make or create the law. {302}

Kant's conception of self-legislation also reveals another crucial aspect of his conception of moral self-governance.<sup>116</sup> In so far as the moral law is the law of the nature of his rational will, the subject of moral obligation must be capable of willing universalizable maxims and be able to act upon a maxim autonomously, that is, he must be able to act upon the maxim *because* of its moral status. The agent must be able to act upon a maxim because of its unconditional rationality. When the agent does act in this way, she self-legislates the law in a further sense: she chooses to commit herself unconditionally to compliance with the law of her will. The validity of the moral law (for an agent) depends upon her having this additional *capacity* to "self-legislate", though its validity does not presuppose that any agent has, in fact, *actually* chosen to comply with it or "legislated" it in this further sense. To be obligated, an agent must be able to regard herself as the law's legislator in several senses, but need not have chosen to comply with it, as the "individual sovereignty" interpretation (discussed above) would suggest.

In the light of this distinction between this further capacity for self-legislation and the exercise of that capacity, we may reconsider passages in which Kant writes about a rational being "obeying only those laws which he himself legislates." As it turns out, what Kant seems to have in mind in such passages is not some agent acting any way she happens to choose, but is instead the idea of a morally worthy agent, a rational agent that is fulfilling her duties. Of course, all agents are required to act only on maxims that they *could* will to be universal law, but the agent that does will her maxims as universal law, *does* in fact commit herself to the moral law (at least on such occasions). Such an agent does in fact will or legislate the moral law in this further

sense: she declares or recognizes that the moral law is the law of her rational nature and declares her own commitment to this law, that she shall follow it. In her moral ac-<sup>{303}</sup>tion, Kant thinks she gives expression to her true self; she recapitulates the law of her rational nature. When she obeys the moral law, she is obeying a law that she gives to herself because it is a law she is freely choosing to comply with and because that law is the law of her nature, a law which she can regard as legislated by her true self, even though it is not created by her. This conception of self-legislation embodies Kant's idea of a good will, of an agent with dignity and moral worth.

Rather than being the most obvious aspect of a constructivist theory of the moral law, rather than revealing that the moral law is a positive law authored or created by us, Kant's conception of self-legislation encapsulates several of his central claims while revealing how the moral law and its substantive principles must be rooted "in the nature of things", including, but not necessarily limited to, the nature of our wills.<sup>117</sup> <sup>{304}</sup>

## FOOTNOTE TEXT

- <sup>1</sup> For a good discussion of the translation of this and related passages, see Acton 1970, 37–40. See also Mary Gregor’s footnote to her translation of G 4: 403 in Gregor 1996, 58. Kant develops the claim that it is the only supreme principle of morality at G 4: 440ff. Apart from the *Kritik der reinen Vernunft* (KrV), all references to Kant are to the volume and page number of the “Academy Edition” (KGS). References to the KrV are to the standard A and B pagination of the first and second editions. Specific published works are cited by means of the abbreviations listed below. Citations to *Reflexionen* and student notes from Kant’s lectures are made by reference to the reflection number or common title for the set of notes, followed by the volume and page number from KGS. Translations from G, KpV, MdS are based upon the translations of Gregor 1996; from R on the translation in Wood/Di Giovanni 1996; from KrV upon the translation of Guyer/Wood 1997; from Kant’s ethics lectures (when possible) on the translation by Heath (Schneewind/Heath 1997), all part of *The Cambridge Edition of the Works of Immanuel Kant*. In each case, I have modified the translations as I have seen fit. {258}
- <sup>2</sup> Reath 1994, 435, has recently identified the Legislation Thesis as the thesis that “the moral law, and the requirements to which it leads, are laws that the rational will legislates”.
- <sup>3</sup> Rawls 1971, 256. Emphasizing this idea, Rawls originally proposed his own theory of “justice as fairness” as a “procedural interpretation of Kant’s conception of autonomy and the categorical imperative”. Later, of course, Rawls modified his own theory in a number of important ways, narrowing his attention to questions of political justice within a modern liberal state, and distinguishing his theory from the details of what he called “Kant’s moral constructivism”.
- <sup>4</sup> Rawls 1980, 556.
- <sup>5</sup> Rawls 1993, 99–100. Cf. *ibid.*, 91, 112, 125. See also Rawls 2000 and 1989. Rawls often specifically emphasizes the dependence of the order of values upon aspects of “our conceptions of person and society”. Cf. Rawls 2000, 240. Now, to be sure, Rawls’s account of constructivism and moral realism is by no means the only {259} conception of these terms in the current literature. For example, the basic contrast between constructivism and rational intuitionism is often articulated in terms of a disagreement about how we come to *know* moral (or other) propositions: it is often framed as a dispute about the role of inference or mental processing (as opposed to their “given-ness” or immediate “perception” or intuition) in our cognition of moral judgments. See Seung 1993; Dancy 1991. On intuitionism and cognitive processing in Kant more generally, see Falkenstein 1990, 574. Rawls identifies such epistemological features as constituting one of the four marks of intuitionistic moral realism. In the recent literature, moral realism is often articulated as the view that there are moral claims that are literally true and that their truth is not dependent upon people’s beliefs, activities and social conventions. Sayre-McCord 1988 has suggested that, in general, realism about a given domain is the view that claims in that domain, literally construed, are true or false and that some such claims are in fact true. He notes that most people think that (most or all) moral claims, if literally true, are true *independent of people’s beliefs, actions and conventions*, thus he concludes that *moral realism* should involve this additional ontological stipulation. See also Boyd 1988. Of course, in the enormous contemporary literature on

moral realism, there is also much debate about the relationship between morality and natural science, often revolving around disputes about explanation, meaning, and reference. In these broader terms, it may be quite possible to be *both* a realist and some kind of constructivist in morality, believing, on the one hand, that our moral cognition involves inference and mental processing while also maintaining that the truth of our moral claims is not dependent upon our beliefs (mental processes), activities or social conventions. The version of moral constructivism that Rawls ascribes to Kant, however, is distinctive: the “CI-procedure” is understood as a cognitive process for reaching objective moral judgments but it is also alleged to be the procedure by which moral values are constructed or constituted, dependent upon rather than independent of our “activity” and “our conceptions of person and society” and not determined by an ontology which is independent of these. *This* form of constructivism does profess to secure objectivity while precluding the ontological commitments of moral realism. It is worth noting that Rawls’s own “political constructivism” does not insist upon this form of anti-realism; see Rawls 1980, 568. While there are some significant unresolved ambiguities in the nature of Rawlsian constructivism, they may be more widespread in his reading of Kant: in the passage just cited in the main text, for example, Rawls places “human” in parenthesis and appears to move freely between talk about “actual” and “ideal activity”, and sometimes suggests that principles, rather than activities, constitute the order of values. These ambiguities make it difficult to determine whether the resulting position really can succeed in eschewing the “ontology” of a “prior or independent order” as it intends. For further discussion of some of these ambiguities, see Krasnoff 1999 and Kain 1999, ch. 3. {260}

