THE DUTY OF VERACITY

by

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ABSTRACT

The central aim of this dissertation is to determine whether Kant's theory of justice can support a juridical (legal) duty of veracity, and if it can, then to determine the nature and scope of such a duty. I construct a Kantian defense of veracity that is social and epistemic. First, I argue that we cannot exercise our practical reason to make choices in the robust way the right of freedom requires without the ability to rationally trust certain social sources of expert knowledge. The duty of veracity is necessary to underwrite that trust. Second, I argue that Kant's standard of 'possible universal consent' requires that any normatively authoritative exercise of the power of consent be not only uncoerced but informed, but consent cannot be informed without sufficient access to certain forms of expert social knowledge. Lies that in principle would undermine rational trust in such knowledge cut off that access.

INDEX WORDS: Truthfulness, Lies, Right to Lie, Free Speech, Freedom, Consent, Possible Consent, Right, Justice, Innate Right, Kant, *The Doctrine of Right*, Assurance, Social Epistemology, *On Liberty*, Mill

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CHAPTER 1

INTRODUCTION

Suppose an oil company's spokesperson lies about the anthropogenic sources of global warming. The lie is unethical, but is it unjust? Can such lies be legitimately prohibited by law? In this dissertation, I will argue not only that they can be prohibited, but that prohibiting them is a requirement constitutional of justice. I refer to the juridical (legal) duty to avoid such lies as the *duty of veracity* (or just *veracity*), to distinguish it from a more general ethical duty of truthfulness.

In a late essay, 'On a Supposed Right to Lie From Philanthropy' (SR), Immanuel Kant asserts a duty of truthfulness in one's 'unavoidable' social testimony:

> Truthfulness in statements that one cannot avoid is a human being's duty to everyone...[By violating this duty] I bring it about, as far as I can, that statements (declarations) in general are not believed…and this is a wrong inflicted upon humanity generally. Thus a lie…makes the source of right unusable.[1]

The nature and scope of the duty of truthfulness in SR, however, is not clear, and Kant's rationale for the duty is not well-developed in this short essay. Kant has traditionally

[1] Immanuel Kant, 'On a Supposed Right to Lie From Philanthropy,' (SR) in *The Cambridge Edition of the Works of Immanuel Kant*, trans. Mary Gregor, ed. Paul Guyer, and Allen Wood (Cambridge: Cambridge University Press, 1992) (Ca), 8:426. All references to Kant's work are from the *Cambridge Edition*; citations are made according to standard Prussian Academy pagination.

been misunderstood to argue dogmatically in SR that ethically one must always be truthful, even in a hypothetical case where a murderer appears at one's door demanding the whereabouts of an intended victim. The duty Kant asserts in SR is *juridical* however, and limited in scope.[2] At the same time, in SR Kant only intimates connections between the duty of veracity and the systematic theory of justice he had set out in prior political writings.[3]

The core of this dissertation consists in two Kantian rationales for the duty of veracity, which may be taken somewhat independently: First, I argue (in chapter four) that we cannot exercise our practical reason to make choices in the robust way that the right of freedom requires without the ability to rationally trust certain social sources of expert knowledge. A duty of veracity is necessary to underwrite that trust. Second, I argue (in chapter five) that Kant's standard of 'possible universal consent' requires that any normatively authoritative exercise of the power of consent be not only uncoerced but *informed*, but consent cannot be informed without sufficient access to certain forms of expert social knowledge. Lies that in principle would undermine rational trust in such

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[2] See Allen Wood, 'Kant and the Right to Lie,' *Eidos* 15 (2011), 96-117, for a review of Kant's essay that corrects the most common misunderstandings and clarifies Kant's claim. Kant distinguishes ethical from juridical duties; the operative difference is that one can rightfully be coerced to perform or avoid acts in conformance with one's juridical duties. See *The Doctrine of Right* (DR), 6:231. The ethical duty of truthfulness is primarily a duty to oneself. See *The Doctrine of Virtue* (DV), 6:429-430.

[3] Kant's popular political writings 'On the common saying: That may be correct in theory but it is of no use in practice' (T) and 'Toward Perpetual Peace' (PP) were published in 1793 and 1795, respectively, and the *Doctrine of Right* (the first part of the *Metaphysics of Morals*) was published in January of 1797. SR was published nine months subsequently in September of 1797. See Ca, 607.

knowledge cut off such access. I thus construct a Kantian defense of the duty of veracity that is social and epistemic. The primary aim of the dissertation is just this defense. Secondary aims are to explore the shape and scope of the duty of veracity, and to review and clarify Kant's theory of justice more generally.

The dissertation is divided into three sections consisting of two chapters each. The first section deals generally with Kant's theory of justice. Chapter two sets out background material and the basic framework of Kant's theory of justice as I understand it. Chapter three then reviews and criticizes one prominent interpretative approach to that framework, the idea that Kantian justice is a self-limiting system of equal freedom. The second section consists in the core chapters of the dissertation that set out the two Kantian rationales for veracity. Chapter four reviews the case for veracity flowing directly from the innate right of freedom; chapter five makes the consent-based case for veracity. These first four chapters (two through five), taken together, satisfy the primary aim of the dissertation, the Kantian defense of veracity.

The third section consists in two chapters that address the dissertation's secondary aims. Both the freedom and consent-based rationales for veracity depend to some degree on the claim that social knowledge is needed to exercise one's freedom. While I argue that it does in chapters four and five, chapter six defends this claim more fully by reviewing what is known as the 'assurance' theory of testimony and arguing that the duty of veracity is necessary to underwrite such assurance. Chapter seven reviews the social epistemic rationale for the right of free discussion of proven scientific knowledge in J.S.

Mill's *On Liberty*. The purpose of this chapter is to show that the classic and best liberal defense of free discussion rights is social and epistemic for such knowledge, thus clearing a path to meet the potential objection that there could be a right for experts to lie about such knowledge. These last two chapters thus explore issues related to the shape and scope of veracity and may be read somewhat independently of the main Kantian defense of veracity.

CHAPTER 2

KANT'S THEORY OF JUSTICE

In this chapter I set out the basic framework of Kant's theory of justice. I begin with some preliminary background material on Kant's practical philosophy such as his distinction between right (law) and virtue (ethics). I then review Kant's universal criterion of justice and his definition of the right of freedom, and then the basic problem of justice and Kant's solution.

While I hope to clarify Kant's theory of justice here, my aim in this chapter is primarily to set out elements of the theory that should not be (and generally are not) heavily contested in the literature. In chapter three I will criticize recent accounts of the first of two main interpretative approaches to Kant's theory of justice, which is to render it as a self-limiting system of equal freedom.

1. Preliminaries

1.1 The moral law

In the *Groundwork for a Metaphysics of Morals* (GM), Kant argues that the supreme principle of morality is the 'categorical imperative':

> [A]ct only in accordance with that maxim through which you can at the same time will that it become a universal law (GM: 4:421).

According to Kant, every action is governed by some principle ('maxim') of the will that connects the action's end with the means by which it is to be achieved in some set of circumstances. To take Kant's own example, the maxim of an act of fraud is, When I am in need of money (circumstances), I will falsely promise to repay a loan (means) in order to obtain quick cash (end).[4] Such fraud is immoral, Kant argues, because while I can will to make such a promise, I cannot at the same time will a universal law that everyone makes such promises without frustrating my end:

> For, the universality of a law that everyone, when he believes himself to be in need, could promise whatever he pleases with the intention of not keeping it would make the promise and the end one might have in it itself impossible, since no one would believe what was promised him but would laugh at all such expressions as vain pretenses (GM: 4:422).

My (false) promise to repay the loan would not be believed in a world where no one kept promises to repay loans when in need of money; therefore, in such a world, I could not achieve my end by way of the false promise to repay.[5] Since my maxim thus 'destroys itself when made into a universal law;' it is therefore impermissible for me to act upon it (GM: 4:402-3).

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[4] 'When I believe myself to be in need of money [circumstances] I shall borrow money [my end] and promise to repay it, even though I know that this will never happen [means]' (GM, 4:422).

[5] In such a world, a promise is inconceivable, since promises just are powers to incur duties such as to repay the loan. The duty to avoid making false promises to repay loans is thus a 'perfect' (narrow as opposed to wide) duty because it generates a contradiction 'in conception' (see GM: 4:424). I discuss the distinction between narrow and wide duties in subsection 1.3.

Kant provides three 'formulas' of the categorical imperative, which he claims are equivalent: 1) the Formula of the Universal Law of Nature (FN), 'act as if the maxim of your action were to become by your will a universal law of nature' (GM: 4:421); 2) the Formula of Humanity (FH): 'so act that you use your humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means' (GM: 4:429); and 3) the Formula of the Kingdom of Ends (FK): 'act in accordance with the maxims of a member giving universal laws for a merely possible kingdom of ends' (GM: 4:439).

1.2 Right and ethics

According to Kant, morality is composed of two coordinate parts: right (justice, law) and virtue (ethics). Kant thus divides the *Metaphysics of Morals* (MM) into the *Doctrine of Right* (DR) and the *Doctrine of Virtue* (DV).[6] The key difference between right and virtue, according to Kant, is that duties of right (legal duties), unlike duties of virtue (ethical duties), are in principle rightfully enforceable by others. The concept of a moral *duty*, whether a legal or an ethical duty, Kant says, is that of a constraint upon the

[6] The distinction is between *Recht* and *Tugend*. *Recht* can refer to right, justice, or law (adjectivally, rightful, just, legal, civil, or sometimes also 'juridical'), terms I will treat as synonyms. Following Kant, I reserve the term 'moral' to apply broadly to any normative duty or power (whether legal or ethical) (see DV: 6:379). So 'moral' duties can be either 'legal' or 'ethical' duties, or both. Kant also occasionally appears to violate his own terminological distinction to use the term 'ethics' to refer to morality more broadly, but I avoid this usage. See Onora O'Neill, 'Enactable and Enforceable: Kant's Criteria for Right and Virtue,' 107(1), *Kant Studien* (De Gruyter, 2016), 111-124, 115.

exercise of free choice in the pursuit of one's subjective ends (DV: 6:379). Such constraint may be either 'external' or 'self-constraint' (internal) (DV: 6:379-80). External constraint on free choice is imposed by others, such as civil liability or punishment for violating public laws; self-constraint is imposed by imperfectly rational agents upon themselves, such as respect for the moral law. When a moral duty consists in an external constraint upon one's free choice, then the duty is *legal*; when the moral duty consists in an internal constraint, then it is *ethical*. The DR 'deals with duties that can be given by external laws,' Kant says, whereas the DV 'treats of duties that cannot be so given' (DV: 6:379). The DR is the 'sum of those laws for which external lawgiving is possible' (DR: 6:229).

There are two senses in which giving a moral duty by external laws might not be 'possible.' First, some external laws are not morally permissible because they would violate principles or rights constitutional of justice. A law creating a hereditary aristocracy, for example, would violate the constitutional right of equality of citizens (T: 8:297). Such external lawgiving is thus not *morally 'p*ossible.' Second, some duties (duties of 'virtue') are duties to have particular ends such as, for example, the duty to make others' happiness one's end. According to Kant, no external constraint can make a person *have an end*: 'No external lawgiving can bring about someone's setting an end for himself (because this is an internal act of the mind), although it may prescribe external actions that lead to an end without the subject making it his end' (DR: 6:239). Duties of virtue to have an end, therefore, can only be self-constraints, or internal lawgivings (DR:

6:239; see DV: 6:381),[7] Hence an external lawgiving is not *practically* 'possible' for such duties.[8]

All 'ethical' duties must be performed out of duty or *because* they are duties, according to Kant, whereas legal duties do not require that duty be the incentive for one's action (see GM: 4:397-8; MM: 6:219). For example: if I avoid breaking a promise I made to you because everyone ought to avoid breaking promises, then my action is *ethical;* if I avoid breaking my promise solely because I want to preserve our friendship, however, then my action is *not ethical* (although not unethical, either). But suppose my promise meets criteria to qualify as a contract and is thus a legal as well as an ethical duty; then so long as I perform what I promised to do on the contract (e.g., repay a loan), my action is *rightful (legal),* regardless of my incentive for keeping my promise (see MM: 6: 220). Whether I perform on the contract because it is ethical to honor agreements, or because I fear a civil suit for breach of the contract, or perhaps only because I happen to be in a good mood; my action meets my legal duty if and only if I perform as agreed. Only my performance, not the end of my action, is relevant to whether I fulfill my legal duty or not.[9] Hence ethical duties that are not also legal duties cannot be given by external laws.

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[7] 'Now I can indeed be constrained by others to perform actions that are *directed as means* to an end, but I can never be constrained by others to *have an end*: only I myself can make something my end' (DV: 6:381).

[8] Kant appears to refer to the subset of *imperfect* (wide) ethical duties as duties of 'virtue;' however this usage is not consistent (see DV: 6:383). The issue is not critical, however, since perfect (narrow) 'ethical' duties also require an end, that is, the end of duty itself.

[9] Note that the end or incentive of an action is not its 'intent.' An intentional killing of a person, for example, is an act of murder, whether the end of the murder is money, revenge, etc. One's end (motive

The moral law (i.e. the categorical imperative) gives the duty in either case, but '[e]thics adds only that this principle [the categorical imperative] is to be thought as the law of your own will and not of will in general which could also be the will of others; in the latter case the law would provide a duty of right, which lies outside the sphere of ethics' (DV: 6:389).

1.3 Narrow and wide obligation

All legal duties are 'narrow' (perfect) obligations, according to Kant, in the sense that the outward aspects of the actions that legal duties require must be precisely specifiable (DV: 6:390). Not all ethical duties are narrow obligations, however. For example, the ethical duty of beneficence is of 'wide' obligation because it does not require rendering any precise level or type of help to others, nor does it require that we help others at every possible opportunity. The duty 'leaves a playroom (*latitude*) for free choice,' Kant says, and what action it requires may thus demand considerable ethical judgment (DV: 6:390). Whereas the narrow legal obligation imposed, for example, by 'easy rescue' statutes in some U.S. state jurisdictions must precisely specify what level and type of help is required (e.g., making a call for an ambulance or police) and when or under what circumstances that help must be rendered (e.g., at the scene of an automobile accident in which one is involved, and when one can do so without risk to oneself).[10] If the action

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or incentive) is irrelevant.

[10] See, for example, Minn Sec. 604A.01.

required by an obligation is not precisely specified in such a way, then the action cannot be rightfully enforced, according to Kant (DV: 6:390-91).[11]

2. The basic framework of Kant's theory of justice

2.1 The universal principle of justice

Kant distinguishes questions as to what the law is empirically (positively) from what law is necessarily (naturally). Kant's concern is 'whether what these [positive] laws prescribed is also right, what the universal criterion is by which one could recognize right as well as wrong' (DR: 6:229). Kant thus seeks to draw a necessary connection between morality and the law; if a public law prescribes action that meets the universal criterion of right, then it is just. While Kant says that one always also has an independent *ethical* duty to conform to just public law, the law's moral authority does not derive from

[11] One might at first think that it is the indeterminacy of duties of virtue that makes their enforcement by external constraint impossible: perhaps if one cannot define the duty's requirements, then neither can one constrain someone to perform it. But this cannot be why external constraints are not 'possible' for duties such as beneficence, since such indeterminacy does not prevent the application of *internal* constraint; otherwise, they would not be duties at all. Hence the indeterminacy of such duties must be unenforceable because they offend principles of justice (and so are *morally* rather than practically impossible to enforce by external constraint). And it is clear why: the enforcement of a duty whose requirements remained subject to reasonable good faith disagreements because of its indeterminacy would be arbitrary and thus coercive. The duty must be clearly defined in public law (via the united will) before it can be rightfully enforced; however, doing so converts the duty into one of narrow obligation.

whether or how it overlaps with ethical duties for Kant, as legal positivists might maintain.[12]

According to Kant, justice concerns only 1) *external* relations between 2) the *free choices* of persons where 3) no account is taken of the *ends* persons have in making those choices (DR: 6:230). Actions that do not have any direct or indirect external 'influence' on others, or that merely affect what others wish they could have, are not the concern of justice, according to Kant (DR: 6:230). For example, Kant says, in a commercial contract to buy goods, the justice of its enforcement depends only on whether each party freely chose to enter the contract (i.e., with offer and acceptance, proper consideration, etc.), not on why it was entered or what each hoped to get from it (e.g., profit) (DR: 6:230). All that matters in such a relation, Kant says, is 'whether the action of one can be united with the freedom of the other in accordance with a universal law' (DR: 6:230). Justice is thus not concerned with what individuals need or desire (their ends), or with what will make them happy but, instead, only with their respective rights of freedom under a universal law.

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[12] Kant is thus a 'natural law' theorist. See Joseph Raz, *The Morality of Freedom*, Chapter Four, 'The Authority of States' (Clarendon, Oxford 1986), for a contrasting legal positivist account of law's moral authority. That Kant nevertheless also holds that one has also an *ethical* duty (of virtue) to obey rightful public law is often overlooked:'Although there is nothing meritorious [virtuous] in the conformity of one's actions with right...the conformity with right of one's maxims of such actions, as duties, that is **respect** for right, is *meritorious*. For one thereby *makes* the right of humanity, or also the right of human beings, one's *end* and in so doing widens one's concept of duty beyond the concept of what is *due (officium debii)*, since another can indeed by his right require of me actions in accordance with the law, but not that the law be also my incentive to such actions' (DV: 6:390-91).