<sup>6</sup> Korsgaard 1996, 112. Korsgaard is even clearer about her own positive view, “it is the endorsement that does the work” (254).

<sup>7</sup> Korsgaard 1989, 331. Cf. Korsgaard 1996, 112: “Of course we discover that the maxim is fit to be a law; but the maxim isn’t a law until we will it, and in that sense create the resulting value.”

<sup>8</sup> Reath 1994.

<sup>9</sup> Herman 1993, 210, conceives of constructivism as “a way between the poles of naturalism and metaphysical realism about value”. There is, however, some ambiguity in Herman’s position. In Herman 1989, 137, a commentary on Rawls 1989, she insists, on the one hand, that “we are not to mistake the idea of construction for some form of creation.” But shortly thereafter Herman claims that “the idea of construction suggests the bringing into being of a moral world that is intelligible to us and expressive of our nature as reasonable and rational beings.” She repeats this latter claim and describes the value of states of affairs as a projection or imputation; see Herman 1993, 214. {261}

<sup>10</sup> Of course, as suggested in n. 5, there may be good reason to consider Kant a constructivist in the purely epistemological (as opposed to the ontological) sense of the term concerned with the role of inference, mental processing, or the use of formal procedures in moral cognition.

<sup>11</sup> KrV, Preface to the second edition. B xvi-xxiv.

<sup>12</sup> It is worth noting in reply that while Kant explicitly limits the validity of, for example, the synthetic a priori “Principles of Pure Understanding” to the range of possible experiences of beings with our, that is, spatio-temporal, form of intuition, [KrV A 159–161/B 198–200] he also insists, as we will see in sections I and II, that the moral law must be valid for *all* rational beings, not just humans or beings with our form of intuition or beings that we can

experience or cognize. Thus, while he denies that, in general, constructivism about a given domain entails unqualified anti-realism or idealism about it, this suggestion seems to be of little use in his metaethics. The cognition of external objects in space and time, for example, involves construction and those spatio-temporal objects are said to be simultaneously “empirically real” and “transcendentally ideal” [KrV A369–A380]. Kant speaks of practical reason’s real (though still limited) extension into a realm inaccessible to theoretical reason [KpV 5: 50ff.], but this does not seem to be an assertion of morality’s *empirical* reality. First, it does not apply only to beings with our form of intuition. Second, the empirical reality of causal determinism precludes the empirical reality of autonomy. For more on this point, see Guyer 2000, 181f., esp. 182 n.10; Ameriks 1996, esp. 40–42; and Guevara 1997. In this context, it is worth noting the possibility that Rawls’s rejection of an ontologically independent “order of values” may ultimately rest more on a general coherentist theory of truth, rather than on any specific features of Kant’s moral philosophy. {262}

<sup>13</sup> Reath 1994, 440. Emphasis in original. It should be noted that Reath resists ascribing (ISP) to Kant for some of the reasons I will mention below. Also, later in his article (457), Reath strengthens part of the principle by adding a “simply because”. Reath ascribes the thesis to Rüdiger Bittner and Robert Paul Wolff. Though there is some evidence that each avoids ascribing the thesis to Kant directly, each does seem to think it is entailed by the best philosophical reconstruction of Kant’s view. See Bittner 1990; Wolff 1973. {263}

<sup>14</sup> Of course even on this interpretation, an agent’s self-legislation of a maxim as a universal law is not a sufficient condition for the existence of a duty. This principle is not sufficient to distinguish between permissible and obligatory acts. Morally permissible maxims can be willed as universal law just as maxims for morally obligatory actions, but this does not entail that once an agent decides to perform a morally permissible act it becomes her *duty*. In such a case, not only is it permissible for the agent to change her mind, but it is also the case that even absent such a change of mind, her failure to perform the action is not the violation of a moral obligation. One’s volitional commitment to permissible maxims for non-obligatory actions is certainly not to be identified with subjection to the moral law.

<sup>15</sup> Against such a view, Anscombe 1958, 2, 13, famously complained, “Kant introduces the idea of ‘legislating for oneself’, which is as absurd as if in these days, when majority votes command great respect, one were to call each reflective decision a man made a *vote* resulting in a majority, which as a matter of proportion is overwhelming, for it is always 1–0. The concept of legislation requires superior power in the legislator. [...] That legislation can be ‘for oneself’ I reject as absurd; whatever you do ‘for yourself’ may be admirable; but it is not legislating.” Anscombe suggested that, while it may have made sense to see the moral law as a law proceeding from God’s will, our will is not an intelligible substitute. Thus, she dismissed Kant’s conception of self-legislation as one failed attempt among many to preserve the idea of moral obligation in abstraction from a divine law conception that makes it intelligible, suggesting that moral philosophers move away from the concept of obligation. For one response, see reference in n. 25, below.

<sup>16</sup> Kant would need to maintain not just that each rational agent could be motivated to follow it out of respect, but that each is volitionally committed to doing so. For passages in which Kant commits himself to the universal applicability of the moral law, see for example G 4: 389; 408; 412; 425f.; 442. For more discussion, see below.

<sup>17</sup> Reath 1994. It is not clear that the position is quite as vulnerable as Reath seems to suggest, however. Moral obligation might not require that we be able to *prove* that everyone has so

willed, but only that it be the case that everyone has willed it. As Reath notes, this is a point Bittner and R.P. Wolff use to undermine the objectivity of the moral law. {264}

18 The point is not so much that our knowledge would be a posteriori since we would need to have experience of others performing this act to know they had done so, but that the validity of the moral law is supposed to be prior to any act of will.

19 Cf. Engstrom's discussion of moral weakness in Engstrom 1988.

20 See also Sullivan 1989, 167–170. {265}

21 The point is not that the agent would have to *begin* to will the immoral maxim and the moral law at the same time. The problem is that the hypothesis seems to demand that contrary volitions must both be “in effect” for a person at the time of any immoral action, a claim Kant denies. Some versions of constructivism may avoid this assumption, but it is central to those espousing the “principle of individual sovereignty”. I thank an anonymous referee for bring this point to my attention. It is true, of course, that Kant believes that all rational agents do have an interest in the moral law, and that an interest (especially a non-empirical interest) presupposes some volitional commitment. But as Kant says in *Grundlegung*, sec.3, “the moral law is valid for us not because it interests us [...] but, rather, the moral law interests us because it is valid for us as men, since it has sprung from our will as intelligence and hence from our proper self.” G 4: 460–461. It is also true that in Kant's later developed *Wille-Willkür* distinction everyone's *Wille* (the will in its legislative function) is committed to the moral law, and in so far as an agent is rational, his *Willkür* (the will in its executive function) will commit to it as well. Kant does seem to think that an immoral agent can be lead, by rational reflection, to recognize the authority of the moral law in its universality, but he does not think that an agent's failure to adequately reflect or, upon reflection, to act out of respect for the moral law compromises its binding authority. {266}

22 Here I agree with Allen Wood's recent suggestion that this and related passages reveal that Kant qualifies as a moral realist in the contemporary sense. See Wood 2000, 157, 374 n.4, 376 n.7. As will emerge below, however, I disagree with Wood's interpretation of this passage and some of its other implications. {267}

23 Sometimes in his courses on philosophical theology, Kant referred to moral theology as “*moralische Theologie*” or the Latin “*Theismus moralis*” and its proponent as a “*Theista moralis*”. See “Religionslehre nach Pölitz” 28: 1002; 1141; 1241. I follow Wood in translating “*theologische Moral*” as “theological morality” to preserve the parallelism with “moral theology”. See Wood 1992, 403; and Wood/Di Giovanni 1996, 348.

24 Kant does not seem to clearly distinguish between these two types of priority, I think, in part because he is concerned with a *systematic* account of knowledge. Of course, we could distinguish the two different sorts of priority claim and identify several other possible positions on the relationship between theology and moral philosophy including positions that deny that either is prior in one respect or the other. {268}

25 Schneewind claims that Kant's conception of obligation is thus more coherent than its theological antecedents, his explicit response to “Anscombe's error” (see n.15 above). See esp. the introduction and conclusion of Schneewind 1993.

26 G 4: 389; 408; 412; 425f.; 442. Schneewind emphasizes the passage from the preface to the *Grundlegung*, but this conviction is expressed throughout Kant's corpus. See Schneewind 1998, 511.

27 Schneewind 1998, 510. Cf. also his APA Presidential Address: Schneewind 1996b, 28, 34.

- 28 Schneewind 1998, 510; also Schneewind 1996b, 28. Schneewind also suggests that Kant accepted another putative implication of morality's universality: the anti-voluntarist conviction that the first principle of morality must determine the morality of *every* possible action. Schneewind 1996b, 27–28, 33. The exact formulation of this idea is controversial, since the derivation of substantive principles from the first principle will involve some, at least minimal, anthropology. The general idea is that each possible action has a determinate moral status (obligatory, permissible or impermissible) and that this status is supposed to be explicable in terms of the first principle of morality, not contingencies subject to God's will or the agent's discretion. Schneewind does not mention this feature in Schneewind 1998.
- 29 Schneewind 1998, 510; also Schneewind 1996b, 27, 33–34. {269}
- 30 Schneewind 1998, 511.
- 31 Of course, a more sophisticated theological voluntarism could sidestep this point by distinguishing between types or levels of divine volitions. If for example, God's second order volitions constitute the moral law and his first-order volitions violated those second-order volitions, we could say that these first-order volitions were immoral. Nonetheless, the application of the moral law to the second order volitions would be tautologous.
- 32 It is important to note that the objection is not to the modal claim that it is a necessary truth that God is morally perfect. Kant agrees that this is a necessary truth. His objection is that theological voluntarism makes this an analytic truth which undermines the significance of the universal applicability of the moral law.
- 33 Schneewind 1996b, 40 n.45. See also Schneewind 1998, 512; and Schneewind 1996a, 294. Here Schneewind has in mind the idea that “to be good is to be the object of a will”, in contrast to the idea that “some states of affairs are good regardless of whether they are desired or willed”. Specifically in relation to the “right and good” passage, he writes (in critique of Paul Guyer), “Kant explicitly allows for two kinds of goodness, or value [...]. Both kinds of ‘good’ and ‘bad’ on Kant's view are *relational* predicates. To be good is to be the necessary object of a will according to a rational principle. [...] Goodness and value, on this reading of Kant, are always explained in terms of rational willing. They cannot themselves be used as final explanations of what it is rational to will” (286). {270}
- 34 Schneewind 1998, 512f. Emphasis added. The connection with Kant's early musings on theodicy is further explored in Schneewind 1986, 66–69; and briefly in Schneewind 1996a, 293–294.
- 35 Schneewind 1998, 524. The interpolated text is a footnote in the original. Schneewind argues that Kant shares this “method” with sentimentalist moral philosophers such as Hutcheson and Hume. To the extent that the method constitutes moral facts, it is more than an epistemic method, for it clearly involves a commitment to an anti-realist moral ontology. For a critical discussion of Schneewind's earlier work on Kant's allegedly “skeptical method”, see Ameriks 1996.
- 36 In Schneewind 1998 and 1996b, Schneewind recognizes Kant's commitment to a moral community that includes *all* rational beings, a point that I do not find in his earlier work on Kant. This necessitates some reconsideration of his earlier suggestion that Kant's “theory of agency as freedom [...] enables us to understand morality, with its due weight, as a human creation” (Schneewind 1991, 307). Schneewind seems to abandon the suggestion that the moral law is a *human* creation, but as the above discussion reveals, he seems still inclined to see it as a kind of creation or making, though one that must involve the activity of all rational

beings, both human and divine.