Kant accordingly defines the 'Universal Principle of Right' (UPR) as follows:

> Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law (DR: 6:230).

Kant also formulates the UPR as a law: 'so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law' (DR: 6:231). A *wrongful* action, Kant says, is a coercive 'hindrance' to one's freedom that cannot coexist with everyone's freedom under universal law; hence the 'hindering of a hindrance' to freedom (in accordance with a universal law) is rightful, Kant argues (DR: 6:231). Coercive limitations on equal rights of freedom necessary to achieve their systematic consistency are likewise rightful, Kant argues: 'a strict right can also be represented as the possibility of a fully reciprocal use of coercion that is consistent with everyone's freedom in accordance with universal laws' (DR: 6:232). While the UPR recalls the CI, Kant's theory of justice in the DR depends primarily on his analysis of 'freedom under a universal law' for its substantive content.[13]

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[13] The UPR may be understood as a version of the CI restricted to maxims for actions that are 1) fully specifiable in terms of the outward aspects of one's action and 2) external or public in the sense that they have to do with the freedom of choice of others. See Onora O'Neill, *Constructing Authorities* (Cambridge: Cambridge University Press, 2015) , 'Kant and the Social Contract Tradition,' Chapter 10, 170-185. Whether the resulting principle may be regarded as independent of the rest of Kant's moral theory ('freestanding') or not is a matter of some debate. See Pogge, Thomas W. "Is Kant's 'Rechtslehre' Comprehensive?" *The Southern Journal of Philosophy* 36.Supplement (1997): 161-187, for the argument that it is.

2.2. The right of freedom

Kant defines the 'innate right of freedom' as follows:

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

Freedom is thus 'independence from being constrained by another's choice,' and the innate *right* of freedom is that freedom systematically limited by everyone else's equal right of freedom under a universal law. This right belongs to each person 'by virtue of his humanity.' Kant elaborates that the innate right of freedom includes the following constituent 'authorizations:'

> ...innate *equality*, that is, independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being *his own master (sui juris)*, as well as being a human being *beyond reproach (iusti)*, since before he performs any act affecting rights he has done no wrong to anyone; and finally, his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it. (DR: 6:237-8).

Kant does not intend this analysis of freedom and its constituents to be complete, and Kant's explication of the right of freedom will continue throughout the DR. But relying somewhat on that later discussion, the constituents of the innate right of freedom might be summed up under the headings of 1) *freedom* from constraint by another's choice, 2) fair *equality*, and 3) *independence*, or being one's own master, together with 4)

appropriate powers and liabilities in one's dealings with others. Kant further distinguishes acquired ('private') rights in property, contract, and in status relations such as marriage or parenthood. Such rights are not innate because they require taking some action in a civil condition to acquire them (DR: 6:237).

Kantian justice thus consists in a system of public laws applicable to all that secures and protects everyone's innate freedom, equality, and independence, as well as their acquired rights, in their inevitable social interactions with each other. At a minimum, then, a just system of law must protect individuals from (unjust) coercion, and enforce their free contractual agreements with each other, but how much more justice requires substantively of law will depend on how one interprets the right of freedom. What precisely does it mean to be free of 'constraint by another's choice'? What coercive limitations may public law impose upon individual choice? How are we to understand what it means to be equal to others, or independent? What powers of acquisition (if any) must law provide to equally free persons? And, perhaps most importantly, how can such questions be answered and enforced in a way that is just?

2.3. The problem of justice

According to Kant, reason alone cannot specify a priori what our equal rights and duties, and powers and liabilities, are with respect to each other (DR: 6:312). Since everyone is innately free and equal, each person has her 'own right to do *what seems right and good to [her]* and not to be dependent on another's opinion about this,' Kant says (DR: 6:312).

No one has the moral authority to unilaterally define the scope of what everyone's moral rights and duties are with respect to others (i.e., legislate them), or to enforce them (i.e., execute them), or to resolve disputes (i.e., adjudicate them). Intractable disagreements and conflicts over our respective rights and powers are thus inevitable in a 'state of nature' lacking institutions to resolve them. While a state of nature is not necessarily a state of injustice, Kant says, 'it would be a state devoid of justice (*status justitia vacuus*), in which when rights are i*n dispute* (*ius controversum*), there would be no judge competent to render a verdict having rightful force' (DR: 6:312).

2.4 Its solution: public right

What is required, Kant says, is to construct

> *...a system of laws for a people...which because they affect one another, need a rightful condition under a will uniting them, a constitution (constituto)*, so that they may enjoy what is laid down as right (DR: 6:311).

Kant refers to this system of public laws and institutions as 'public right,' and a society existing under such a system as one existing in a 'rightful' or 'civil' condition, as opposed to one in a state of nature. The coercive enforcement of public law is justifiable under such a system, according to Kant, because

> when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong to what he decides upon with regard to himself (for *volenti non fit iniuria*). Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each,

> and so only the general united will of the people, can be legislative (DR: 6:313-14).

Hence it is only by constituting a general or *united* will to authoritatively determine, enforce, and adjudicate our rights and duties with respect to each other that we can avoid wronging one another in cases of conflict, Kant argues.

Kant follows this argument with a definition of the attributes of a *citizen* in the civil condition:

> In terms of rights, the attributes of a citizen...are: lawful *freedom,* the attribute of obeying no other law than that to which he has given his consent; civil *equality*, that of not recognizing among the people any superior with the moral capacity to bind him as a matter of right in a way that he could not in turn bind the other; and third, civil *independence*, of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people. From his independence follows his civil personality, his attribute of not needing to be represented by another where right is concerned (DR: 3:314).

The rights of citizens in a civil condition thus parallel the constituents of the innate right of freedom of individuals in a state of nature that Kant had set out earlier in the DR. Public law constructs, enforces and adjudicates these rights in accordance with a general or united will, thus solving the problem of justice.

CHAPTER 3

KANTIAN JUSTICE AS A SYSTEM OF EQUAL FREEDOM

Two competing interpretations of the framework of Kant's theory of justice are prominent in the literature. The first defines Kantian freedom and justice strictly in terms of the unconstrained exercise of rights of freedom within a merely consistent system of equal rights of freedom. The second casts Kantian freedom and justice more positively in terms of possible universal consent to public law, where protections and powers guaranteeing the exercise of equal rights of freedom is one of the necessary conditions for that consent.

In this chapter, I criticize the first approach by reviewing Arthur Ripstein's (2011) attempt to respond to a decisive objection to any account of justice as a self-limiting system of equal freedom. The objection is that an appeal to freedom cannot by itself adjudicate conflicts between rights of freedom; hence, some other more fundamental value or principle must be at work in the system, such as consent. I argue that Ripstein's attempt to cast the right of freedom as 'purposiveness' fails to answer this objection. I then argue that B. Sharon Byrd and Joachim Hruschka's (2010) account of Kantian justice as a self-limiting system of equal freedom also fails to answer the objection, though they never explicitly address it.

1. Justice as a self-limiting system of equal freedom

In *Force and Freedom*, Arthur Ripstein characterizes Kant's *Doctrine of Right* as a 'system of equal freedom' and explicates Kant's system by defending it from what Ripstein says has been thought a 'devastating objection.'[14] The objection, which Ripstein attributes originally to Samuel Taylor Coleridge (reformulated by H.L.A. Hart and others), is that 'liberty is not a self-limiting principle, so societies and theories of justice that aspire to guide them must decide which liberties to favor, or how to weigh liberty against other values.'[15] Ripstein responds that these critics erroneously conceive freedom as a person's 'ability to *achieve* his or her purposes,' which is 'negative liberty,' whereas Kant conceives freedom as a person's 'capacity *to choose* the ends [a person] will use [his or her] means to pursue,' which Ripstein refers to as one's 'purposiveness' to draw out the contrast.[16] Ripstein marks a 'fundamental distinction' between interfering with a person's

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[14] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), 31. (FF)

[15] FF, 32. Besides Coleridge and Hart, Ripstein attributes this objection in some form also to G.A. Cohen, Ronald Dworkin, Charles Taylor, Will Kymlicka, Henry Sidgwick, and Frederick Maitland, among others. See FF, 31-33, 233-237. See also Arthur Ripstein, 'Beyond the Harm Principle,' *Philosophy & Public Affairs* 34 (2006): 215-45, 229-231.

[16] FF, 33 (emphasis in original), 34 (emphasis added). The full quotation is from Chapter Two ('The Innate Right of Humanity'): 'At the level of innate right, your right to freedom protects your purposiveness—your capacity to choose the ends you will use your means to pursue—against the choices of others...You remain independent if no one else gets to tell you what purposes to pursue with your means...' FF, 33-34. Earlier on the same page, Ripstein elaborates, '[A] system of equal freedom is one in which each person is free to use his or her own powers, individually or cooperatively, to set his or her own purposes...' FF, 33. In his Chapter One, Ripstein refers to independence as 'your ability

purposes (one's ends) and interfering with a person's *purposiveness* (the ability to set and pursue one's ends with one's means).[17] If Kantian freedom is conceived as purposiveness, Ripstein says, then 'one person's freedom need not conflict with another's [freedom],' and Kant's *Doctrine of Right*, understood as a self-limiting system of equal rights of freedom, is not subject to this decisive objection.[18]

1.1 The objection (the problem of justice, redux)

H.L.A. Hart raises the objection that motivates Ripstein's project in the course of a critique of John Rawls' 'lexical' prioritization of the claims of liberty over other sorts of moral considerations in Rawls' *A Theory of Justice* (1971).[19] In early articles Rawls had formulated his first principle of justice as "an equal right to the most extensive liberty compatible with a like liberty for all.'[20] Rawls' right of liberty in these articles is therefore 1) general ('liberty as such'), 2) equal for each person, 3) maximized in a total system, and 4) 'lexically' prior to any other moral desiderata such as the general welfare.[21]

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to use your powers to set and pursue your own purposes.' FF, 16. In Chapter Eight, Ripstein says 'As a matter of your innate right to freedom, you have your own bodily powers, subject to your choice...' FF, 241.

17 FF, 41.

18 FF, 39.

19 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

20 H.L.A. Hart, 'Rawls on Liberty and Its Priority,' *The University of Chicago Law Review,* 40: 538 (1973), quoting John Rawls, 'Justice as Fairness, ' *Philosophical Review* 67, 164-5 (1958).

21 See Rawls, *Theory* (1971), Sec. 39, 82 for more on the 'lexical' priority of the first principle of justice, and how it reflects the priority of the right over the good. Rawls' characterization of the concept of

Moreover, Rawls conceived liberty as the 'negative liberty' to do what one chooses to do without the interference of others; hence the *right* of liberty is what one *ought* to be able to choose to do without such interference.[22] According to this early statement of Rawls' first principle of justice, then, one ought to be able to choose one's ends without others' interference to the maximum extent one can, limited only by everyone else's equal right to do the same. Some restrictive laws are therefore necessary to make the maximal exercise of each person's negative liberty compatible with that of every other; these laws would define the right of liberty by composing a consistent 'system of equal freedom.'[23]

Hart primarily questions what it means to limit liberty solely for the sake of *more* or a *more extensive* liberty in a consistent system of equal rights of liberty. As a simple example of such a limitation, Rawls had adduced rules of order for debate, which Rawls said restrict one's liberty to interrupt others in order to maximize everyone's liberty to communicate his or her thoughts. But Hart points out that even in this simple case, the introduction of limiting rules of order does not increase everyone's *liberty* so much as resolve a conflict between competing liberties (to interrupt and to speak) by reference to a value that any rational person engaging in debate must hold, which is the exchange of ideas that debate presumably serves.[24] While it may be true that any rational person

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liberty at work in these early articles as 'liberty as such' is from *Political Liberalism* (1993) (PL).

[22] See Isiah Berlin, 'Two Concepts of Liberty' in *Isiah Berlin: The Proper Study of Mankind* (New York: Farrar, Straus, Giroux, 1997), 191-242 for a fuller discussion of negative liberty.

[23] I will refer to a system with the features identified as a 'system of equal freedom.'

[24] Hart, 543. It is worth considering *why* it is rational to resolve the conflict with these rules. The reason is not that doing so maximizes everyone's liberty, but because the conflicting liberties at issue here *serve the same end* in different ways, and so the conflict can be decisively resolved by reference to the

engaged in a debate would agree to rules that limit interruptions in order to better serve the presumed goal of debate, it is difficult to see how this consideration has anything to do with securing quantitatively more *liberty* or a more 'extensive' liberty in a system, Hart argues.[25]

As a more complex example of how liberty limits itself, Rawls had adduced the resolution of a conflict between constitutional rights of free speech or of the person and the right to govern oneself through a democratically elected legislature, rights which Rawls had said can come into conflict because the legislature cannot vote to restrict these constitutional rights.[26] For example, citizens may have no right through their legislature to ban certain unpopular or unethical forms of speech or personal choices. To resolve this conflict, Rawls had said that one must 'balance' conflicting liberties to achieve the greatest total liberty, the point where 'the danger to liberty from the marginal loss in control over those holding political power just balances the security of liberty gained by the greater use of constitutional devices [i.e., rights of free speech and of the person].'[27]

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internal connections the liberties have to each other and with the shared end of the exchange of ideas. See Jeremy Waldron, 'Rights in Conflict,' in Waldron, *Liberal Rights* (Cambridge: New York 1993) for an application of this idea to argue that there is no right of free expression to advocate Nazism or other exclusionary doctrines.

[25] See Hart, 543 ('Plainly what such rules of debate help to secure is not a greater or more extensive liberty, but a liberty to do something which is more valuable for any rational person than the activities forbidden by the rules, or, as Rawls himself says, something more 'profitable.").

[26] See Hart, 544.

[27] Hart, 544, quoting Rawls, *Theory*, 229.

Hart criticizes such balancing as vague and *ad hoc*: 'I cannot myself understand...how such a balance is conceivable if the only appeal is, as Rawls says, to a "greater liberty."'[28] In such conflicts, Hart says, 'the resolution of conflict must involve consideration of the relative value of different modes of conduct, and not merely the extent or amount of freedom.'[29] Hart criticizes Rawls' appeal to how a 'representative citizen' would balance and maximize total liberty in a system. Hart argues that this standard is insufficient to resolve conflicts between, for example, rights of private property and freedom of movement, because it seems reasonable to prefer many different such resolutions, none (or any) of which could be said to 'maximize' total liberty.[30] Finally Hart points out that Rawls' standard in these early articles would appear to bar many common legal restrictions on activities that cause significant harm or suffering to others but that do not constrain their liberty.[31]

In subsequent work, Rawls concedes Hart's main points and incorporates them into his revised theory of justice, remarking that '[n]o changes made in justice as fairness in this restatement are more significant than those forced by Hart's review.'[32] Rawls agrees with

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[28] Hart, 544.

[29] Hart, 544.

[30] Hart, 546-547.

[31] Hart, 547-550. Laws against libel or slander, or laws prohibiting gross invasions of privacy, or any restrictions on the use of private property (e.g. automobiles) in order to protect the environment, as well as many others, would seem difficult to justify, Hart says. Hart, 548.

[32] John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, Cambridge, MA: 2001) (JF), 42n. See also John Rawls, *Political Liberalism* (Columbia University Press, New York, 1993) (PL), Lecture Eight, 'The Basic Liberties and their Priority,' 289-292.

Hart that conflicts of basic liberties generally cannot be resolved by an appeal to maximizing 'liberty as such,' which Rawls clarifies is neither the preeminent nor even the main goal of social and political justice.[33] While any restrictive law must be reasonable, Rawls points out that this requirement by itself creates no special priority for a general right of liberty over other claims.[34] Rawls does maintain that basic liberties such as political speech can be self-limiting within their 'central range of application;' however, he agrees with Hart that a quantitative criterion for how this self-limiting works is insufficient and that some qualitative criterion is necessary.[35] There is no sense in which liberty is self-limiting in Rawls' revised theory; moreover, Rawls argues that even the idea of maximizing liberty may be incoherent, as it seems to imply that we should maximize either the 'number of deliberate affirmations of the good' (which is 'absurd') or 'maximize just and rational actions by maximizing the occasions which require them' (which would be 'madness'), or both.[36]

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[33] Rawls, PL, 291-292.

[34] Rawls, PL, 292. These remarks carry additional weight in this context, as Rawls believes his theory maintains strong Kantian roots. Rawls' apparent effort to articulate his first principle of justice in a way that at least resembles the UPR underscores the connection. See Rawls, *Theory,* The Kantian Interpretation of Justice as Fairness,' Sec. 40, 251-257.

[35] Rawls, PL, 297; 341n49.

[36] Rawls, PL, 333-334.

2. Failed responses

2.1 Ripstein's conception of Kantian freedom as 'purposiveness'

Ripstein asserts that the original objection to the idea of justice as a consistent system of equal freedom depends on a loose conception of liberty that 'characterizes any intentional actions or regulations that prevent a person from achieving his or her purposes as hindrances to freedom.'[37] Of course people's *purposes* will sometimes come into conflict, Ripstein says, because 'how different exercises of negative liberty interact with each other depends on the particular purposes the people are pursuing, or what Kant would call the 'matter' of their choice.'[38] And '[i]f our purposes come into conflict, so too must our negative freedom.'[39] Ripstein thus concedes Hart's objection to justice conceived as a system of equal freedom, if freedom is conceived as negative liberty.

Ripstein argues that liberty should instead be conceived as 'the respective independence of persons from each other,' which Ripstein says does not mean independence from the mere *effects* of others' choices.[40] For example, if your purpose is to get milk at the store, but I arrive before you and purchase the last carton of milk on the shelf, then my choice has not interfered with your freedom *as independence*, Ripstein claims, but merely

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[37] FF, 32.

[38] FF, 33.

[39] FF, 33.

[40] FF, 33.

altered the 'context' in which you exercise it.[41] Similarly, if I refuse to work with you on a project, or if I bring a product to market that competes with yours, or if I damage something that is mine but that you use, or if I take down a fence that exposes your land to wind, then, in all such cases, I do not interfere with your independence but instead merely alter its context by exercising my own freedom.[42]

2.1.1 Freedom as purposiveness

Ripstein argues that, instead of conceiving liberty as freedom from interference with one's *purposes*, freedom should be conceived as freedom from interference with what Ripstein calls a person's *purposiveness.* As we have seen (chapter two), Kant defines freedom as 'independence from being constrained by another's choice;' however, he does not define what exactly being 'constrained' by another's choice means (DR, 6:237). Ripstein offers several glosses on Kant's language—constraint is when another 'decides' your purposes for you, 'tells you' your purposes, 'makes you' pursue their purposes, 'compels' or 'forces' you to pursue their purposes—but in each case Ripstein's meaning is the same: you are wrongfully constrained by another's choice when another *chooses for you*, rather than you choosing your own purposes for yourself.[43] Freedom as

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[41] FF, 17.

[42] FF, 39.

[43] FF: 33, 34, 36, 37, 39, 45, 49. Here are some of the relevant quotations in context (emphases added): 'You are independent if you are the one who *decides what ends* you will use your means to pursue, as opposed to having someone else *decide for you*' (FF: 33); '…the prohibition of one person *deciding what purposes* another will pursue…' (FF: 34-5); '[t]he slave does not *set his own end*s, but is merely a means for the *ends set by someone else*' (FF: 36); 'Another person is not entitled to *decide for you*...'

independence 'must be understood in terms of my right that you not choose for me,' Ripstein asserts (FF: 39). Ripstein says, for example, that '[t]he slave does not set his own ends, but is merely a means for the ends set by someone else' (FF: 36).

To choose one's own purposes means at least to choose how to use one's own 'bodily powers,' which Ripstein argues are always among the means one takes to be practically necessary to achieve one's chosen ends.[44] Ripstein identifies only two possible ways that another might interfere with your use of your powers, which he says 'exhaust the space of possible violations of independence:' another might 1) *injure* you, or 2) '*usurp'* your powers.[45] Ripstein defines injury as when another 'restricts your ability to use your powers, either by physically constraining you or by depriving you of the ability to use them.'[46] Injury is a relatively unambiguous way to interfere with your use of your powers and so your ability to set ends with them. When I physically harm or constrain your powers, I interfere with your ability to set any purpose that requires the use of those powers, to the extent of the physical harm or constraint. For example, if I break your fingers, or if I handcuff your hands behind your back, then I restrict your ability to choose to use your hands to play the piano.[47] Acts of injury are wrongful not primarily because of the harm such acts might inflict on your powers, Ripstein says, but, instead, because

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(FF: 37); '…my independence of your choice must be understood in terms of my right that you not *choose for me*' (FF: 39); 'If I usurp your powers, I *decide what purposes* you will pursue…' (FF: 45).

44 FF: 40-41.

45 FF: 45; FF: 43-44.

46 FF: 45.

47 See FF: 44.

you do not choose for yourself how to use them.[48] As illustration Ripstein offers the example of a dentist who secretly fluoridates the teeth of an anti-fluoridation activist.[49] Since there is no apparent harm in such a case and, arguably, a benefit, Ripstein asserts that the first category of violations, 'usurping,' is the more basic form of violations of the Kantian right of freedom.[50] Ripstein defines what it means to 'usurp' someone's powers in terms nearly identical to those in which he describes what it means to be wrongfully constrained by another's choice: 'If I usurp your powers, I decide what purposes you will pursue.'[51]

2.1.2. Choosing for another

It is difficult to see how someone could 'decide' another person's purposes, or 'choose for' her, however. Suppose you demand that I do something on pain of injury or death. I may comply and do what you demand, but my compliance is then merely a *means* toward my true end of self-preservation. If you brandish a pistol at me and demand that I dance, and so I do dance, then my end is not dancing but, instead, to avoid being shot, and my dancing is a means toward *that* end, not my end itself. While it is not impossible for me to choose the end of dancing in this example, or to choose the end of dancing in addition

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[48] FF: 45,

[49] FF: 44.

[50] Ripstein argues a similar point in the context of an extended example of a supposedly harmless trespass (see Ripstein 2006: 218-29).

[51] FF: 45.

to the end of avoiding injury, the point is that your threat to shoot me does not compel me to choose dancing as my own end. Kant makes this point very clearly:

> Now I can indeed be constrained by others to perform *actions* that are directed as means to an end, but I can never be constrained by others *to have an end*: only I myself can *make* something my end' (DV: 6:381).

Hence while your threat to shoot me unless I dance may indeed constrain my choice whether to dance, the wrongfulness of that constraint cannot consist in your *choosing the end* of dancing for me, according to Kant.

2.1.3 A vicious circle

Ripstein's account of freedom as purposiveness fails in another way, as well. Consider one of Ripstein's simple illustrative examples more closely:

> [S]omeone else can frustrate your plans by getting the last quart of milk in the store. If they do so, they don't interfere with your independence [purposiveness], because they impose no limits on your ability to use your powers to set and pursue your own purposes. They just change the world in ways that make your means useless for the particular purpose you would have set.[52]

Ripstein appears to equivocate as to the choice made here. When someone else frustrates me by getting the last quart of milk in the store, he or she does not interfere with a particular purpose I 'would have set' but, instead, one that I did set, one I chose. The situation is not that I cannot choose to get a quart of milk in the store because I know there is no milk there—if true, then this would be a simple manifestation of the

[52] FF: 16.

distinction between a choice and a wish. If there is no milk in the store and I know this, then I cannot rationally choose to get milk there; I can merely wish it were possible for me to do so. But *before* someone takes the last quart of milk, I can choose to get milk in the store because I take it that I have the means I need to do so. I take it that I have enough money and that the milk is available (and that I can get to the store, that the store is open, etc.). Then, when someone else takes the last quart of milk and I know this, he or she interferes with one of the conditions (viz., the availability of milk) that needs to obtain for me to take it that I have the means I need to set the end of getting milk at the store. Someone else's rightful choice to buy the last quart of milk in the store does, therefore, appear to limit my 'ability to use [my] powers to set and pursue' my end of getting milk at the store, contrary to Ripstein's assertion otherwise.

Now, presumably, I could still choose to get milk at the store at some later time, or choose to get milk at some other store, or in some other way. But if that is why Ripstein thinks that taking the last quart of milk in the store does not interfere with my purposiveness, then taking it would not have made my means 'useless for the particular purpose [I] would have set,' as Ripstein says, precisely because I could return later or go elsewhere to use my means (e.g., money, etc.) to get milk. Whether my choice is to get milk now at this store, or more generally to get milk somewhere soon, or something else, is an interpretive issue that should be separated from the philosophical matter at hand. What my chosen end is would likely be resolved pragmatically; for example, perhaps I am picking up milk at the only local store on my way home from work and have no time to go elsewhere. But regardless of what my particular end is, when someone interferes

with means or conditions that I take to be necessary for me to achieve my end (and I take it that I cannot reinstate those means or conditions), then they interfere with my ability to rationally choose that end with my means.

Ripstein claims that acts such as buying the last milk are rightful because while they 'change the world' in ways that affect my *purposes*, they do not interfere with my 'ability to determine how to use [the means I] already have' to set and pursue my purposes, which is my *purposiveness*.[53] But what the preceding analysis demonstrates is that the means I take myself to need in order to rationally choose an end may often depend upon conditions or states of the world that others might rightfully change. When others change such conditions or states (and I take it I cannot reinstate them), then others may render the means I take it I need insufficient for my ends. If I then take it that I lack and cannot acquire the (new) means I need to choose my ends, then others interfere with my ability to rationally choose my ends just as effectively as if they had directly constrained the means I took myself to need for my ends. Others' rightful acts that interfere with such conditions may therefore interfere with my ability to use my means to set and pursue my ends, which is my purposiveness.

This point seems easy overlook in Ripstein's simple examples because in the examples others do not interfere directly with means that are my own (e.g., my money, my body) but, instead, interfere only with conditions or states of the world that we tend to generally assume I am not entitled to control (e.g., the availability of milk in a store, a presumably public space, etc.). The sufficiency of my means for my ends depends upon those

[53] FF: 41.

conditions, however, so the examples may seem to show that interfering with the conditions upon which my choice depends (its mere 'context') is rightful, as opposed to interfering with the means I need for my ends, which is wrongful. That is, in the examples it seems easy to conflate 1) an implicit distinction between the *means* I take it I need for my ends and *conditions* or states of the world upon which the sufficiency of those means for my ends depend, with 2) the entirely different distinction between means (or, indeed, conditions) that are *my own* and means (or conditions) that are *not my own* to use or exploit for my ends. In Ripstein's simple examples we tend to implicitly assume that I am not entitled to have milk available in the store, or to occupy the space or person's time, because these are conditions or states of the world that I would not usually be entitled to control, as opposed to means like my money or my body, which I would usually be entitled to control. But this assumption might fail. For example, I might be entitled to have milk available in the store because I live in a 'food desert' and the store is my only accessible source of milk or other fresh foods, or I might be entitled to choose to occupy some public space at some time by my right of free association, or I might be entitled to meet some particular person on various rationales. If so, then the acts in Ripstein's simple examples might wrong me despite merely 'chang[ing] the world' or 'context' in which I choose, rather than interfering with means of my own that I take it I need for my ends.

Ripstein's account of purposiveness thus invites a vicious circle: While I may not be rightfully entitled to have milk available in the store, or to stand in the space, or to meet the person, the reason, according to Ripstein, must be that my right of freedom as

purposiveness in the system of equal freedom does not require these entitlements. But whether my right of freedom as purposiveness requires these entitlements cannot be determined if my purposiveness is itself defined in terms of the entitlements the system of equal freedom generates. That is, Ripstein argues that (1) state institutions are just if they secure everyone's right of freedom as purposiveness in a consistent system of equal rights of freedom. But if (2) the right of freedom as purposiveness is itself defined in terms of whatever entitlements those institutions determine one to have, then (3) *any* consistent set of such entitlements secures everyone's equal right of freedom (see Ebels-Duggan 2011: 563).[54] Whether the system determines that I am entitled to get milk at the store (or not), my right of freedom to get milk there (or not) is, by that very determination, secure. Ripstein's emphasis on the innate entitlement to the exclusive use of one's own bodily powers may partially limit this circularity, but the circularity would still prevent normative extensions of one's entitlements beyond the exclusive use of one's own bodily powers. A system of equal freedom in which everyone is exclusively entitled only to the use of one's own bodily powers is a system in which everyone has the ability to use all (only) those means that one is entitled to use toward one's chosen ends (see Ebels-Duggan 2011: 569). If such a system is inadequate to Kantian justice, the injustice does not consist in a failure to secure everyone's equal freedom *as purposiveness*.

2.2 Byrd and Hruschka's system of equal freedom

Byrd and Hruschka interpret Kant's theory of justice as a consistent system of equal freedom in which coercive limitations on the right of freedom are only permitted if they

[54] Ebels-Duggan develops this line of criticism more fully (see Ebels-Duggan 2011: 562-571).

are strictly necessary to secure a like freedom for all. Hence Byrd and Hruschka's interpretation of Kantian justice is in this respect identical to Rawls' early statement of his first principle of justice. Byrd and Hruschka appear to understand freedom, moreover, empirically as a form of 'negative liberty,' rather than in some normative fashion such as Ripstein's 'purposiveness' or something else. I argue that Hart's objection therefore applies.

While Byrd and Hruschka do not directly respond to the objection (or even appear to acknowledge it), the problem of justice emerges in passing in the context of their crucial discussion of Kant's 'Postulate of Practical Reason Regarding Rights.'[55] There, Byrd and Hruschka elaborate on one of Kant's examples in the DR to illustrate how one person's right to choose naturally limits another's like right to choose (DR: 6:249):

> [Reason a priori] can absolutely prohibit me from using physical force to grab an apple out of someone else's hand, because the grabbing would be a use of coercion that would be incompatible with the other person's freedom of choice to hold onto the apple, and thus a violation of the universal principle of right. On the other hand, if the apple is lying unused and masterless on the ground—ground that does not yet belong to anyone—then I can take the apple into my possession without violating anyone else's rights.[56]

Byrd and Hruschka then raise and respond to the following objection:

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[55] Byrd and Hruschka (2010), Chapter Five, 107-121. See this dissertation, chapter four, for discussion of the postulate.

[56] Byrd and Hruschka, 112.

> One might object by positing another individual a little farther away from the apple than I am who also would like to take and eat the apple and say: Would it not violate that person's freedom of choice to grab the apple off the ground, thus making it impossible for him to get it? The answer is that my taking it does not violate that person's freedom of choice and thus is not something with which the law is concerned. Law, as Kant states, does not relate to one person's choice interacting with another person's wish, and thus mere needs, but instead to the other person's choice. The other person has a choice with respect to taking the apple only if he is aware that his own self-determined action can bring forth that object of his desire. If he is farther away from the apple than I am, then he has no choice with respect to taking the apple, because his own self-determined action cannot bring forth that object of his desire. I will get to the apple first and take it, without violating any choice he might like to have had.[57]

Hart's objection in this context would be that it is not at all clear how Byrd and Hruschka's appeal to freedom of choice determines that the other person who is further away has no right to choose to acquire the apple in this case. Why should proximity to the apple (or footspeed) be what determines whether one takes oneself to have the powers one needs (and thus the choice) to acquire the apple? Who *should* have a right to choose to acquire the apple? The person closest? The person neediest? Perhaps it should be cut in two. These are the questions that justice must answer.

[57] Byrd and Hruschka, 113.

Byrd and Hruschka attempt to evade such questions with the vague and equivocal formulation of freedom of choice as when one is 'aware that his own self-determined action can bring forth that object of his desire,' departing somewhat from their earlier formulations. My freedom of choice is understood either empirically or normatively here. If it is understood empirically as negative liberty, then your taking the apple before I do limits my ability to take the apple and so my freedom to choose to do so. Byrd and Hruschka must then explain why my *right* of freedom of choice should be limited when I am not as quick or as close as you are to the apple. If my freedom is understood normatively, on the other hand (in the way Ripstein argues), then Byrd and Hruschka would maintain that your taking the apple before I do does not limit my (normative) freedom because I can only do what I take myself to be *entitled* to do, and since I do not take myself to be entitled to take the apple if I am aware that you can get there first, your taking does not limit my freedom to choose to take it myself. But then Byrd and Hruschka's account of freedom and justice is subject to the same vicious circularity that undermines Ripstein's account of freedom. If my freedom depends on what I am entitled to do, but my entitlements are determined by what my equal freedom in the system of equal freedom requires them to be, then any consistent system of entitlements, including a system where I am entitled to do *nothing*, will satisfy the standard of justice. (Indeed, noting this circularity is merely another way to state the original objection; some value other than freedom must be imposing order on the entitlements in the system.)

Byrd and Hruschka's appeal to the distinction between a choice and a wish is irrelevant. Freedom of choice is the ability to do what one takes oneself to be able to do *without the*

interference of others' choices.[58] The interference of others is not the same kind of interference that a recalcitrant natural world may impose upon the ends one is able to set. If I cannot swim in a lake because it has dried up, then that does not interfere with my freedom of choice, but if I cannot swim in the lake because you block my access to it, then that does interfere with my freedom of choice because the interference is one you make by your choice. Similarly, if I cannot take the apple because a wild animal runs away with it, then that is no limitation on my freedom of choice to take it, but if I cannot acquire the apple because you choose to get it before I do, then that does indeed limit my freedom of choice. The *right* of freedom of choice is then defined by determining when or under what conditions others may or may not interfere with one's freedom of choice. Perhaps I should have no right to choose to take the apple in this case because those who get there first ought to have rights to it, but whether that should be so has nothing to do with the distinction between choices and wishes. Hart's objection thus stands.

3. Freedom as consent to public law

The dialectic of critical discussion between Rawls and Hart (which has deeper roots) to which Ripstein alludes has I think established that any account of justice that is fundamentally about maximizing the exercise of equal rights of liberty in a system will either 1) fail to properly order liberties and adjudicate conflicts, or 2) be so thin as to result in an intolerable lack of justification for many important legislative restrictions on

[58] See Berlin, 194. Recall that Kant defines freedom as 'independence from being constrained *by another's choice*' (emphasis added) (DR: 6:237).

activities that cause significant harm or suffering but do not constrain anyone's liberty.[59] This critique should provide good reason by itself to avoid interpreting Kant's theory of justice as a self-limiting system of equal freedom, but doing so seems particularly unnecessary given the plausibility of alternative contractualist or consent-based approaches to Kantian justice. Consent-based accounts emphasize Kant's many references to the standard of possible universal consent to law (T: 8:297) and avoid the objection that preoccupies Ripstein because they need not insist that a general right of freedom takes priority over all other rights and considerations of justice.[60] On consent-based accounts, conflicts between rights and other values are resolved by laws or institutions that are just so long as they satisfy certain necessary conditions for the exercise of the possible consent of everyone.[61] These conditions may be understood to specify a set of constitutional principles and basic rights such as those Kant sets out in the 'republican' constitution.[62] I suggest that such contractualist accounts offer a better approach to understanding Kantian justice.