37 I say much reduced rather than eliminated since Kant insists that at least one significant  
asymmetry remains: the moral law appears to us, but not to God, as an imperative. {271}

38 The apparent impossibility of getting things wrong or violating the law once it is created is  
crucial here.

39 Baumgarten 1760 (reprinted in KGS 19: 7–91) and 1740 (<sup>2</sup>1751 and <sup>3</sup>1763 reprinted in KGS  
27: 733–1028). For a discussion of Kant’s textbooks, see Schwaiger 1999a, 34–38. In this  
section I draw upon the classic work of Schmucker 1961, esp. 288–290, 354f.; Schwaiger has  
recently synthesized a wealth of historical and philological literature and presents a needed  
critique of some of Schmucker’s conclusions. See Schwaiger 1999a and 1999b. Final  
revisions of this paper have benefitted significantly from Schwaiger’s work. {272}

40 Wolff 1733, 8 (§ 8). For a recent discussion of Wolff, see Schröder 1988.

41 Wolff 1733, 20–21 (§ 29).

42 Wolff explicitly discusses God’s role as legislator and author in Wolff 1738, § 271–284.

43 Wolff 1733, § 20–21. See also his *Anmerkungen zur deutschen Metaphysik* (= Wolff 1724),  
ad § 980, where he specifically cites the tradition of arguing in this manner against the  
atheist. It is worth noting that, if God failed to exist, though we would still have obligations,  
we could not have obligations to God, and the content of {273} some other particular  
obligations might also change, a point that I think Wolff could accept, though he does not  
directly observe it anywhere I am aware of. In this connection, it is also helpful to keep in  
mind Wolff’s views about the epistemic independence of the law of nature expressed in his  
controversial study of the morality of the Chinese.

44 Wolff 1733, 27 (§ 35). Emphasis added.

45 It also follows from this conception that the law of nature is contained in God’s choice to  
actualize a particular possible world (it is entailed by the natures of things in that world), not  
something additional he adds to it by willing it.

46 In Leibniz’s eyes, Hobbes and Pufendorf maintained that law is fundamentally the command  
of a superior being and that, due to his superior power, God’s commands are the basis of  
justice. Leibniz connected these suggestions with Descartes’ claim that God’s will is what  
makes the proposition *the sum of the three angles of a triangle is equal to two right angles* a  
necessary truth. (Indeed Descartes and Leibniz both linked the two issues.) Leibniz found  
both suggestions deeply problematic: they confuse the nature of necessary and contingent  
truths. It is interesting to note that while Leibniz accused these philosophers of conceptual  
confusion and described Descartes’ view as a paradox, the weight of his objection to both  
views relies not on the charge of conceptual incoherence, but on the apparent moral  
implications of the view: the way it conflicts with the idea that we should praise God because  
he is just, and the claim that the science of right is a necessary and demonstrative science.  
{274}

See René Descartes (1596-1650), “Sixth Replies” (Adam/Tannery 1964 (AT), VII 432-436),  
in Descartes 1985 (1641), 291-294, esp. 291. The issue was raised against Descartes by  
Gassendi in response to the fifth Meditation in the fifth objections, AT 318-319 (Descartes  
1985, 221), replied to by Descartes in the fifth replies, AT 380 (261), and raised again in the  
sixth objections compiled by Mersenne, AT 417-418 (281). G.W. Leibniz (1646-1716),  
*Opinion on the Principles of Pufendorf* (1706), § 4, (in Leibniz 1972, 70-73); *On the  
Common Concept of Justice* (c. 1703) § 1 (Leibniz 1972, 48-50). For discussion of these

issues, see Riley 1996, 34, 129-133, 213-215.

<sup>47</sup> On the philosophical relationship between Baumgarten and Wolff, see Schwaiger 1999a, 44–50, and Schwaiger 1999b. Schwaiger argues persuasively that, contrary to widespread misconceptions about the lack of innovation among Wolffians, Baumgarten was a rather original ethical theorist. For example, the concept of obligation plays only a minor role in Wolff’s own theory. In an important advance, Baumgarten modifies Wolff’s definition slightly (he insists that obligation involve an *overriding* motive) and he makes obligation fundamental to his theory. (Baumgarten 1760, § 15) As Schwaiger 1999a, 160, and 1999b also note, Kant, while he agrees with Baumgarten about the centrality of the concept of obligation, seems not to have noticed that Baumgarten had modified the Wolffian definition.

<sup>48</sup> Baumgarten 1760, 61–62 (§ 100). Reprinted in KGS 19: 48. Thanks to Jeff Brower for assistance with this translation. {275}

<sup>49</sup> Of course, Kant does have a view about the appropriate relation between moral knowledge and revelation, but that would take us too far afield.

<sup>50</sup> Baumgarten 1760, § 101, agrees with Wolff that the natural law depends on the divine intellect, not the divine will.

<sup>51</sup> More detail on these marginalia follows in the next section. John Hare has recently argued that much of Kant’s attack on theological voluntarism can be best understood as a criticism of particular features of Christian August Crusius’s (1715–1775) theory, which is probably true. See Hare 2001, 97 ff. Kant was no doubt familiar with Crusius’s theory, not the least through contact with his combative Crusian colleague, Daniel Weymann. Schwaiger has recently argued that Schmucker’s claims about the Crusian influence on Kant’s conception of the categorical imperative are exaggerated. See Schwaiger 1999a, 40–65.

<sup>52</sup> On the development of this distinction, see Schwaiger 1999a, 160ff.

<sup>53</sup> There are at least two issues here. First, it is not clear what is so special about the desire for perfection, or why it must be universal. Second, even if it were universal, its role in practical reasoning would still appear to be hypothetical. (There is no suggestion that the inclination that grounds obligation needs to be grounded in practical reason, rather than the other way around.) Of course, exactly how this is spelled out and how fair it is to Wolff will depend upon whether we favor a psychological or normative interpretation of Wolff’s law of nature. {276}

<sup>54</sup> “Moralphilosophie Collins” 27: 282–283.

<sup>55</sup> The case of lying seems to be Kant’s favorite. In addition to the passage just quoted, cf. “Moralphilosophie Collins” 27: 277. Herder records Kant drawing the connection between the necessity of morality and geometrical truths in the early 1760s. See *Praktische Philosophie Herder* 27: 9–10. {277}

<sup>56</sup> “Moralphilosophie Collins” 27: 261–262. For a similar thought in Kant’s published works, see MdS 6: 222. Textual note: here the square brackets indicate my interpolation of two minor variations. According to the apparatus to the Akademie edition (KGS 27: 1222, 1249, 1412), the earlier copies of these notes, i.e. “moralische Vorlesung 1791”, “praktische Philosophie Marburg” and “Mrongovius I,” have “*natürliche*” [natural] instead of “*allgemeine*” [universal] (and the contrary to sense “*gut*” [good] instead of “*böse*” [evil] in the last line). On the basis of extensive philological work, Wilhelm Kraus distinguished between three different groups of notes stemming from this same set of lectures and argued that “1791” and “Marburg” are the best representatives of the first and second groups,

respectively. See Kraus 1926, esp. 46. The recently rediscovered “Moral Kaehler” manuscript (edited by Stark) also contains “*natürliche*” and “*gut*”, respectively. Stark 1999 argues that “Moral Kaehler” is at least as authoritative as “moralische Vorlesung 1791”, Kraus’s choice. {278}

<sup>57</sup> There is an obvious linguistic connection in German between the terms for the will or faculty of choice [*die Willkür*], upon which positive law depends, and what is arbitrary [*willkürlich*].

<sup>58</sup> Of course, *if* one had a categorical obligation to obey all of someone else’s commands, then the obligation to obey any of those particular commands would be indirect and contingent, yet still *categorically* rather than hypothetically required. Neither Wolff nor Baumgarten ground God’s authority to command categorically. Kant’s contention, moreover, is that fundamental moral obligations like the prohibition on lying, do *not* need to be mediated in this way by anyone’s volitions. (I thank a referee for encouraging me to clarify this point.) In the strictest sense, perhaps only the obligation to the supreme principle of morality is absolutely immediate and internal to the will; specific duties, such as the prohibition on lying, seem to be mediated by or derived from the supreme principle and typically involve at least a small number of “anthropological” assumptions. But as long as neither the derivation nor the anthropological assumptions significantly depend upon anyone’s volitions, Kant’s central claims about the distinctive immediacy and internality of moral obligations can be preserved.

<sup>59</sup> Kant consistently maintains that the moral law is not a positive law, but there is some unclarity about whether there can be a positive obligation to obey the moral law, in addition to the natural obligation to obey it. In this set of lecture notes, Kant seems to pair natural obligations with the natural law and positive obligations with positive law and suggests that positive obligations are always obligations to actions that are themselves indifferent, i.e., not already the subject of a natural obligation. This would suggest that, strictly speaking, there cannot be both a natural and a positive obligation to the same thing. We can imagine, of course, that a civil authority prohibits murder (which also seems to be prohibited by the natural law), but Kant insists that this statutory obligation has a different object than the moral obligation since it can only reach outward conduct, and cannot demand a moral disposition. When we consider the divine law, however, things become a bit more complicated. Kant later introduces (in “Moral Mron-{279} govius II”, quoted at n. 74) the idea that God is an “author of obligation” and that God’s commands add “a new obligation” not only to act in accord with morality but to act out of respect for the moral law. This new obligation seems to fit with some of Kant’s criteria for a positive obligation, but precisely because of this unique aspect of God’s commands, it is not entirely clear whether Kant would consider this “new obligation” to be a *positive* obligation. If he did, he could still insist that our moral obligations are not *merely* positive obligations since this new positive divine obligation “piggy-backs” on a *prior* natural obligation to the same act and disposition. In “Metaphysik der Sitten Vigilantius” 27: 529, Kant suggests that God’s command enhances or emphasizes the “force” of the natural obligation. I thank John Hare for pressing me on this point in discussion.

<sup>60</sup> In fact, Kant suggests, God’s nature seems to make him a better candidate for author than any human will could be because God’s volitions necessarily correspond with the content of the moral law, whereas ours do not. See “Moralphilosophie Collins” 27: 263. There seems to be one exception to the claim that Kant consistently insists that God is not the author of the

moral law: “Religionslehre nach Pölitz” 28: 1002. This might be explained as a possible mistranscription of *Urbild* [archetype] as *Urheber* [author]. It is tempting to emphasize the way these claims about the moral law seem to support what has been called the “autonomy of ethics” from theology. See Larmore 1998. Kant certainly does intend to rule out certain kinds of dependence of ethics on theology. Yet it is important to remember that Kant repeatedly suggests (in his published works and otherwise) that it is proper, even necessary to view our moral obligations as divine commands. Exactly how we should understand Kant’s non-voluntarist theory of divine commands is a controversial question that must be left for another occasion. {280}

<sup>61</sup> Kant’s particular focus on the nature of the will, practical reason, or understanding becomes clearer in the *Grundlegung*, as we will see; but it is hinted at in several ways in these lectures from the 1770s: Kant identifies moral goodness with the perfection of the will (27: 266), speaks of the “nature of a free will” (27: 267), insists that the supreme principle of morality must be an internal, immediate, pure, intellectual principle of pure reason (27: 276) and claims that the understanding has a “nature” and that though it is difficult to see exactly how, the intellectual principle is contained in the understanding, in virtue of its “universal form” (27: 1428). Of course Kant contrasts this rational nature with “human nature” repeatedly, and rejects the putative moral principle, “Live according to nature” (27: 266).

<sup>62</sup> Kant devotes significant effort in the lectures to clarifying and demonstrating how God’s status as legislator satisfies the later condition. He does not emphasize the necessity of rewards and sanctions in moral self-legislation; perhaps that role is played by moral self-contentment and/or the recriminations of conscience.