Conclusion

In this chapter, I have argued that accounts of Kantian justice that render it as a self-limiting system of equal freedom fall to Hart's decisive objection. While I thus reject

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[59] Hart, 547-50. See note supra for a list of some of those who endorse the objection.

[60] Abandoning the idea that a general right of liberty should have such special priority is precisely the adjustment that Rawls made to his original statement of his first (liberty) principle of justice in response to Hart's version of the objection (see Rawls 1993: 291-92).

[61] O'Neill (2015), 170-78.

[62] O'Neill (2015), 178-79.

Ripstein's or Byrd and Hruschka's accounts, in the next chapter (four), I nevertheless set out a rationale for the duty of veracity that does not depend on taking the alternative, consent-based approach. I set out the consent-based approach to Kantian justice in chapter five, together with the rationale for veracity flowing from it.

CHAPTER 4

VERACITY AS AN EPISTEMIC CONDITION OF FREEDOM

In this chapter, I argue that the innate right of freedom directly requires a duty of veracity. In the *Doctrine of Right* (DR), Kant argues that we cannot exercise our freedom in the robust way that the right of freedom requires without the power to 'intelligibly' possess (i.e., own) external things (DR: 6:249). In an analogous way, I argue here that we cannot fully exercise our practical reason to make free choices without the power to trust certain expert sources of testimonial knowledge. The duty of veracity is necessary to underwrite that trust, which is necessary for freedom.

1. Freedom and powers of acquisition

Recall that in the Introduction to the *Doctrine of Right*, Kant defines the innate right of freedom as follows:

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

Hence while *freedom* is 'independence from being constrained by another's choice,' one has a *right* of freedom 'insofar as it [freedom] can coexist with the freedom of every other

in accordance with a universal law.' If freedom as independence is understood as the ability to do what one chooses to do without interference by others, then according to Kant, one has a right of freedom to make any practically possible choice that does not interfere with the freedom of any other, in accordance with a universal law.[63]

The term 'right' is ambiguous, however, and may refer singly or in combination to any of hat Wesley Newcomb Hohfeld refers to as a 'claim-right,' a 'privilege' (i.e., a permission), a 'power,' or an 'immunity.[64] Hence it is not obvious precisely what the 'right' of freedom requires, beyond reciprocally equal (claim-) rights of non-interference with one's free choices. I will argue here that Kant understands the right of freedom to require juridical *powers* necessary to make permissible practical choices, where permissible choices are those that 'can coexist with everyone's right of freedom in accordance with a universal law' (i.e., choices the maxim of which is in accordance with a universal law under which everyone's freedom can coexist).[65]

The *power to acquire property rights* to external things is one such power. Property rights to an external thing may include claims against others' use or interference with one's possession of the thing, powers to alienate the thing (e.g., by selling or gifting it) or

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[63] See this dissertation, chapter two. In this chapter I construe Kantian external freedom descriptively as a form of 'negative liberty' rather than normatively as for example Ripstein's 'purposiveness.' Negative liberty is the ability to do what one chooses to do without interference by others; the right of negative liberty determines when one *should* have this ability. See Berlin (1997), 191-242, 194.

[64] See Hohfeld (1917): 20-33. See also Appendix to this chapter, 'Hohfeldian Jural Relations.'

[65] I do not intend to (directly) invoke the categorical imperative here. I refer only to the standard of the UPR referred to implicitly in Kant's definition of the right of freedom. See chapter two.

to permit its use by others, permissions to use it oneself, and immunities from others' alterations of certain property rights to the thing. External things include not only land or chattels, but whatever can be 'mine or yours,' which Kant says includes the 'deeds' of persons in contract, as well as 'status' relations such as those created by marriage or in families. I argue that the right of freedom requires that everyone have the power to acquire such rights to the extent that one's choices to exercise those rights are permissible.

2. The 'Postulate of Practical Reason with Regard to Rights'

In Part One of the DR, Kant argues that we must be able to *use* external things in order to exercise our freedom but that we cannot use things to the extent the right of freedom requires unless we can 'intelligibly' possess (i.e., own) them (see DR: 6:250). Hence we must postulate that ownership of external things is 'possible,' Kant concludes, which he terms the 'Postulate of Practical Reason with Regard to Rights (PPRRR):

> It is possible for me to have any external object of my choice as mine; that is, a maxim by which, if it were to become a law, an object of choice would in itself (objectively) have to belong to no one (res nullius) is contrary to rights (DR: 6:250).

The conclusion of Kant's argument is that ownership of external things must be possible; that is, that the right of freedom requires us to make the PPRRR (i.e., that ownership is possible). Kant frames the PPRRR in terms of a concomitant duty, as well: 'it is a duty of

right to act towards others so that what is external (usable) could also become someone's' (DR, 6:252).[66]

It seems plausible to think that if one could not *use* external things, then free choice would be impossible, since one would then be deprived of the means necessary to set one's ends.[67] But why does free choice require that we also be able to *own* external things? Kant distinguishes between 'empirical' and 'intelligible' possession (ownership) of external things. Empirical possession consists in physically holding or controlling the thing, whereas '…something external is mine [owned] if I would be wronged by being disturbed in my use of it even though I am not in possession of it (not holding the object)' (DR: 6:249). For example, I empirically possess an apple when I hold it in my hand or physically secure it in some other way (e.g., in a locker), but I intelligibly possess (own) the apple if I have a right to use and exclude others from using it without having to physically secure it (DR: 6:249).

Kant's thought appears to be that if we had to empirically possess (physically hold or guard) everything that we use as we pursue our various projects and choices in the world, then many otherwise permissible free choices to use external things without interference

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[66] One might violate the duty by interfering with another's acquisition of a thing in order to prevent *anyone* from using it. See Byrd and Hruschka, 119. Perhaps someone who interferes with another's property in order to vandalize it is a good example.

[67] This is strictly the case if Kant's distinction between a 'person' and a 'thing' defines the class of 'external things.'

would be practically impossible to make.[68] For example, suppose I want to build a house. It seems it would be practically impossible for me to 'empirically' acquire and then hold or guard all the building materials I would need, and coerce or cajole all the work performances I would require, among other things, to build the house. Without the juridical power to acquire and 'intelligibly' possess (own) building materials or to enter into binding contracts with workers, I cannot rationally take myself to have or be able to acquire the means I need to achieve my end of building a house. I therefore cannot practically rationally choose to build the house. But since the right of freedom requires that all permissible free choices to use external things without interference be practically possible, intelligible possession must be possible, Kant postulates.

Note that this rationale does not require the state to provide all the means one might need to achieve any practically possible end (e.g., material means such as money, lumber, tools, etc., to build the house) but only those means necessary to remove interferences with one's freedom that others' choices impose. The freedom of choice that is the concern of justice is the ability to do what one takes oneself to be able to do without the interference of others; it is not the ability to do what one takes oneself to be able to do *tout court,* that is, with what one merely wants or wishes to do. While it is true that I cannot choose to build a house if I lack and cannot acquire funds needed to pay for it, such a lack is not one imposed on me by others' choices. Whereas my inability to

[68] 'Permissible' choices are those that do not interfere with the freedom of every other under a universal law (i.e., choices the maxim of which if made a universal law would not interfere with anyone's freedom). One has no duty to avoid making such choices; hence, they are permissible. See 'permissions and powers' in the next section.

acquire ownership rights is one imposed by the equal rights of others (in a state of nature) to choose to resist my unilateral assertion of rights to external things.

Kant's argument for the PPRRR is thus that 1) the right of freedom requires that all permissible free choices to use external things without interference be practically possible for us, but since 2) some permissible choices to use external things without interference are not practically possible for us unless we have the juridical power to intelligibly possess (own) things, then, therefore, 3) the right of freedom requires that we have the juridical power to intelligibly possess external things. That is, intelligible possession must be 'possible' (i.e., the PPRRR). Kant's argument reflects the following valid pattern of modal logical inference (where '□' is 'juridically necessary' and '◊' is 'juridically possible'):[69]

1. □◊U (It must be possible to use external things.)

2, □(~◊U ∨ ◊O) (It's not possible to use external things unless we can own them.)[70]

2'. □(◊U → ◊O) (Equivalent to 2)

Therefore, □◊O (It must be *possible* to own external things.)

3. Permissions versus powers

Kant refers to the PPRRR as a 'permissive law' of practical reason, but it is clear that the postulate yields not merely a permission but a juridical *power* or 'authorization...to put all

[69] Kant employs a similar form of modal reasoning to draw inferences from his 'possible universal consent' standard of rightfulness as well. I analyze it further in the next chapter (five).

[70] I avoid quantifiers in (1) and (2), but nothing is lost in this simplification.

others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because [for example] we have been the first to take them into our possession' (DR, 6:247).[71] Only the authoritative exercise of a normative power, not a mere permission, can alter normative obligations between persons in this way. When Kant claims that intelligible possession must be 'possible,' therefore, I argue that what he means is that one must have the *power* to acquire property rights to external things, to the extent that the exercise of that power is permissible.

In the introduction to the *Metaphysics of Morals* (MM), Kant defines a '*permitted (licitum)'* action as one 'not contrary to obligation' and an 'authorization (*faculta moralis*)' as 'this freedom [i.e., permission] which is not limited by any opposing imperative' (DR: 6:222). Kant goes on to explain that a categorical imperative (law) generates duties to do or to avoid certain actions (DR: 6:223), that is, obligations and prohibitions. But some actions are 'neither commanded nor prohibited,' Kant observes, and then raises the question as to whether there must be a 'permissive law' to account for such actions. If so, Kant says, then 'the authorization would not always have to do with [such actions]; for, considering the action in terms of moral laws, no special law would be required for it' (DR: 6:223). (Later in the DR, of course, Kant argues that there must be such a permissive law, which is the PPRRR.)

Kant's terminology can confuse modern readers; however, his analysis of normative concepts reflects common distinctions made in applications of modern deontic logic to

[71] See Byrd and Hruschka, 100 ('[L]aws we call 'power-conferring norms' today were called 'permissive laws' in the eighteenth century'), and their Chapter Four for further clarification of this important point.

the law and may indeed help illuminate those applications.[72] First, Kant explicitly distinguishes what a standard scheme of modern deontic logic would identify as mutually exclusive categories of *obligations*, *options*, and *prohibitions*, in accordance with the following tripartite division:

|-----permissible-------|

| obligation | option | prohibition |

|--------omissible--------|

While obligations and prohibitions are the result of a categorical imperative (law), Kant says, optional actions require no special 'permissive' law because 'considering the action in terms of moral laws,' they are simply actions that law neither requires nor prohibits.[73] Optional acts are both *permissible* because one has no duty to avoid them, and *omissible* because one has no duty to perform them; that is, as Kant says, one is 'free to do or not to do [them] as [one] pleases.' (DR: 6:223). For example, one has a permission to give to charity because one has no duty not to do so, but one has an option to give to charity only if doing so is also not obligatory (i.e. omissible).

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[72] See Joachim Hruschka, 'The Permissive Law of Practical Reason in Kant's *Metaphysics of Morals*,' *Law and Philosophy* 23:45-72 (2004), 54-56, for discussion of the background tradition from which Kant draws some of his terms. See Kevin Saunders, 'What Logic Can and Cannot Tell Us about Law,' *Notre Dame Law Review* 73:3 (1999), 666-88. for one effort to apply modern deontic logic to the law.

[73] Kant rejects the idea that all actions are either required or forbidden, even in the wider ethical rather than juridical context: 'But that man can be called fantastically virtuous who allows nothing to be morally indifferent (adiaphora) and strews all his steps with duties, as with man-traps; it is not indifferent to him whether I eat meat or fish, drink beer or wine, supposing that both agree with me. Fantastic virtue is a concern with petty details [Mikrologie] which were it admitted into the doctrine of virtue, would turn the government of virtue into tyranny' (DV: 6:409 in Hruschka (2004): 49n13).

But the most important deontic logical distinction that Kant marks for purposes determining what Kant means by the 'possibility' of private property is that drawn between a permission and a power ('authorization').[74] 'Authorizations' may not have anything to do with options, Kant says, except in the sense that options are permissible and the 'permissive' law authorizes only permissible choices.[75] The reason is that while permissions help describe some state of normative relations between persons, powers govern some of the possible transitions that one might make between such states by performing some action. One has a *permission* to perform some action when one is in

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[74] Kant's explicit definition of an 'authorization' as 'this freedom [i.e., a permission that] is not limited by any opposing imperative' is vague and seemingly empty, but operatively, what Kant means by an 'authorization' is made clear in his defense of the PPRRR and in subsequent applications throughout the DR.

[75] The legal power to perform an action does not logically imply a legal permission to perform that action, however, as one of Hohfeld's motivating examples demonstrates: Suppose I am the trustee of an estate charged with fiduciary duties to responsibly manage trust assets on behalf of the beneficiary. I nonetheless have the legal power to negligently sell those assets (because under U.S. law, buyers acquire good title over the assets as a result of the sale), despite that in doing so I violate fiduciary duties in making the sale. Hence I have a *power* to alter legal relations in a way that is not *permitted* because I have a duty not to do so. This is not necessarily a counterexample to Kant's implicit claim that authorizations cannot be exercised in impermissible ways, however, because 1) Kant is concerned with natural, not positive law, and 2) this example may be only one instance of a larger issue with resolving juridical conflicts, rather than an indication of the failure of Kant's specific claim. Perhaps I have a general authorization to sell assets (which is permissible, in accordance with Kant's claim) and the implication that I might abuse this general authorization in specific situations (and so create a conflict) is therefore inevitable.

some normative relation that does not impose any obligation to avoid the action, that is, when the act is 'not contrary to obligation;' one has a *power*, on the other hand, just when one's action would *change* normative relations between persons if one were to perform it. A power is therefore a counterfactual conditional: one has a power if and only if 1) one *could* act, and 2) *if* one did act, then normative relations between persons *would* change.[76] One way to render such counterfactuals in natural language is to say that it is 'possible' for one to perform some action that would change normative relations between persons in some way; for example, when 'it is possible for me to have any external object of my choice as mine' (the PPRRR). The PPRRR thus yields the conclusion that we must have the *power* to acquire private property rights.

4. The PPRRR and expert testimonial knowledge

Kant's argument in support of the PPRRR thus appears to be valid and yields the conclusion that we must have the juridical power to acquire property rights to external things (i.e. to own them). I argue that an analogous argument should hold with respect to certain forms of expert social knowledge. We must be able to know things in order to effectively exercise our practical reason to make free choices, but we cannot know things to the extent such freedom requires unless we can trust the social testimony of experts who know things that we cannot learn on our own (or cannot easily learn).[77] Without the

[76] See Saunders, 486-92.

[77] While a traditional view may hold that belief or reasonable belief is sufficient to take action, it seems clear that knowledge is usually required, instead. See John Hawthorne and Jason Stanley, 'Knowledge and Action,' *The Journal of Philosophy,* 105(10):571-590 (2008). For example, suppose a doctor tells

ability to trust expert testimony, we cannot acquire expert testimonial knowledge and, as a result, we are deprived of the robust knowledge we need to exercise our practical reason to make free choices. Hence the power to trust expert testimony must be possible, which could be understood as a corollary to the PPRRR. It is therefore also a duty of right to act toward others so that trust in expert testimony is possible. I suggest that the duty of veracity either is this duty or one of its constituents.

In a state of nature, where no such duty of right applies, experts or others with esoteric knowledge may lie or recklessly disregard the truth in their testimonial declarations to others without wronging them. I argue that it is therefore not rational to trust that what experts tell us is true and justified.[78] In the state of nature, we can only know what we can ourselves directly verify or otherwise gather evidence to prove, but such direct knowledge is too thin to support genuinely free choices. For example, perhaps when building my house I need to know whether I am in a flood plain. In a state of nature, I cannot rationally trust that expert surveyors or insurers will truthfully report their knowledge to me unless I can somehow directly influence them to do so through coercion or other clear incentive to truthfully tell me what I need to know. This is analogous to how in a state of nature, we can use only those external things that we can ourselves hold

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me that a treatment is safe but is aware that she does not know but merely reasonably believes that it is. We would regard the doctor's recommendation as negligent (indeed, reckless); she should not have told me it was safe unless she *knew* it was (Hawthorne and Stanley, 2-3). Hawthorne and Stanley provide several other such intuitive examples and defend what they term 'The Reason-Knowledge Principle: Where one's choice is p-dependent, it is appropriate to treat the proposition that p as a reason for acting iff you know that p' (Hawthorne and Stanley, 9).

[78] I defend this claim more fully in chapter six.

or guard (possess 'empirically'); but such empirical possession, according to Kant, is too thin to support genuinely free choices. But the freedom to exercise one's practical reason to make choices requires socially warranted expert knowledge as much as it requires intelligible possession of external things. Such knowledge is impossible without trust in expert testimony. Hence the right of freedom requires an epistemic duty of right to underwrite our trust in expert testimony, which is a duty of veracity.