<sup>63</sup> This teaching method was not intended to and does not facilitate a word-for-word transcription by students. See Schwaiger 1999a, 144ff.; Stark 1991. On general interpretive issues regarding the student notes of Kant’s lectures, see Stark 2003, 15–20; Stark 1987, 136ff.; Schwaiger 2000; Schwaiger 1999a, 142ff. For a brief discussion in English, see also Ameriks/Naragon 1997; and Schneewind 1997. As Stark 1987, 137, notes, Adickes established that in the case of the Physical Geography, Kant shared a manuscript of his own with some of his students, but this does not appear to be the case with his other courses. The exact origin of these other texts is uncertain. {281}

<sup>64</sup> Stark and Schwaiger have each persuasively argued that this group of notes originated in connection with Kant’s lectures in Wintersemester 1774–75, 1775–76, or 1776–77. See Stark 1999, 74, 85 (including a helpful list of these thirteen sets); Schwaiger 1999a, 157. In addition to these thirteen texts, there are four other sets of notes from Kant’s lectures on moral philosophy: “Praktische Philosophie Herder”, “Praktische Philosophie Powalski”, “Moral Mrongovius II”, and “Metaphysik der Sitten Vigilantius.” We consider some evidence from these other notes below.

<sup>65</sup> Kraus 1926, esp. 66, argued that Paul Menzer’s three sources and the “Moralphilosophie Collins” (the foundation of the Akademie edition) fall into the third group in terms of reliability. Extended passages from Kraus appear in Stark 1999, 80–81. The good news Stark reveals is that the recently rediscovered but as yet unpublished “Moral Kaehler” notes are arguably at least as reliable as the “moralische Vorlesung 1791” notes that Kraus believed to represent the most reliable group.

<sup>66</sup> Stark has aptly refuted the suggestion that Kant may have led a “double life”, publishing one thing while teaching another. See Stark 1987, 139–140.

- <sup>67</sup> “*Necessitans universaliter secundum legem aliquam hanc legem fert. Edictum. / Sancit legem, non creat obligationem, sed imponit*”. Refl. 6513, under and to Baumgarten 1760, 61 (§ 100). Thanks to Rebecca Konyndyk DeYoung for assistance with the translation from the Latin. Erich Adickes (KGS 19: 48) classified this as from phase δ?(1762–63) κ?(1769). On the reliability of Adickes’ dating, see Schwaiger 1999a, 22ff.; Stark 1993, 142–151; Hinske 1996, 241–243. If we accept Schmucker’s conclusion that Kant’s critical interaction with Rousseau’s writings first began between October 1763 and February 1764, the early dating of this note suggests that Kant’s reflections on this issue began before his encounters with Rousseau, a significant result. Cf. Schmucker 1961, 142. An early reflection on the concept of natural obligations is Refl. 6472 to Baumgarten 1760, 13 (§ 29). Phase ε (1763?). {282}
- <sup>68</sup> Refl. 6680, to Baumgarten 1760, 61 (§ 100). Adickes (KGS 19: 131) classified this as from Phase κ? (1769) υ? (1776–78).
- <sup>69</sup> Refl. 6769, to Baumgarten 1760, 61 (§ 100). Phase ξ? (1772) φ? (1776–8) (KGS 19: 156).
- <sup>70</sup> Refl. 7089, to Baumgarten 1760, 61. Phase υ? (1776–78) κ? (1769) (KGS 19: 246). Adickes’ notation indicates that “he gives them” [*er giebt sie*] was an amendment Kant made contemporaneously with the rest of the remark.
- <sup>71</sup> Refl. 7090, to Baumgarten 1760, 61. Phase υ? (1776–78) (KGS 19: 247).
- <sup>72</sup> Refl. 7092, to Baumgarten 1760, 62. Phase υ? (1776–78) ξ? (1772) φ? (1776–78) (KGS 19: 247). Adickes’ notation indicates that the word “divine” [*göttliche*] was another contemporaneous addition. Kant also suggests that God sees the moral law in himself (as we can as well), but is the archetype, not the author of it (Refl. 6758; see also Refl. 6472, 6500, 6771, 6773). Interestingly, when Kant writes about the origin of our concept of God, he says that reason frames [*entwirft*] the idea of moral perfection *a priori* (G 4: 409). But in the *Religion* he also observes that we are not the author of this idea of moral perfection (R 6: 61). {283}
- <sup>73</sup> Wood has recently argued that, in spite of this passage, Kant is a moral realist, not a constructivist since it is “the *idea* of the will of every rational being as legislative” (or the volition toward this idea) that is the author of the moral law, rather than the will of any finite individual. On Wood’s reading, this makes moral truth independent of what finite individuals just happen to think or will. See Wood 2000, 157–161; 410. While I accept Wood’s realist conclusion, I remain unpersuaded by aspects of his argument. First, Wood’s shift between “the idea” and “the volition toward the idea” is significant. Dependence upon the latter would rest morality on the actual volition of finite wills. Even if the content of the moral law were settled by the idea, resting its bindingness upon agents’ actual volition toward the idea would appear to compromise its categorical necessity. Second, as I argue below, Wood’s discussion fails to note the difference between Kant’s two conceptions of authorship and acknowledge his insistence that the moral law has no author in the strict sense. {284}
- <sup>74</sup> “Moral Mrongovius II” 29: 633–634. Note: this corrects Lehmann’s transcription error at KGS 29: 633, line 37, which omits a “not”. Thanks to an anonymous referee for questioning the sense of the passage, and to Werner Stark for assistance in re-examining a film of the manuscript. It should be noted that this important passage is unfortunately not included in the recent Scheewind/Heath 1997 edition of an otherwise virtually complete set of selections from these notes. Also in “Moral Mrongovius II”, 29: 627, Kant notes that, “If I conceive of a most perfect will, I can view all moral laws as commands of this will. Not as arbitrary commands, however, but as necessary ones.” See also n. 59. For more on Krzysstof

Mrongovius, see Stark/Zelazny 1987.

<sup>75</sup> “Metaphysik der Sitten Vigilantius”, 27: 544f. Although these notes of Johann Friedrich Vigilantius sometimes assume the voice of a reporter (“Professor Kant says [...]”) rather than that of a transcriptionist, in conversation, Werner Stark has suggested to me that Vigilantius’s background provides us with good reason to ascribe high reliability to the contents of Vigilantius’s notes, relative to others. {285}

<sup>76</sup> In support of his interpretation, Wood 2000, 175 (cf. *ibid.*, 81), has appealed to a passage from G 4: 448: “reason must regard itself as the author of its principles [...]”. But, it is not clear that “author” must be taken in the strict sense here, nor that Kant is speaking of the author of objective, rather than subjective principles.

<sup>77</sup> “Moral Mrongovius II”, 29: 634. {286}

<sup>78</sup> In “Moralphilosophie Collins”, 27: 253–255, 262, 264–266, 275–277, Kant uses the criteria of universality, immediacy and necessity to criticize the theories and putative supreme principles proposed by Epicurus, Helvetius, Mandeville, Shaftesbury, Hutcheson, Montaigne, Hobbes, Crusius, Wolff and Baumgarten. Cf. G 4: 441f.; KpV 5: 40 f.; and “Moral Mrongovius II” 29: 621–629.

<sup>79</sup> For a recent discussion of the formula of universal law, see Korsgaard 1985. For a philosophically sensitive account of its role in moral judgment, see Herman 1993. There is a growing literature on the alleged “gap” in Kant’s transition from the concept of the categorical imperative to the first formulation of it. See Aune 1979, 28–34, 83–90; Wood 1990, chapter 9; Allison 1996, chapter 10; Mariña 1998; Wood 2000, 81ff.; Gaut/Kerstein 1999.

<sup>80</sup> To quote Rawls’s description of the ontological aspects of Kant’s alleged realist rival, “rational intuitionism” (Rawls 2000, 72). As long as we distinguish between {287} the nature of the will and its acts, this much of the description seems to comfortably fit Kant’s account. Again, Kant insists on something that many other rationalist-realists may not: that the moral law depends, fundamentally, on the *nature of the rational will*. He also contests aspects of others’ “intuitionistic” moral epistemology.

<sup>81</sup> Kant suggests that this idea emerges from reflection on the unconditional grounds of obligation underlying the derivations of the formula of universal law and the formula of humanity. For two recent discussions of its derivation, see Reath 1994, 450–452, and Wood 2000, 158. Reath emphasizes how the outlines of an analysis of rational volition can “introduce” or “suggest” the idea of unconditional justification or unconditional value, and that a demand for unconditional justification *could* be rooted in the nature of a rational will; but he does not elaborate on why Kant thinks that the categorical imperative *must* be based in the nature of a rational will. Kant typically (at least in the first two sections of the *Grundlegung*) argues transcendently from an analysis of *duty*, which presupposes a certain kind of unconditionality, to infer what the categorical imperative underlying it must be and that it must be based in the nature of the rational will. My discussion in the rest of this section relies significantly on sec. IV of Reath’s paper, and on several of his critical suggestions.

<sup>82</sup> As he says, this idea allows us to “indicate in the imperative itself ” the specific distinguishing mark of an unconditional norm or categorical imperative [G 4: 431f.]. {288}

<sup>83</sup> Kant (G 4: 425–6) also insists that the principle also cannot be merely innate or “implanted” (as if it were merely an arbitrary, yet built-in recognition) nor can its authority be merely contingently built-in, as if it were an essential feature of some, but not necessarily all kinds of

rational wills subject to the law.

84 Again, for Kant, to legislate (*ein Gesetz geben*) is to *give* or declare a law in accord with one's will, but not necessarily to *make* a law or formulate it however one may choose. In so far as the law (*das Gesetz*) is given (*ist gegeben*) to the rational will by the nature of the rational will (*vom Willen selbst*) for itself, the will can be said to be self-legislating (*selbstgesetzgebend*.)

85 Reath 1994, 450, cf. *ibid.*, 451, 452.

86 Reath 1994, 452. {289}

87 Reath 1994, 452, and Wood 2000, 157. For further discussion of Reath, see section III below.

88 This approximates Rawls' suggestion that Kant's view, as opposed to that of his "rational intuitionist" predecessors, requires a rather robust or "complicated" "conception of the person" (Rawls 2000, 237f.). But, so far as I can see, nothing in this account requires completely eschewing all realist "ontological presuppositions" and "the nature of things" or replacing them with the products of rational activity. In fact, the view seems to contain significant presuppositions about the *nature* of persons and not just their self-conceptions. It seems to presuppose that the rational will *has* a nature (which reason itself attempts "to describe", as Rawls 2000, 243, helpfully put it) and that there are (in fact, that we are) rational agents (in the relevant sense.) These appear to be ontological commitments; and this conception of practical reason also seems (at least to Kant) to include some metaphysical presuppositions, for example, that of transcendental freedom. As I suggested in the introduction, one might attempt an "ontologically anodyne" interpretation of these commitments, on the basis of allegedly general features of Kant's transcendental idealism. (Rawls's choice to emphasize the *conception* of the person, rather than the *nature* of the person, may be an example of this tendency.) Again, I think this would be a mistake, and it would, in any event, make Kant's alleged moral constructivism independent of any issues specific to morality or the moral conception of "self-legislation", which is enough for present purposes. As we will see in the next section, however, a sophisticated, specifically *moral* grounding for a constructivist interpretation might concede these ontological aspects of the grounding of the supreme principle of morality yet attempt to distinguish itself as constructivist at the level of substantive principles. {290}

89 Reath 1994, 436. {291}

90 Reath 1994, 450; 453. The interpretation of the formula of universal law as the basis of a formal procedure for the construction of substantive principles goes back to Rawls and has been developed in some detail by Reath, Onora O'Neill, Barbara Herman, Thomas Pogge and others. For recent criticisms of proceduralist interpretations of the categorical imperative, see n. 103, below.

91 Reath 1994, 442. {292}

92 Reath 1994, 452. Since the normative force and formulation of the general categorical imperative are grounded in the nature of practical reason, it is correct that neither originates in a *purely* external source. (Of course, this is not to say that they are *radically* internal either, in the sense of being purely psychological or without ontological assumptions and implications.) See, for example, Ameriks 2000, 13f., and Ameriks, 1996.