Conclusion

In this chapter I have argued that just as we cannot exercise our freedom without the power to own external things, so we cannot exercise our practical reason to make free choices without the power to *trust* certain expert sources of testimonial knowledge. I then suggested that a juridical duty of veracity is necessary to underwrite that trust. In chapter six, I will defend the latter claim and argue that trust is necessary to acquire expert knowledge, and that the duty of veracity is in turn necessary to underwrite that trust. Before proceeding to that defense, however, in the next chapter (five) I will set out the consent-based rationale for the duty of veracity, since this rationale for veracity also ultimately depends on the claim that veracity is necessary to underwrite expert testimonial knowledge.

CHAPTER 5

VERACITY AS AN EPISTEMIC CONDITION OF POSSIBLE UNIVERSAL CONSENT

In this chapter, I argue that Kant's standard of 'possible universal consent' to public law requires a duty of veracity. Any normatively authoritative exercise of the power of consent must be both uncoerced and *informed,* but provisions protecting the epistemic conditions of consent seem conspicuously absent in Kant's 'republican' constitution.[79] I argue that a duty of veracity in certain sensitive expert social testimonial declarations is one epistemically necessary condition for the normatively authoritative exercise of the power of consent.

1. Possible Universal Consent

Recall that in the *Doctrine of Right* (DR), Kant defines the 'Universal Principle of Right' (UPR) as follows:

[79] Kant alludes to 'formal' epistemic conditions of justice in his famous but badly misunderstood essay, 'On a Supposed Right to Lie out of Philanthropy.' In SR, Kant claims that even when a lying declaration does no 'material wrong ('to someone or other'), lies may nonetheless violate the principle of right 'formally' (SR, 8:429). I explore this in the last section.

> Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law (DR: 6:230).[80]

According to the *possible universal consent* standard of rightfulness, public laws structuring rights and powers can coexist with everyone's freedom in accordance with a universal law if and only if everyone could possibly consent to those laws.[81] Freedom on this account is defined in terms of the attribute of a citizen 'obeying no other law than that to which he has given his consent' (DR: 3:314).

Kant articulates the possible universal consent standard most clearly in his popular political essay, 'On the Common Saying: 'That May Be Correct in Theory but It Is of No Use in Practice'' (T):

> For this is the touchstone of any public law's conformity with right...if a public law is so constituted that a whole people *could not possibly* give its consent to it (as, e.g., that a certain class of *subjects* should have the hereditary privilege of

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[80] Compare Kant's statement of the categorical imperative, '[A]ct only in accordance with that maxim through which you can at the same time will that it become a universal law.' *Groundwork for the Metaphysics of Morals* (GM), 4:421. While the issue is contested, I understand the UPR as a restricted version of the categorical imperative. Duties of right are 1) fully specifiable in terms of the outward aspects of one's action and 2) external or public in the sense that they have to do with the freedom of choice of others. The UPR is the CI restricted to maxims for these kinds of actions. That is what Kant is trying to express by the complicated locution 'if on its maxim the freedom of each can coexist with everyone's freedom in accordance with a universal law.' See Chapter Two.

[81] See Onora O'Neill, *Constructing Authorities* (Cambridge: Cambridge University Press, 2015). 'Kant and the Social Contract Tradition,' Chapter 10, 170-185, for the best review of Kant's universal possible consent standard.

ruling rank), it is unjust; but if it is *only possible* that a people could agree to it; it is a duty to consider the law just... (T: 8:297)

Laws structuring rightful relations with others are those to which everyone could possibly consent, according to Kant; therefore, some positive public law is juridically *necessary* to secure conditions for the possibility of universal consent, while the rest of positive public law is juridically *possible* in the service of other aims, so long as it does not violate those conditions. Kant's modal standard of rightfulness thus both generates some necessary positive law and simultaneously restricts all possible positive law.[82]

The logic of the universal possible consent standard can be captured in the following valid modal logical argument scheme (where '□' is 'juridically necessary' and '◊' is 'juridically possible'):

1. □◊(x)Cx (Universal consent must be possible to any public law.)

2. □ (◊(x)Cx → [conditions]) (Certain conditions must be met for universal consent to any public law to be possible.)

Therefore, □[conditions] (Therefore, meeting those conditions is juridically necessary.[83]

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[82] Enacting some positive public law is obligatory because human beings cannot avoid social interactions with each other. See O'Neill (2015), 182-183. This is where Kant's 'Postulate of Practical Reason Regarding Rights' enters in the universal possible consent reading of the Universal Principle of Right (DR: 6: 250).

[83] Here is a simple Fitch-style derivation in the basic modal logic K:

1. □◊(x)Cx Premise

2. □(◊(x)Cx → [conditions]) Premise

3. □| ◊(x)Cx, by 1, □ Elim

In the possible worlds semantics of modern modal logic, possibility (or false necessity) generates an accessible possible world, whereas necessity (or false possibility) quantifies over all accessible possible worlds. Kant's standard indirectly exploits this feature of modal logical semantics to entail conditions for both obligatory and permissible positive law.

1.1. Actual and possible consent

To illustrate the standard, Kant asserts that a principle of the 'hereditary privilege of ruling rank' cannot possibly secure the consent of everyone (T, 8:297, supra). Yet it is not difficult to imagine cases of adaptive preferences where, say, serfs raised in oppressive conditions have formed actual preferences for a feudal system in which hereditary lords rule. Such serfs may therefore actually consent to the principle of

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4. | ◊(x)Cx → [conditions], by 2, □ Elim

5. | [conditions,] by 3,4, → Elim

6. Therefore, □[conditions], by 5, □ Intro

Semantically, the proof can be explicated in the following way: If justice requires the possibility of universal consent (Premise One), then justice requires that universal consent be possible in every world where everything that justice requires actually obtains. Call such worlds 'just worlds.' Let w be any such just world. Universal consent to law is therefore normatively possible in w. But justice requires that certain minimum necessary conditions be met for universal consent to be normatively possible (Premise Two). Hence, since universal consent is normatively possible in just world w, the conditions for its possibility are met in w. But since w is any arbitrary just world, what applies in w applies in every possible world that is just. Therefore, generalizing, the conditions for the possibility of universal consent are met in every possible just world, which is to say, justice requires these conditions to be met.

hereditary rule, and where consent is actually given, it may seem it must therefore be 'possible' to give consent. The question, then, is why Kant's standard would bar the possibility of consent in such cases of adaptive preferences, which are less problematic for the more familiar liberal standard of universal *hypothetical* consent.[84] Why is consent not 'possible' for serfs who (adaptively) prefer the feudal system and so would actually consent to it?

I argue that the answer is that 1) Kant glosses the 'possibility' of consent deontically in terms of the normative *authority* or power of consent, and that 2) in a Kantian moral system, one's preferences are not normatively authoritative. First, consent is a normative *power* to alter the rights, permissions and duties (or other normative relations, including

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[84] Contrast John Rawls' standard of the unanimous hypothetical consent of mutually-disinterested rational agents deliberating under reasonable conditions. According to Rawls, '[t]he liberal principle of legitimacy [is that] when constitutional essentials are involved, political power, as the power of free and equal citizens, is to be exercised in ways that all citizens as reasonable and rational might endorse in the light of their common human reason.' John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001) (JAF), 84; see also JAF 41. Principles of justice that *would* be endorsed by rational agents set under reasonable constraints (i.e., in Rawls' 'original position') are justifiable to human agents like us who have reason but are not always governed by it, and this justifiability is what both requires and legitimates public law, Rawls argues. Coercive law must be 'justifiable to all in terms of their free public reason' (JAF: 141; see also JAF: 89, 202). Rawls' standard thus requires only that principles of justice hypothetically *would* be universally consented to by rational agents subject to the reasonable constraints of the original position; therefore, the actual universal consent of imperfectly rational human agents (the serfs and lords in Kant's example) to such principles is irrelevant, on Rawls' account. See Appendix to this chapter for a logical analysis of the difference between standards of possible versus hypothetical consent.

powers) that hold between oneself and other persons. Wesley Newcomb Hohfeld distinguishes (claim-) 'rights,' 'privileges' (permissions), 'powers,' and 'immunities' in a legal context, and these distinctions help clarify what Kant means by the 'possibility of consent.'[85] Second, in Kant's moral theory, the fact that one's consent reflects one's preferences is not sufficient by itself to establish the normative authority of one's consent to alter one's moral relations with others in order to realize one's preferences.[86] That is, in Kant's moral theory the moral significance of consent does not depend upon whether one actually (or rationally or reasonably, as on Rawls' hypothetical consent standard) wants that to which one consents. As Onora O'Neill puts the point:

> It is only within moral theories for beings who can sometimes act independently of desires—who are to that extent autonomous—that the notion of consent carries independent weight. In such theories it is important that consent be possible for others, but of less concern whether what they consent to is what they want.'[87]

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[85] See appendix to chapter four, 'Hohfeldian Jural Relations'. For example, one may be *permitted* to 'consent' to be a serf or a slave in the sense that one has no duty not to be a serf (let us assume, for the sake of argument), but lack the *power* to consent because one's 'consent,' though actual, would nevertheless fail to alter normative relations between oneself and others so as to render oneself a serf or slave. Hohfeld's analysis clarifies such distinctions. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. Walter Wheeler Cook (New Haven, CT: Yale University Press, 1919).

[86] For an account of how the 'normative authority' of one's consent is impaired when one is subject to coercion, see Jappa Pallikkathayil, 'The Possibility of Choice: Three Accounts of the Problem with Coercion,' *Philosophers' Imprint*, 11:16 (November, 2011). Pallikkathayil's account depends on distinguishing consent as a power in Hohfeld's sense, although Palikkathayil does not use Hohfeld's terminology.

[87] Onora O'Neill, 'Between Consenting Adults,' *Philosophy and Public Affairs* 14:3 (1985), 252-277, 261.

While it may at first seem puzzling that the actuality of consent does not imply its possibility, the failure of such an implication is a widely recognized feature of modal logical systems where operators such as 'possibility' and 'necessity' are interpreted deontically, though usually to mean morally 'permissible' and 'obligatory,' respectively.[88] The implication intuitively does not hold in deontic contexts; for example, the actuality of the commission of a murder does not imply its moral permissibility (deontic 'possibility'); nor does the moral obligation (deontic 'necessity') to avoid committing murder imply that murders do not actually occur. Whereas both implications hold on alethic interpretations of modal operators. While Kant glosses modal 'possibility' here to refer to a moral power rather than permission to consent, the context is still deontic rather than alethic, and so it is not surprising that the actuality of consent does not imply its possibility. Just as any actual murder is not therefore necessarily deontically 'possible' in the sense of permissible, neither is any actual act of consent therefore necessarily deontically 'possible' in the sense of normatively authoritative.[89] O'Neill suggests why this is so when what is at issue is the actual or possible exercise of a moral *power* of consent rather than a permission, but her general point applies in both cases. In Kantian ethics, one's preferences have little bearing on the *moral* significance of one's actions; that is, what one prefers has little to do with what one morally ought or ought not to do (in the case of

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[88] Von Wright is the canonical source for deontic logic. See von Wright, G. H. "Deontic Logic." *Mind*, 60 (1951), 1–15.

[89] Refusal to give consent is also not therefore normatively authoritative. Kant adduces an example of a war tax to which citizens refuse to give consent but says that the war tax is rightful if their consent is possible (T: 8:298n).

a permission), or with the moral impact that one's actions might have on one's normative relations with others (in the case of a power). In a Kantian moral system, it is the moral law that determines what moral duties and powers one has, not one's contingent preferences.[90]

1.2. Necessary conditions for universal possible consent

Kant's possible universal consent standard therefore focuses attention on the *necessary conditions for the normatively authoritative exercise of consent as a moral power*, rather than on an answer to the question as to whether some apparent act of consent is actual or accords with one's preferences or not. Kant sets out constitutional principles that public law must meet to satisfy the standard:

> A constitution established, first on principles of the *freedom* of the members of a society (as individuals), second on principles of the *dependence* of all upon a single common legislation (as subjects), and third on the law of their *equality* (*as citizens of a state*)—the sole constitution that issues from the idea of the original contract, on which all rightful legislation of a people must be based—is a *republican* constitution' (PP: 8:349-50).

[90] This is a general characteristic of deontological approaches to ethics. See, for example, Kant's discussion of happiness at GM, sec 1., 4:393-397, or Kant's discussion leading to the formula of humanity at GM: 4:426-29, though almost any citation could be made in Kant's practical philosophy for support.

Any constitution that lacks provisions to establish these principles—freedom, independence, and equality—cannot secure the possible consent of all, Kant claims.[91] Kant's rationale for this claim appears to be that one has no authority to consent to changes in one's normative relations with others (i.e., the set of one's duties, permissions, etc.) that would violate conditions necessary to authoritatively exercise of the power of consent. The argument is thus similar in form to that sometimes deployed against the legitimacy of slave contracts. Even if it were possible to alienate the innate right of freedom, to do so would be to render oneself a thing rather than a person and, therefore, incapable of being juridically bound by the slave contract (see DR: 6:241).[92] Serfs in the hypothetical case of adaptive preferences, then, lack the authority to consent to their juridical subordination to lords because then lords could impose laws or choices upon

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[91] Universal possible consent is what Kant means when he refers to 'the idea of the original contract' here. See O'Neill (2015), 180-183.

[92] While it is of course possible to consent to restrictions on one's freedom (and other changes in one's normative relations with others), there is no such thing as consent to the partial restriction or alienation of one's *right* of freedom, as this right is defined in terms of restrictions to which one can possibly (authoritatively) consent. The enforcement of contracts freely entered, for example, is not a restriction on one's right of freedom. Kant's argument is that such rights as freedom and equality are *immunities* (in Hohfeld's terms) because they are necessary conditions for the moral authority of consent. That is, if one could consent to give up one of these immunities, then one would give up one's ability to authoritatively consent to anything. Once established as immunities, however, the question as to when actual agreed-upon restrictions on freedom, equality or independence, fail to be consensual is different and inevitably a matter of some judgment. While consent to enslavement is an easy case because the limitation on one's freedom is nearly entire, consent to work for subsistence wages, for example, may not be.

serfs to which serfs could not possibly consent, offers that they could not refuse.[93] The violated condition in such a case is the constitutional principle of equality. The rationales for the other constitutional principles as necessary conditions for the normative authority of consent run along similar lines.[94]

2. Veracity as an epistemic condition for possible universal consent

Any normatively authoritative exercise of consent must be *informed* as well as uncoerced. I argue that the possible universal consent standard therefore implies *epistemically* necessary conditions for the normative authority of consent, as well, and that a duty of veracity in making certain sensitive expert social testimonial declarations is necessary to underwrite those conditions.

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[93] See Onora O'Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), Chapter Three, especially 87-91. Note that normatively one probably cannot consent to one's own juridical superiority, either, given the morally 'legislative' aspect of the autonomous will (see GM, 4:439-40). Regardless, the serfs cannot consent to juridical inferiority and so universal consent is impossible.

[94] See O'Neill (2015), 178-179. Derek Parfit argues that possible consent is incoherent as a (modal) standard and that by 'possible' consent Kant must mean 'rational' consent, which is a standard of hypothetical consent (see Parfit, *On What Matters,* chapter eight). But by 'possible' consent Kant means *normatively authoritative* consent (i.e. a power), not logically or metaphysically possible consent, which is how Parfit understands it (Parfit, 178-79). When I consent to be sedated for surgery, for example, I retain the power of consent normatively even if it is physically not possible for me to exercise that power while I am unconscious. Whereas a willing slave would theoretically give up the *normative* power to consent, while retaining the natural or physical capacity. The standard would thus allow the exercise of my consent to be sedated for surgery but not to be a slave, contrary to Parfit's claims.

2.1. 'Formally' wrong lies

In SR, Kant claims that even when a lying declaration does no 'material' wrong ('to someone or other'), lies may nonetheless violate the principle of right 'formally:'

> [Even t]hough by a certain lie I in fact wrong no one, I nevertheless violate the principle of right...*in general* (I do wrong formally though not materially); and this is much worse than committing an injustice to someone or other, since such a deed does not always presuppose in the subject a principle of doing so (SR: 8:429).

The injustice is 'much worse,' Kant says, because lies that are *formally* juridically wrong are not only intended to deceive another (as are all lies) but also presuppose the rejection of all rightful relations with others. Lies or other injustices that are materially wrong (e.g., fraud, defamation, etc.) do not always presuppose the rejection of rightful relations, Kant implies.[95]

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[95] Perhaps this implication can be worked out in the following way. Recall that for Kant 'transgressions' of moral duties are contradictory because one wills both that one's maxim should hold for oneself but, simultaneously, that the 'opposite' (i.e., contradiction) of one's maxim should hold as a universal law (GM: 4:424). Suppose, then, that one wills a merely materially wrongful act, such as a fraudulent promise to repay a loan. One therefore wills both that one's materially wrongful maxim for the act (the permissibility of lying to induce a loan) holds for oneself but, simultaneously, that everyone else respect the opposite of one's maxim (that one is juridically obligated not to lie to induce loans). Hence one wills a material wrong but does not will the rejection of general principles of contract or criminal law necessary for rightful relations to hold. This analysis needs work, but Kant is not arguing that maxims of 'formal' wrongs consist in doing wrong solely for the sake of doing wrong, that is, maxims

Kant had previously distinguished formal and material wrongs in the DR, noting that the distinction 'has many applications in the doctrine of right' (DR, 6:308n). There, Kant characterizes formally wrong acts as those that presuppose the rejection of the possibility of reciprocal assurances against interference with 'what is [one's own],' that is, with one's innate right of freedom or one's acquired rights of property, in contract, etc. (see DR: 6:307). Kant adduces an example where a commander falsely promises to treat prisoners well in order to induce the surrender of an enemy who would do the same were their positions reversed. The commander's lie does not materially wrong the enemy, but is instead a formal wrong because it presupposes the rejection of justice 'and so subvert[s] the right of human beings as such' (DR, 308n).[96] While materially wrong acts presuppose principles that are merely inconsistent with justice, formally wrong acts presuppose the rejection of justice itself.