93 This can be seen as an insightful and creative way of elaborating Rawls's suggestion that it is the "content" of the moral law, or a set of substantive moral principles, rather than the supreme principle or formal procedure itself, that is constructed. See Rawls 1989, 98f., and

- Rawls 2000, 237–239.
- 94 Reath 1994, 455. As he explains, “a normative procedure which a legislative agent is bound to follow in order to give law also creates the possibility of exercising authority, because it binds other agents to accept the results of this procedure when properly carried out.”
- 95 Reath 1997, 219.
- 96 Reath 1994, 453f. {293}
- 97 Reath 1994, 454. “The general point is that, while the FUL [Formula of Universal Law] constrains the results of moral deliberation, its content will depend largely on the maxims which individuals bring to it.” The sense of the passage suggests that “its content” refers to the content of morality (or the content of the moral law), rather than simply the content of moral deliberation. But Reath may mean that the content of FUL (or the content generated by it?) is determined by the maxims one brings to it (i.e. FUL.)
- 98 Reath 1994, 455. {294}
- 99 Herman 1996, 71. Similar claims about the context sensitivity of moral deliberation are also born out in recent work on the “anthropological side” of Kant’s ethics. See, for example, Wood 2000; Munzel 1999; Louden 2000; Höffe 2002.
- 100 Herman 1996, 65ff.
- 101 This is not to say that Kantian morality accords all cultural arrangements equal moral footing. While it may be culturally sensitive, Kantian morality is not entirely relativistic, so it may not be as “sensitive” as some advocates of particularity might like. See for example Hare 1996, chapter 6.
- 102 Moreover, in less “procedural” terms, the rational expression of the agent’s obligatory concern for the agency of others requires an awareness of and sensitivity to the context of their agency. {295}
- 103 For doubts about proceduralism, see Wood 2000, 91, 97, 105, 107, 164, 182. On the limits of proceduralism, see Herman 1993, 132–158, esp. 147. On Herman’s reconstruction, the results of the “categorical imperative procedure” are not duties, but “deliberative presumptions” which may be rebutted in the course of deliberation. “What the CI procedure shows is that actions of a certain kind are not to be counted as ‘routine means’” (149). {296}
- 104 This might be seen as an extension of Rawls’s suggestion that the content of the moral law be identified with the totality of all generalized maxims actually approved by the procedure. See Rawls 1989, 93, 98.
- 105 Likewise, the epistemic claim that one’s grasp of the content of the moral law must be dependent upon moral deliberation is beside the point. {297}
- 106 I say “they all” because, although everyone may see it is a reason for those who have it, not everyone *has* it, only those with the relevant maxim do. The point is that one’s having the relevant maxim, and thus having the reason, is completely independent of someone else’s enactment. I am thankful to an anonymous referee for pressing for clarification on this point.
- 107 Reath 1994, 443. There is something very right about Reath’s claim here in the case of necessary, non-positive laws: the subject/legislator distinction collapses because there is no legislative discretion. This is precisely the disanalogy with positive laws.
- 108 Reath 1997, 228.
- 109 Reath 1997, 230. {298}
- 110 Reath 1997, 231.

- <sup>111</sup> This also follows from Reath’s identification of a legislator’s volitional state with the process of reasoning that validates it. Reath 1994, 455.
- <sup>112</sup> Reath 1997, 232.
- <sup>113</sup> Reath’s conception of the categorical imperative as a “power-conferring” law does not seem able to stand on its own. Reath 1994, 455, suggested that the supreme principle, the categorical imperative, is constitutive of rather than restrictive of sovereignty because it is derived from the nature of rational volition, as opposed {299} to some external source, and it “creates the possibility of exercising authority, [...] it binds other agents to accept the results [...].” However, it seems that unless the elements of discretion and reason-giving can be established, the power that the supreme principle confers does not amount to sovereignty in the intended sense. {300}
- <sup>114</sup> For a helpful discussion, see Ameriks 1989. {301}
- <sup>115</sup> As he says (G 4: 431), this idea allows us to “indicate in the imperative itself ” the specific distinguishing mark of an unconditional norm or categorical imperative. {302}
- <sup>116</sup> G 4: 431–432. Guyer 2000, 202f., helpfully explains that part of what the Formula of Autonomy does is “[exhibit] rational nature as not only an objective end but also one that can motivate us [...]. In other words, the idea of oneself as a universal legislator rather than as a mere subject of universal laws imposed from without allows one to conceive of oneself as having an identity that is fulfilled by universal legislating. When we so conceive of ourselves, action in accord with [the categorical imperative] seems like the realization of our own identity rather than submission to an external constraint, and is in this way well motivated. Thus the idea of oneself as a universal legislator essential to [the principle of autonomy] introduces a self-conception that is a condition of the possibility of being motivated to act on a categorical rather than merely hypothetical imperative.” On Guyer’s account, adoption of and action on the categorical imperative is rationally motivated because it is a means for attaining autonomy or self-mastery, which is of fundamental value. {303}
- <sup>117</sup> I would like to thank Karl Ameriks, David Solomon, Otfried Höffe, John Hare, Jeffrey Brower, Pauline Kleingeld, Eric Watkins, several anonymous referees, and audiences at the 1998 World Congress of Philosophy, 1998 APA Pacific Division Meeting (including my commentator there, Mark LeBar), Purdue University, the University of Southern California, the University of Notre Dame, and Eberhard-Karls-Universität, Tübingen, all of whom provided helpful feedback on earlier versions of various parts of this paper. I am also grateful to the German-American Fulbright Commission, The Harvey Fellows Program, and the Alexander von Humboldt Foundation for financial support during various points in the composition of this paper. {304}

{303} **BIBLIOGRAPHY**

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- KrV** *Kritik der reinen Vernunft* [Critique of Pure Reason]. 1<sup>st</sup> ed. [A] 1781; 2<sup>nd</sup> ed. [B] 1787.
- KpV** *Kritik der praktischen Vernunft* [Critique of Practical Reason]. 1788.
- MdS** *Die Metaphysik der Sitten* [The Metaphysics of Morals]. 1<sup>st</sup> ed. 1797; 2<sup>nd</sup> ed. 1798.
- R** *Die Religion innerhalb der Grenzen der blossen Vernunft* [Religion Within the Limits of Reason Alone]. 1st ed. 1793; 2nd ed. 1794.
- KGS** *Kant's gesammelte Schriften*. Ed. Deutsche Akademie der Wissenschaften zu Berlin (formerly Königliche Preussische Akademie der Wissenschaften). 29 vols. Berlin 1902–.

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