Perjury is a model case of a lie that is a formal wrong because a law requiring truthful testimony under oath is necessary for judicial institutions to function. Even when one's perjury materially wrongs no one, the principle that governs the act of lying under oath

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of evil or anti-moral action. Such maxims do not appear to be impossible, but Kant clearly intends more by 'formal' wrongs.

[96] The commander and his or her enemy do no material wrong to each other by such trickery, Kant says, because they are both at fault; nevertheless they 'do wrong in the highest degree, because they take away any validity from the concept of right itself and hand everything over to savage violence, as if by law, and so subvert the right of human beings as such.' (DR, 308n). While those who war and feud among themselves do no material wrong to each other, they do wrong 'in the highest degree by willing to be and to remain in a condition that is not rightful...' (DR, 6:307).

presupposes the rejection of civil society, which is not possible without judicial institutions. Kant's point in SR about such lies is not that acts of lying under oath undermine judicial institutions or critical supportive epistemic practices and thus civil society, although if lying became commonplace, then perhaps that might indeed happen over time.[97] Lying under oath does occur, yet judicial institutions persist. Kant's point is, instead, that the subjective principle of the permissibility of one's perjury rejects a universal public law that is necessary for the functioning of judicial institutions and so civil society; hence the maxim of one's act of lying under oath (to achieve some subjective end) presupposes the rejection of justice itself. Perjury is therefore 'formally' wrong, even if one's lie under oath materially wrongs no one in particular, and even if the lie would have little impact on judicial institutions.

2.2. Formal duties of veracity and norms of communication

One cannot possibly consent to maxims of deceit any more than one can consent to maxims of coercion, though only the latter are the focus of the protections in Kant's republican constitution. One cannot possibly consent to share a deceiver's true maxim of action because the success of the deceit depends upon one's ignorance of that maxim (see GM: 4:429-30). Just as a maxim of coercion precludes consent, so a deceiver's maxim precludes consent to that maxim, regardless of whether the deceit is successful or not.[98]

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[97] See Allen Wood, 'Kant and the Right to Lie,' *Eidos* 15 (2011), 96-117, 110-117.

[98] See Christine Korsgaard, 'Kant and the Right to Lie: Kant on Dealing with Evil,' *Philosophy and Public Affairs* 15:4 (1986), 325-349, 330-333; see Onora O'Neill, 'Between Consenting Adults,' *Philosophy and Public Affairs* 14:3 (1985), 252-277.

In the context of right, however, one's maxim is not wrongful unless it deprives another of the use of his or her freedom. While juridically wrongful lies deprive others of 'what is [their own],' juridically permissible lies, Kant says, leave others free to reject what they are told, 'for it is entirely up to them whether they want to believe [the liar] or not' (DR, 6:238).

Consider a case of lying about a positive public law. If such lying does no material wrong to another, then the deceit is only (formally) wrongful if it presupposes the rejection of justice. But the deceit presupposes the rejection of justice only if the target of the deceit is dependent upon the deceiver for knowledge of the law. Hence lying about public law is only (formally) wrongful when those upon whom the public relies for knowledge of the law lie about it, such as government officials charged with legislating, executing or adjudicating the law. It is this epistemic dependency that renders the lie wrongful.

While lying about public law by such government officials is thus wrongful, formal duties of veracity extend considerably further. Consent is a communicative action; therefore, any action whose maxim rejects norms constitutive of consent as a communicative action may render consent generally impossible to achieve, and if so, then the action may be formally wrongful. Some epistemic norms constitutive of consent as a communicative action include the intelligibility, relevance, truthfulness, and accuracy of assertions, among other norms.[99] For example, in general one cannot possibly consent

[99] See Manson and O'Neill, 57-64.

when communication does not allow *access* to information relevant to the end.[100] Similarly, one cannot possibly consent when communication is rendered unintelligible (e.g., perhaps rendered in a foreign language, or in 'legalese,' or a bar code), or when the communication overwhelms one with irrelevant information (e.g., as in consent forms with hundreds of pages). But again, not all communicative actions that violate such norms therefore presuppose the rejection of communicative consent in general. Violations of these norms are only wrongful when the violation interferes with audiences' freedom; when, as Kant says, they are not 'free to reject what they are told.'

One key way, I have argued, that audiences may not be free to reject what they are told is when audiences are epistemically dependent upon the communicator for knowledge of what is told. Expert knowledge is by definition inaccessible to non-experts except by expert testimony. If access to such knowledge is necessary to form consent to public law, then maxims of lying testimonial assertions that when universalized would destroy rational trust in expert sources of such knowledge reject a necessary condition for possible universal consent to public law.[101] Duties of veracity regulating such expert testimony are therefore a largely overlooked foundation of a civil society.

But again while the focus thus far has been on deceit by experts, further duties of veracity may apply when non-experts lie or deceive in order to undermine trust in expert testimony. Suppose I am a lobbyist for the fossil fuels industry, and while I am no expert on the matter, my aim is to confuse the public about scientific knowledge of the

[100] See Onora O'Neill, 'Some Limits of Informed Consent,' *Journal of Medical Ethics* 23 (2003), 4-7, 6.

[101] I defend the antecedent in Chapter Six.

anthropogenic sources of climate change. My efforts to deceive the public and to obscure scientific knowledge may be subject to a duty of veracity for the same reason that the expert's testimony is subject to it: the maxim of my action if universalized would destroy rational trust in expert testimony necessary for consent to public laws to be normatively authoritative.

In general, one needs access to relevant knowledge for one's consent to be informed and thus normatively authoritative. But I claim that in a society without a duty of veracity, expert testimony generally cannot be trusted, cutting off such access. I defend this latter claim in the next chapter.

CHAPTER 6

HOW VERACITY UNDERWRITES TRUST: ASSURANCE AND LIES

In previous chapters, I have argued that the duty of veracity is a necessary condition of Kantian justice. Without sufficient access to certain forms of expert knowledge, we cannot exercise our freedom in the robust way the right of freedom requires, nor can we possibly consent as a whole people to the system of public laws. Hence maxims for acts of lying or deceit that when universalized would in principle cut off such access are formally wrongful, which I have argued establishes the duty of veracity.

In this chapter, I argue that the duty of veracity is needed to underwrite testimony where the reason an audience has to accept what a speaker tells is the audience's *trust* in the speaker's implicit or explicit assurance that the speaker's testimony is true. Without the power to exercise such trust, non-expert audiences cannot gain sufficient access to expert knowledge such as scientific knowledge. The rationality of this trust depends on an enforceable duty of veracity concerning such testimony, I argue.

1. The assurance theory of testimony

While an audience might learn from a speaker's words in many ways, the testimony at issue here is a *telling*, an illocutionary speech act whose intent is to assert information as true to an audience assumed to be ignorant of it. When is an audience justified in believing that what a speaker tells it is true? There is some debate within social epistemology as to whether warrants for testimonial knowledge have strictly evidentiary sources, or whether there is or can be any *non-evidentiary* reason to accept speaker testimony that can yield knowledge, and if so, what this reason might be. The latter claim is characteristic of 'interpersonal' or 'assurance' theories of testimony.[102]

1.1 Evidentiary theories of testimony

'Evidentiary' theories of testimony require that there be empirical, non-testimonial *evidence* that what speakers tell audiences is true; otherwise, even true testimony fails to convert to knowledge. There are two main types of evidentiary theories of testimony: 'nonreductionist' and 'reductionist.'[103] On nonreductionist evidentiary theories, audiences are rationally warranted to accept testimony as a reliable source of true information, so long as there is no defeating evidence that a speaker's testimony is false

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[102] See Jennifer Lackey, 'Testimony: Acquiring Knowledge from Others' in *Social Epistemology*, eds. Alvin Goldman and Dennis Whitcomb (New York: Oxford University Press, 2011), 71-91, for a review and some criticism of the 'interpersonal view' of testimony.

[103] See Lackey, 73-75; see also Richard Moran, 'Getting Told and Being Believed', *Philosopher's Imprint* 5:5 (Aug, 2005), 2.

in a particular case. On reductionist evidentiary theories, besides the absence of such defeating evidence, there must in addition be some *positive* evidence that the particular speaker's testimony is true in order to rationally warrant its acceptance. The audience's evidence for its testimonial beliefs thus could be characterized as 'a priori' on a nonreductionist theory and 'a posteriori' on a reductionist theory.[104] Nonreductionists sometimes draw an analogy with how we are generally taken to be warranted in our acceptance of what we remember or perceive, so long as there is no defeating evidence that memory or sense perception is faulty in particular cases.[105] Warrants for testimonial assertions operate similarly, non-reductionists argue.

The reductionist-nonreductionist debate may appear to track the wider internalist-externalist divide in epistemology concerning proper warrants for knowledge. That is, reductionists often argue in an internalist way that audiences positively must have some idea as to why a particular speaker's testimony is true in order to acquire knowledge from it, whereas nonreductionists often argue in an externalist way that audiences do not need to know why the speaker's testimony is true, so long as the process by which the audience comes to accept the speaker's testimony is a reliable one.[106] But there is no necessary connection between reductionism-nonreductionism concerning testimony, on the one hand, and internalism-externalism concerning warrants for knowledge, on the

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[104] Moran, 3.

[105] See Hinchman, Edward S. 'Telling as Inviting to Trust.' *Philosophy and Phenomenological Research* 70, no. 3 (May 1, 2005): 562–87, 577-78.

[106] See Keith Lehrer, *Theory of Knowledge*, 164. Lehrer argues that testimonial knowledge is not possible when an audience has 'no idea' whether the speaker is trustworthy or not (Lehrer, 165). (Externalists such as Alvin Goldman would deny this claim.)

other. Externalists might also argue that warrants for testimony reduce to the reliability of processes of audience acceptance in particular cases, and internalists might argue that audiences can come to some understanding of positive evidence establishing the background general reliability of testimony.[107] Internalists might also argue, for example, that we have access to evidence supporting the general reliability of our memory or sense perception, which is why these faculties yield knowledge in the absence of defeating evidence that they are faulty.

Whether there is sufficient evidence to (defeasibly) warrant the acceptance of testimony by 'default' or not may be the simplest way to characterize the difference between nonreductionist and reductionist evidentiary theories of testimony.[108] Nonreductionists argue that there is evidence sufficient to accept testimony as true by default; reductionists deny this claim and require positive evidence in each case of testimony.

Nonreductionist evidentiary theories are subject to the objection that they sanction gullibility or irrationality, since speakers may often lie or mislead, or make reckless or negligent assertions.[109] Moreover, there may be no way to characterize 'testimony' or the evidence of its reliability in general terms, since it seems inevitable that any act of testimony will always be made in a particular context heavily laden with positive

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[107] Lackey would characterize this latter position as a form of 'global' reductionism, however (see Lackey, 74-75).

[108] See Moran, 4.

[109] See Lackey, 75; see also Peter Faulkner, 'What is Wrong with Lying?' *Philosophy and Phenomenological Research* 75:3 (Nov, 2007).

evidence going to its reliability.[110] Reductionist theories, on the other hand, are subject to objections that 1) in practice we do seem to acquire much of our testimonial knowledge by the default acceptance of what others tell us; for instance, when a stranger reports the correct time or gives directions, and, moreover, 2) reductionist theories appear to imply that children, who typically accept testimony uncritically, as a result have little or no testimonial knowledge, which may seem implausible. Hybrid views combining elements of reductionism and nonreductionism to order to mitigate these objections are thus common.

1.2 Assurance theory as non-evidentiary

Assurance theorists criticize both reductionist and nonreductionist evidentiary theories of testimony for ignoring the importance of the interpersonal *relationship* between speakers and trusting audiences in successful testimonial exchanges. Theories that ignore this relationship fail to capture the special, non-evidentiary reason that audiences have for accepting a trusted speaker's testimony when the speaker assures the audience that what she tells it is true.[111] Richard Moran refers to this reason for accepting a speaker's testimonial assertion as believing the speaker, as opposed to believing the proposition the speaker asserts.[112] The speaker 'takes responsibility' for the truth of her telling, Moran says, and the audience believes what the speaker tells it not as a result of the evaluation of

[110] See Elizabeth Fricker, 'Trusting others in the sciences: a priori or empirical warrant?', *Studies in History and Philosophy of Science* 33 (2002), 373–383.

[111] Moran, 4, 15-16; Faulker, 542.

[112] Moran, 2.

evidence but by 'taking the speaker's word for it.'[113] Hence '[t]elling cannot be thought of as the presentation or acceptance of evidence at all,' Moran asserts.[114]

On the assurance theory of testimony, a 'deal of trust' is struck between speaker and audience when an audience trusts a speaker's assurance that what the speaker tells it is true.[115] If the speaker honors the deal and in fact tells the truth in response to the audience's trust then, on the assurance theory, the audience's belief that the speaker's testimony is true converts to knowledge.[116] The audience's warrant for accepting what it is told is thus thought to be non-evidentiary because it does not directly depend on empirical evidence establishing that the speaker's testimony is true, whether that evidence would establish the reliability of testimony by default or in particular cases. The audience's reason for believing what the speaker tells it is, instead, that it *trusts* the speaker's assurance that the testimony is true, assurance theorists argue, and this reason for belief is primarily a *moral* one, although not without epistemic significance. Trust on the assurance theory thus should not be understood in the way that one might 'trust' that a tree branch appears to be large enough to support one's weight and not break. 'Trust' in this sense of reliability fails to distinguish human sources of knowledge from non-human ones such as clocks or instrument gauges, assurance theorists argue, adding that trusting a speaker would be unnecessary if one had empirical evidence that the speaker's testimony

[113] Moran, 2.

[114] Moran, 3.

[115] M. Fricker, 257-8.

[116] Faulkner, 552.

is reliable.[117] While the audience's trust is not insensitive to defeating evidence that the speaker is unreliable, audiences may extend their trust in a speaker without any evidence (a priori or otherwise) that the speaker is reliable.[118]

1.3 Trust as a moral power: the 'deal of trust'

The audience's ability to trust a speaker's assurance is therefore a moral *power*. When an audience exercises its power to trust a speaker's assurance, the audience alters the normative relationship between speaker and audience such that the speaker has a duty to tell the truth and the audience has a correlative right to accept what the speaker tells it as true. When does an audience have this power of trust and what are its effects?

The power is exercised and the 'deal of trust' struck when an audience accepts a speaker's implicit or explicit 'invitation' (offer) to trust the speaker.[119] The deal of trust consists in a bilateral exchange of (implicit or explicit) promises: the speaker's promise to tell the truth and the audience's promise to accept what the speaker tells it (i.e. to trust

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[117] See, for example, Faulkner, 547. Moran argues that if testimonial warrants are to be understood as providing evidence for a speaker's beliefs, then direct observation of the speaker's behavior would seem a less risky way to gather such evidence, since speakers may lie or be careless in what they say (Moran, 6). This belies how confidently we do rely on testimony for our knowledge.

[118] Faulkner, 546-548. I criticize this idea in the next (third) section.

[119] See Hinchman, 565-68. The 'invitation' language may be a bit misleading, since an invitation usually connotes not an offer but a mere solicitation to make an offer; e.g., I may invite you to make an offer to buy my house. Hinchman intends 'invitation' to connote an offer, however, such that when the audience accepts it, the deal of trust is struck.

the speaker). The deal of trust thus imposes duties not only on the speaker to tell the truth, but also on the audience to accept what the speaker tells. It is a genuine exchange: the speaker promises to tell the truth *because* the audience promises to trust the speaker, and the audience promises to trust the speaker *because* the speaker promises to tell the truth.

The deal can be proposed by either party: when an audience with an epistemic need makes an inquiry of a speaker, then this is generally (though not always) understood as an offer to trust the speaker in exchange for her promise to tell the truth, which the speaker may or may not accept by answering trust-responsively. Hence either speaker or audience might have the power to close the deal of trust. Speakers and audiences therefore also have preliminary moral powers—to offer to tell the truth, or to offer to accept what is told—that when exercised create powers to close the deal of trust in the other party. But however the deal of trust is struck, the speaker incurs a duty to be honest and competent in her testimony, and the audience incurs a duty to accept the speaker's testimony, with correlative rights in each party (to the audience's trust, to the speaker's trustworthiness).

2. The incompleteness of assurance theory

In this section I argue that the assurance theory of testimony is incomplete. A speaker may have some moral reason to tell the truth in response to my trust, and I may then have some moral reason to accept that what she tells me is true. But I only have an *epistemic*

reason to believe what the speaker has told me if I also have some evidence to believe that the speaker will properly respond to her moral reason to tell me the truth when I trust her. And I cannot simply *presume* this latter belief. It must be justified.

2.1 The problem of lies

Critics of assurance theory object that a speaker's assurance provides the audience with a moral but no *epistemic* reason to accept what the speaker tells as true. What can a speaker's assurance that her testimony is true add to the audience's epistemic warrant for what it is told? Suppose a speaker is a liar or incompetent; it seems clear that such a speaker's assurance that her testimony is true would add nothing to the audience's epistemic warrant for its truth.[120] But if assurance can only warrant testimony when speakers are honest and competent, then testimonial warrants would depend on evidence to that effect (either generally or in particular cases), rather than on the speaker's assurance. Hence whether a speaker gives her assurance or not appears to be epistemically irrelevant.

Critics thus present assurance theory with a dilemma:[121] Either 1) assurance does warrant speaker testimony, in which case the assurance of a liar or incompetent speaker could warrant her testimony, which seems implausible. Or, 2) a speaker's assurance warrants her testimony only so long as there is no evidence that the speaker is a liar or incompetent, in which case the speaker's assurance seems epistemically irrelevant, since

[120] Lackey, see also Moran, 15.

[121] See Lackey, 79-80.

the audience's warrant would rely (by default) on background evidence that speakers are generally not liars or incompetent.[122] That is, either the assurances of speakers who are liars or incompetent count epistemically, or assurance theory is merely a form of evidentiary nonreductionism about testimony.

The problem is acute in the case of lies. For a speaker who may be *incompetent*, her assurance may indicate to the audience that the speaker has taken the proper care to make sure that what she asserts is true.[123] Her assurance that what she tells is true thus may provide some additional epistemic reason to accept what she tells, since assertions by incompetent speakers are not always accompanied with such assurances. For a speaker who may be a *liar*, however, her assurance that what she tells is true can add nothing epistemically, because lies always come with the implicit or explicit assurance that they are true. A speaker's assurance that what she tells is true thus can do nothing to distinguish lies from true testimony. Hence I refer to the objection as the problem of lies.

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[122] Hinchman, for example, responds to the objection as follows

> Trust is epistemically reasonable when the thing trusted is worthy of the trust—as long as there is no evidence available that it is untrustworthy. Assuming satisfaction of this negative evidential condition...when an epistemic faculty is trustworthy by serving as a reliable guide to the truth, it makes available an entitlement to believe what it tells you whose basis lies simply in the fact that you trust it (Hinchman, 577-78).

Hinchman thus responds that audiences have a (default) warrant to accept testimony because doing so reliably yields truth, in the absence of defeaters. This is merely a form of evidentiary nonreductionism and so fails to avoid this second horn of the dilemma (see Faulkner, 551). See note 34.

[123] This may be why Lackey adduces as a counterexample a speaker who is 'radically' unreliable (Lackey, 79).

An initial response to the problem of lies is to point out that the deal of trust is made only when the audience in fact *trusts* the speaker's assurance. The audience's mere recognition that a speaker assures the audience that what the speaker tells it is true is indeed epistemically irrelevant.[124] Only when the deal of trust is closed by 'affectively trusting' the speaker's assurance does the speaker incur a duty to take responsibility for the truth of what she tells.[125] On the assurance theory, it is the speaker's duty to tell the truth in the deal of trust that warrants the audience's acceptance of speaker testimony, not merely the audience's recognition of the speaker's assurance that what she tells it is true.[126]

This response is insufficient, however. I have already noted that lies are characteristically made with assurances that they are true. But liars do not merely provide such assurances; they do so in order to gain the audience's trust, so closing (and breaching) the deal of trust. Lies are always made in the teeth of trust.[127] Liars purport to

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[124] Moran, 15.

[125] Faulkner. 547.

[126] See M. Fricker, 262.

[127] See Faulkner, 537 ('In lying, a speaker does not intend his audience to accept his lie because of independent evidence but intends his audience accept his lie *because of his telling it*. The motivation for presenting his assertion as sincere is to thereby ensure that an audience treats his intention that the audience believe that p *as a reason for believing that p.')* Faulkner teases out this element of trust in lying via an extended counterexample from Augustine of a Jesuit attempting to mislead an enemy Franciscan into taking a dangerous road by way of what might be called a 'triple-bluff' (Faulkner, 536-38). Neither priest 'lies' to the other because neither offers assurance in exchange for trust. Similarly,

be sincere and to take responsibility for what they tell in just the same way that trust-responsive speakers do. Hence closing the deal of trust with a speaker again does not by itself appear to provide any additional epistemic reason to believe a speaker who may be a liar.[128]

What is needed is some reason to think that speakers (who may be liars) are more likely to tell the truth when they close the deal of trust with an audience, that is, that speakers are *trust-responsive*.

2.2. The presumption of affective trust

Phillip Pettit argues that speakers have positive and negative instrumental reasons to be trust-responsive because, positively, speakers value the relationship (friendship, moral community, etc.) they have with trusting audiences and, negatively, speakers fear the social costs that audiences might impose on speakers who prove unworthy of their trust.[129] Miranda Fricker argues similarly: positively, speakers recognize the importance of trust to valuable testimonial practices of 'good-informing;' and, negatively, audiences

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'lying' is not possible in a game such as poker, where there is no attempt to form the deal of trust; for example, a bluff is not a lie, as no offer to trust is made.

[128] Faulkner, 543-44. Moran appears to define a 'telling' as *honest* testimony in an attempt to preempt the problem of lies: 'the speaker cannot count as having promised or asserted something if he had no such intention.' (Moran, 2). But this claim is false. People do sometimes wrongly make promises they intend to break and assert things they know to be untrue. Hence there is no reason to think that they might not also sometimes intentionally 'tell' others things that are untrue.

will 'hold [speakers] to their word' when they betray audiences' trust, presumably by imposing social costs on deceptive or incompetent speakers.[130]

Paul Faulkner agrees but maintains that an audience may *presume* that such positive and negative instrumental reasons to tell the truth will motivate speakers to be trust-responsive, and presumptions, unlike beliefs, can be made without evidence that they are true:[131]

> Now the presumption that S is trustworthy is not the belief that S is trustworthy. A presumption unlike a belief can be made without evidence and irrespective of the evidence. This is illustrated by the case of the reformer who employs someone recently discharged from prison for theft. The reformer can trust her new employee and leave him with the till despite her evidence that he is a thief. In doing so, she expects him not to steal because she believes he recognises her dependence on him in this respect and presumes, at the very least, that the ex-convict will respond favourably to her trust. And this presumption need not be justified by the reformer's beliefs about the ex-convict's character: the reformer can trust largely irrespective of what is believed.

Faulkner then argues that if the presumption of affective trust is actually fulfilled, then the audience's *morally* motivating reason to accept the speaker's testimony becomes an

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[129] See Phillip Pettit, 'The Cunning of Trust,' *Philosophy and Public Affairs* 24:3 (1995), 202-225, 221.

[130] See Miranda Fricker, 'Group Testimony—The Making of a Collective Good Informant,' *Philosophy and Phenomenological Research 84:2* (March 2012), 249-276, 269.

[131] Faulkner, 552.

epistemically justifying one, and the audience's true testimonial belief is therefore converted to knowledge:

> Pettit's idea is that a trusted individual can have an instrumental reason to become trustworthy in response to trust. This is essentially correct but what must be crucially added is that it is a presumption of affective trust that the trusted will prove trust-responsive. […] If the speaker responds to these [instrumental] reasons and so tries to tell the truth and succeeds in doing so, then the audience's affective trust will be central to an explanation of how the audience came to acquire a true belief. The existence of such a connection, when things go right, is sufficient for the [morally] motivating reason for belief provided by the audience's affective trust to also be [epistemically] justifying. In affectively trusting a speaker, an audience makes a presumption about the speaker that gives him [the audience] a motivating reason for belief and when this presumption is fulfilled he gains a justifying reason for belief.[132]

I argue that Faulkner's version of assurance theory fails to avoid the dilemma that the problem of lies presents. Taking the second horn of the dilemma first: if Faulkner argues that the positive and negative instrumental reasons that speakers have to be trust-responsive are what epistemically justify the audience's presumption of trust-responsiveness, then Faulkner's version of assurance theory amounts to a minor innovation to a nonreductionist *evidentiary* theory of testimony.[133] Faulkner merely adds

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[132] Faulkner, 552-53.

[133] Faulkner (correctly) criticizes Hinchman for failing to offer a way out of the dilemma 'because it [Hinchman's account] amounts to proposing an externalist reductionist solution to the problem of lies:

that it is the speaker's assurance *made in the deal of trust* that provides the evidence that the speaker's testimony is reliable.[134] The key to assurance theory will therefore lie in what account it can give of the instrumental reasons speakers have to be trust-responsive.

Alternatively, now taking the first horn of the dilemma: if Faulkner does insist that no evidence (instrumental or otherwise) need be given that speakers are trust-responsive because audiences may simply *presume* that they are, then it is difficult to see how trusting a speaker's testimony on the basis of such a presumption could yield knowledge.

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an audience's belief that a speaker is trustworthy is justified by its satisfaction of externalist criteria' (Faulkner, 551). I argue that on this horn of the dilemma, Faulkner is subject to precisely the same criticism. (Faulkner's definition of 'reductionism' varies from the usual taxonomy and contrasts with 'anti-reductionism,' by which he means *non-evidentiary* theories of testimony. Applying the usual taxonomy, Faulkner's criticism is thus that Hinchman's theory is in fact a nonreductionist evidentiary theory of testimony, and that is also externalist.)

[134] Moran reaches this point in the dialectic and responds to the objection by defining a 'telling' in the deal of trust as a *sincere* (non-lying) assertion that is trusted: '[f]or the act of telling to complete itself there must be a correspondence between the reason being presented by the speaker and the reason accepted by his audience' (Moran, 26, see Moran, 23-26). This response begs the question as to why a speaker cannot 'tell' a trusting audience something that is false (i.e., lie), however. Moran appears to confuse cases of lying with cases of *mistake*. While bilateral (and some unilateral) mistakes can prevent the formation of a deal of trust, lies do not prevent its formation. For example, if I am a dentist and mistakenly tell you that you need a tooth crowned (perhaps because I referred to the wrong patient X-ray chart), then arguably there was no telling. But if I am lying about your need for a crown (perhaps in order to profit from performing the procedure), then there was indeed a telling and a deal of trust formed, which I breached by lying to you.

If the trusted assurances of liars can add nothing epistemically to the audience's warrant, then what epistemic justification do audiences have for presuming that they can?

Suppose I am Faulkner's reformer who helps rehabilitate ex-convicts by employing them in my shop. I may have a good *moral* reason to accept an ex-convict's assurance that a short till is not of her doing. But unless there is some evidence that the ex-convict will respond to my trust by telling the truth, I have no *epistemic* reason to believe the ex-convict's assurance, even if she is indeed trust-responsive and is telling the truth for that reason. For all I *know*, she may be lying. Even if my moral presumption that she will not betray my trust turns out to be correct, I lack knowledge of what she tells me unless and until some justification is given to support my presumption that she is properly trust-responsive. I must justify my presumption that she is trust-responsive before I have knowledge.[135] Until I do, I have what might perhaps be called a mere presumption of knowledge.

2.3. Presumptions and justification

I take it that the lucky fulfillment of a presumption is an insufficient justification for knowledge. If I presume that a speaker is trust-responsive without any justification, then even if the speaker is trust-responsive and tells the truth because I trusted her, my resulting true belief is not knowledge because it is merely lucky. Suppose I trust (without

[135] By speaking of a 'justified belief,' I do not intend to make my criticism only from an internalist point of view on justification. Externalists also require some evidentiary account of the reliability of the process or processes (or whatever it is) that leads knowers to believe true propositions.

evidence) that my lottery ticket is a winner. If it turns out that I am right, I cannot justify my true belief that my ticket is a winner by reference to my very trust that it is. My true belief is merely lucky. This remains the case even if I presume (without evidence) that the power of positive thinking influences lotteries, and then claim to trust that my ticket is a winner in order to activate this power. If I lack evidence for my presumption that positive thinking influences lotteries, then even if positive thinking does influence lotteries and my ticket is a winner because of my trust in it, my resulting true belief is merely lucky. My presumption explains what motivated my belief but fails to justify it epistemically. Of course, if my presumption that positive thinking influences lotteries were epistemically warranted, then it would be a justified belief, and this belief together with the exercise of my sunny trust would furnish a justification for my trusting belief that my ticket is a winner that (if true) might convert it to knowledge. In that case, I would know my ticket is a winner because 1) I would justifiably believe (rather than merely presume) that positive thinking influences lotteries and, accordingly, 2) I would trust that my ticket is a winner, and 3) my ticket would be a winner because I had trusted that it was. (Alas, positive thinking does not influence lotteries.) Similarly, unless I can epistemically justify my presumption that a speaker is trust-responsive, I do not know that what the speaker tells me in response to my trust is true, even if the speaker does tell me the truth because I trusted her. My true belief is merely lucky.

Presumptions indicate a shift in the burden of proof, not that evidence is unnecessary or irrelevant, and if the fulfillment of a presumption is to yield knowledge, then making the presumption still requires epistemic justification.[136] Otherwise its fulfillment is merely

[136] Faulkner acknowledges this much. See Faulkner, 553.

lucky, as the lottery example shows. Whatever reason *motivates* making a presumption, it must be epistemically *justifiable* if its fulfillment is to issue in knowledge. A 'presumption' is just a default assumption, but setting up the default still requires epistemic justification. Examples of epistemically justifiable default presumptions might include the presumption that a simpler explanation is better (Occam's razor), or that 'normal' conditions hold when drawing some inference (sometimes known as 'common-sense inertia'). For example, I might presume that my car will not start because I am out of gas (simple), rather than because it has been possessed by evil demons (complex). Or I might presume that I can use a boat to cross a river, rather than that I cannot do so because the boat is made of lead or the river of lava or the earth's gravity will reverse, etc. When epistemically justifiable presumptions such as these are fulfilled, resulting true beliefs are not merely lucky ones.

What Faulkner and other assurance theorists must give is some account of how and why making the moral presumption of trust-responsiveness is epistemically justifiable as a default. The account must explain why the exercise of the power of trust generates not just a moral right but also an epistemic justification to believe what trusted speakers tell. Such an account would complete assurance theory.

3. The duty of veracity in a civil society completes assurance theory

It is generally rational to assume that others in a civil society with you will not kill you, or steal from you, and that they will respect your rights, because it is rational to believe

that others will want to avoid punishment or liability for their misdeeds. But outside civil society, in what Kant refers to as the 'state of nature,' such assumptions seem unwarranted. In a state of nature lacking public institutions to define, enforce and adjudicate legal duties and powers, it seems naive to simply trust that strangers will respect your rights when they might take advantage of you without suffering any penalty or punishment. Kant agrees and argues that it is rightful to coerce strangers to enter into a civil condition with you and not wrongful to resist them with force if they refuse to subject themselves to public authority (DR: 6:307):

> ...for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over others as their master (not to respect the superiority of the rights of others when they feel superior to them in strength or cunning)? (DR: 6:307).

Prudence, rather than trust, should be one's rule in the absence of a public authority empowered to enforce one's rights, according to Kant. While many people might act ethically and respect your rights out of duty, many would not, and it is irrational to rely on strangers to do so in a state of nature. In a civil condition, on the other hand, it may be epistemically justifiable to presume that strangers will act rightfully because if they do not, then they are subject to punishment or liability.

I argue that it is similarly irrational to believe that strangers in a state of nature will respect a testimonial 'deal of trust' struck with you when deceiving or misleading you may be to their advantage, whereas such a belief is rational in the civil condition where a

public authority imposes external penalties for breaches of such trust. The 'deal of trust' suggest a legal analogy. In a civil society, when I make an offer that you accept with consideration, I may then rationally presume that you will be motivated to perform on the contract thus formed despite knowing little or nothing about you or your business history. My reliance on your promise is rational because it rests on my presumption that the existence of the contract will motivate you to perform as promised, which is justified because I know that if you do not perform, then you will be subject to civil liability and enforcement. I am thus epistemically justified in believing that you will perform as promised. If what you have promised to do is to tell me the truth, then I am epistemically justified in believing what you tell me. In a state of nature, however, where public institutions to enforce such agreements do not exist, it seems irrational for me to presume that you would be motivated to keep your promise when or if it so happened that our agreement turned out to be to your detriment. My presumption is only rational if I have some evidence to justify the belief that the existence of our agreement would serve to motivate you (perhaps for ethical reasons) to perform as you agreed despite that doing so is to your detriment. Without such evidence that you are trust-responsive in this sense, your promise would seem of little worth, given that many would falsely make such unenforceable promises; therefore, I cannot justifiably rely on it. I may be ethically motivated to extend my trust in you anyway, of course, but I would have no *epistemic* justification to think you will perform.

Mere ethical duties of truthfulness seem a poor fit for underwriting assurance theory in another way. According to Kant, lying always violates a duty to oneself, since the maxim

of a lie when universalized thwarts the natural purpose of one's capacity of communication (DV, 6:429-430). The ethical duty to tell the truth thus holds whether an audience trusts a speaker or not. But the assurance theory of testimony depends crucially on the epistemically efficacious exercise of the normative *power* of trust, and what is needed is some account of the heightened duty speakers have to tell the truth to audiences who trust them. On a Kantian account of the duty of truthfulness, speakers have no more *ethical* reason to tell the truth in response to an audience's trust than at any other time. The speaker's relationship to the trusting audience—crucial to assurance theory—is irrelevant. The duty of veracity, on the other hand, like any other legal duty, is characteristically a narrow duty of right that is owed *to others* under precisely defined circumstances. Duties of veracity thus apply just when assurance theory requires them.

3.1 Instrumental reasons to tell the truth

Only some civil duties of truthfulness are typically explicitly present in extant regimes of public law; duties to avoid fraud, defamation, false warranty under contract, falsehoods in advertising, perjury, and a few others. Is an audience's presumption of speaker trust-responsiveness unjustifiable outside these categories of enforceable positive law? I argue that the presumption is still justifiable, for two reasons. First, I have argued that the duty of veracity is a 'formal' duty of right and, therefore, a *constitutional* requirement. The duty is therefore technically enforceable without explicit enactment into positive public law, in the same way that duties necessary to guarantee civil rights such as equal protection or due process are. Second, even if a legal duty of truthfulness such as the

duty of veracity is not likely to be enforced by public authority, I argue that such duties will nevertheless give speakers pause, since duties of right are those most likely to be enforced extra-judicially, whether by (illegal) force or by strong social censure. While the social costs that communities might impose upon speakers who violate strictly *ethical* duties of truthfulness do not appear to be enough to rationally warrant reliance upon them, the social costs such communities might impose upon speakers who violate duties of right may indeed be sufficient. Violations of rights, whether those rights are protected in positive public law or not, are intrinsically connected with grounds for rightful corrective retribution, according to Kant (see DR: 6:231), and give rise to sentiments of outrage and desires for revenge different in kind from merely ethical violations, according to Mill.[137] Hence speakers may have good instrumental reasons to hesitate to violate the duty of veracity even if it has not been enacted into positive law. Such reluctance seems to me to add just enough to establish the epistemic warrant for the audience's presumption that speakers will be trust-responsive when testifying to legally salient matters.

4. Formal epistemic rights

I have argued that the duty of veracity completes assurance theory by underwriting the reliability of testimony made in the deal of trust. I have thus defended assurance theory in a nonreductionist, evidentiary way, implicitly rejecting the idea that assurance theory is a *non-evidentiary* theory of testimony. In this final section, I will consider whether the duty of veracity might provide some support for the latter, stronger claim.

[137] See John Stuart Mill, *Utilitarianism*, ed George Sher (Indianapolis: Hackett, 1979), 50-52.

Recall that the deal of trust on the assurance theory consists in a bilateral exchange of a speaker's duty to tell the truth for the audience's duty to accept what it is told, with correlative rights. Kant describes a 'promise' (deal) made in similar terms, as a bilateral exchange of the promissor's duty of 'fidelity' to do what is promised for the promisee's duty of 'belief' (trust) that the promissor will perform as promised:

> Fidelity is always required in regard to him who promises something, so that he keeps to what was promised[;] belief, however, is required in regard to him to whom something is promised, namely, so that he accepts as true that the other will keep his promise. The two must be combined with each other… It also indicates a very bad mode of thought if one never trusts anyone in anything, but instead one wants to see everything that is promised and pledged to him present and fulfilled (LL: 193).[138]

If what is promised is to tell the truth, then Kant is describing the deal of trust. Kant argues that 'without fidelity and belief, no *republique*, no public affairs, would be able to exist' (LL: 193). Kant cannot mean here that everyone must perform *ethical* promissory duties of fidelity and belief, or else the civil condition is impossible. What Kant means, minimally, is that without the power to enter into enforceable contractual agreements with others that impose reciprocal duties of fidelity and belief, the civil condition is impossible. Kant's claim that *belief* that the promissor will perform is what is legally required of the promisee is striking. If the required belief is that the promissor-speaker

[138] Immanuel Kant. *Lectures on Logic*, translated and edited by J. Michael Young (Cambridge: Cambridge University Press, 1992).

(in the deal of trust) is telling the truth, then does Kant think this belief is *epistemically* justifiable?

Kant also appears to defend a default presumption of trust in testimonial belief by making an appeal to a standard of fairness:

> As for other things that concern the credibility and honorability of witnesses who make assertions about experiences they have obtained, everyone is taken to be honorable and upright until the opposite has been proved, namely, that he deviates from the truth. According to the well-known rule of fairness:
>
> *quilibet presumitar bonus;*
>
> *donex probetar contrarium.*
>
> [Everyone is presumed good until the opposite is proved.] (LL: 196).

Kant's justification for this presumption also does not appear to refer to evidence of its reliability, yet Kant appears to think making it is epistemically justifiable, given the 'rule of fairness.'

Can presumptions be *epistemically* justifiable without making any reference to evidence of their reliability? Consider Occam's razor again. Even if there were no evidence that simpler explanations are more likely to be correct, it may nevertheless be epistemically justifiable to prefer simpler explanations when possible. Perhaps it is generally rational to be conservative in positing new entities in one's theories, or perhaps simpler explanations are more elegant, or are capable of cohering better with other theories, or unify better with other explanations. The point is that a presumption need not always

refer to evidence of its *reliability* (i.e. its likelihood of being true) in order for it to nevertheless be epistemic justifiable. It may, instead, refer to standards of rationality. Such standards might apply absent defeating evidence that presumptions capturing them are unreliable, thus providing an epistemic but 'non-evidentary' reason to accept them as defaults.

I argue that an appeal to the civil community as also necessarily an epistemic one may provide a similar foundation for an epistemic but 'non-evidentiary' justification for the presumption of trust. Consider the widespread default presumption within scientific communities that data and results shared in published research can be replicated and have not been intentionally falsified. Some recent meta-studies of published scientific findings in certain fields have called this claim into some question. Suppose that there is no evidence that making this default presumption of trust will lead to more truth and less error. If a scientist nevertheless presumes that the results of a prior published study are true, and acquires new true beliefs that depend on that prior research, then her ensuing true beliefs do not appear to be merely lucky ones. The presumption appears to be epistemically justifiable by reference to its necessity in achieving the organizing purpose of scientific practice, but in a non-evidentiary way. The presumption in such a case seems not merely morally but epistemically justifiable because trusting the veracity of fellow scientists is a necessary condition for the success prosecution of scientific practice.

If the civil community can be understood to have a similar epistemic profile, then the presumption of speaker trust-responsiveness might be similarly epistemically justifiable

without reference to evidence that making it reliably yields truth. The assurance theory might then be described as 'non-evidentiary' in a non-trivial way. In Chapter four, I argued that the duty of veracity is a generally necessary condition for the normatively authoritative exercise of consent to public law, that is, for possible universal consent. I argued that such consent is impossible unless it is *informed*, which requires sufficient access to expert knowledge, which requires veracity. The duty of veracity and the correlative right to accept trusted testimony are therefore necessary *epistemic* conditions of possible consent to public law and authority. The civil condition is thus at once also an epistemic one by way of consent. Hence if I make the presumption of trust underwritten by veracity and then acquire new true beliefs as a result, my beliefs may not be merely lucky ones, for the same reason that the scientist who trusted prior research results acquired not merely lucky true beliefs but knowledge.

Consider the case of sworn testimony made in a court of law. Suppose there is no evidence that witnesses testifying under oath in official proceedings are more likely to tell the truth (i.e. are more reliable) than other witnesses. If a jury nevertheless presumes that such a witness tells the truth and the witness as a result does so, would the jury's true testimonial belief be merely lucky? The jury has a *juridically* motivating reason to presume that witnesses testifying in a court of law will be motivated to tell the truth in response to the court's trust, but is there any *epistemic* justification to presume that witnesses are trust-responsive in this way? If there is, then the reason is that if juries did not accept sworn testimony by default, then an *epistemic* condition for the formation of the civil state would fail. The default rule is rationally justifiable because it is necessary

to maintain not just a civil condition but a civil condition that is also an *epistemic* condition. The civil community is one with a certain epistemic profile, and acting in accordance with duties and rights necessary to maintain that profile are therefore epistemically justifiable, even if there is no evidence that doing so actually reliably results in true beliefs. Hence if sworn witness testimony turns out to be true, then the jury's true belief is not lucky in the sense that it is epistemically unjustifiable.

Conclusion

If the assurance theory is accurate as to why and how testimony generates knowledge, then testimony (tellings) outside civil contexts might appear rarely to do so, simply because we probably ought *not* to presume that our trust in those who tell us things will motivate them to in fact try to be trustworthy. Too many people would lie or mislead others in order to achieve their goals, and they do so precisely by assuring us that what they tell us is true, cultivating and violating our trust in them. Epistemically then we would seem better off always requiring speakers to produce evidence to back up their claims, or if that is not possible, then at least evidence of their credibility. When speakers insist that we ought to simply believe them, and perhaps resent our inquiries into their trustworthiness, then that would seem to raise alarms.

But the belief that speakers will respond to our trust by telling the truth seems justifiable in cases where speakers are otherwise subject in principle to civil liability or culpability for their lies, that is, to a duty of veracity. Moreover, there may be some reason to think

that the presumption of trust-responsiveness that the duty of veracity underwrites in the civil condition can be justified epistemically in a way that is not 'evidentiary' in the sense that the presumption leads to reliably true belief. If so, then the duty of veracity resolves a puzzle central to making sense of the assurance theory of testimony. The assurance theory also gives the duty of veracity its basic shape: one has a juridical duty of veracity to tell the truth in the deal of trust.

CHAPTER 7

MILL SOCIAL-EPISTEMIC RATIONALE FOR THE FREEDOM OF DISCUSSION

In *On Liberty*, John Stuart Mill argues that we must respect others' absolute rights of free discussion because we can never be 'certain' that our own opinions are true.[139] Since opinions that dissent from our own might always turn out to be true, Mill says, we must not censor dissent; otherwise, we 'assume our own infallibility.'[140] Yet in his major work on epistemology and the philosophy of science, *A System of Logic Ratiocinative and Inductive*, Mill says that scientific knowledge can indeed be proven 'certain' and sets out inductive and deductive methods by which such proof might be achieved.[141] Universal laws of nature such as Newton's laws of motion can be proven certain, according to Mill.[142] In a second branch of argument in *Liberty*, Mill also argues that we

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[139] John Stuart Mill, *On Liberty* (1859) in *Essays on Politics and Society*, J.M. Robson, ed., *The Collected Works of John Stuart Mill*, vol. 18 (Toronto, 1977), 229.

[140] Mill, *Liberty*, 258.

[141] John Stuart Mill, *A System of Logic Ratiocinative and Inductive* (1872), 8th edition, in J.M. Robson, ed., *Collected Works of John Stuart Mill*, vol. 7 (Toronto, 1974), 571; see generally book three ('Of Induction'), 283-640, and chapters 8-11, 388-464, for the methods. See Struan Jacobs, 'From *Logic* to *Liberty*: Theories of Knowledge in Two Works of John Stuart Mill,' *The Canadian Journal of Philosophy* 16, no. 4 (1986), 751-67, at 754-63; see also Struan Jacobs, 'Misunderstanding John Stuart Mill on Science: Paul Feyerabend's Bad Influence,' *The Social Science Journal* 40 (2003), 201-12, at 204–5.

[142] Mill, *Logic*, 570-71.

must be able to completely defend our true opinions in critical debate in order to justify them; otherwise, we do not 'in any proper sense of the word' know what we claim to know.[143] Yet Mill concedes that most people could not defend even basic scientific knowledge in such a debate;[144] and indeed, it may turn out that few could rebut the ingenious objections that a clever flat-earther might raise, much less those that might be raised against the conclusions of climate science or to evolutionary theory.[145]

It appears, then, that either 1) Mill must not intend the epistemic arguments for the right of free discussion in *Liberty* to apply to proven scientific knowledge, or alternatively, 2) Mill abandons or substantially revises the verificationist philosophy of science he had set out in *Logic* for some new, critical epistemology and philosophy of science in *Liberty*. Neither alternative is satisfactory, however. On the one hand, in *Liberty* Mill intends to

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[143] Mill, *Liberty*, 245.

[144] Mill, *Liberty*, 246.

[145] Consider, for example, the following simple objection to the theory of the round earth: While it is true that with the naked eye on a clear day one may seem to observe a departing ship at sea gradually descend below the horizon until it is no longer visible, it is also true that if, after the ship becomes no longer visible with the naked eye, one then attempts to observe the ship with a telescope, the ship will be rendered fully visible again. This visibility by telescope occurs, moreover, at a distance (about six miles out) at which the curvature of the putatively round earth should, as a matter of simple geometry, block a direct line of sight to the ship. How can this be, asks the clever flat-earther, if the earth is indeed round? Must one be able to answer this objection, as well as any other objection that flat-earthers might raise, in order to claim to know that the earth is round? For a historical account of the controversy surrounding such an objection and its expert refutation, see Christine Garwood, *Flat Earth* (Macmillan 2007), 104–125.

defend the 'absolute freedom of opinion and sentiment on all subjects, practical or speculative, *scientific*, moral, or theological' and adduces Newton's physics prominently among his examples; and on the other hand, it seems unlikely that Mill would abruptly overturn the carefully crafted philosophy of science of *Logic* in an *ad hoc* way in *Liberty*, and without comment elsewhere.[146] A plausible interpretation of Mill's claims in *Liberty* should preserve both Mill's intention to defend an absolute freedom of discussion as well as maintain a reasonable level of consistency between the philosophy of science of *Logic* and that latent in *Liberty.* It should also rebut the simple but potent objections Mill himself raises to his epistemic argument for free discussion in *Liberty*.

I argue that in *Liberty* Mill distinguishes two kinds of epistemic warrant for expert knowledge: 1) a direct evidentiary warrant that experts such as scientists hold that verifies their knowledge 'proper,' and 2) a *social,* testimonial warrant that non-experts hold for what Mill refers to as their 'rational[ly] assur[ed]' opinions.'[147] In *Liberty,* Mill does not argue that knowledge can never be verified or proven true *to experts* such as scientists; instead, Mill argues that in the absence of the freedom of discussion, *non-experts* cannot establish a 'rational assurance' that the opinions that experts report to them as proven knowledge are indeed true and completely justified. When objections to proven expert knowledge are censored, Mill argues, *non-experts* cannot rationally be certain that experts have considered and satisfactorily answered any given objection

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[146] Mill, *Liberty*, 225, emphasis added. See Jacobs, 'From *Logic* to *Liberty*', 766-67.

[147] Mill, *Liberty*, 245, 231. Most epistemologists would characterize such rationally assured opinions as knowledge, since they are both true and (socially) warranted. Mill tends to reserve the term 'knowledge' for true opinions held with the direct warrant, however.

because the objection and its answer would be censored. Hence an absolute freedom of discussion is necessary to underwrite the non-expert *social* warrant for proven expert knowledge, Mill argues. Moreover, while experts do need to be familiar with objections in order to fully comprehend direct warrants for expert knowledge, Mill does not insist that non-experts be able to defend expert knowledge from all objections in order to nevertheless hold good social warrants for that knowledge.

Mill breaks the argument in Chapter Two of *Liberty* into two distinct 'branch[es]' that roughly correspond with traditional epistemological concerns for the truth and justification of knowledge, respectively.[148] In the two main sections of this paper that follow, I review the dialectic of each branch of Mill's argument in turn. My aim is to show how Mill distinguishes a social-epistemic rationale for the freedom of discussion in the course of making responses to common but potent objections. I begin each main section with a brief introductory synopsis.

[148] Mill, *Liberty*, 229. In the first (truth) branch, Mill supposes that censored opinions might be true, whereas in the second (justification) branch, Mill supposes the opposite, that censored opinions are entirely false (Mill, *Liberty*, 229, 243). I omit Mill's third 'case' where Mill supposes that opposing opinions each capture part of a truth approached dialectically (see Mill, *Liberty*, 252-57). Unlike in his first two cases, Mill makes no references in this third case to expert scientific knowledge, and it is reasonable to conclude that Mill intends the argument there to apply only to the moral or normative forms of knowledge that are Mill's primary focus in *Liberty (*see Jacobs, 'From *Logic* to *Liberty*,' 766).

1. The truth and fallibility branch

In the first (truth) 'branch' of Mill's argument in Chapter Two of *On Liberty*, Mill does not argue that scientific knowledge can never be proven true.[149] Mill argues, instead, that expert scientists who comprehend the proof of scientific knowledge can indeed have 'complete' assurance of its truth, but that in the absence of a right of free discussion, 'mankind' (non-experts) could not have 'as complete assurance,' implicitly suggesting a social-epistemic rationale for the freedom of discussion of such knowledge.[150] Mill suggests this social-epistemic rationale soon after conceding that one need not have 'absolute' or infallible certainty in one's beliefs in order to nonetheless have a rational assurance of their truth sufficient for practical purposes.[151] Such rational assurance cannot be established without the freedom of discussion, Mill argues, which is not merely instrumental toward that assurance but a *necessary condition* for establishing it.

1.1 Mill's basic argument

History shows that all human knowledge is fallible, Mill observes, since we would now reject as absurdities many of the opinions that in past eras were regarded as settled truths.[152] Since we cannot be absolutely certain that even our most well-established opinions are true, Mill argues, we should not censor contrary opinions simply because we

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[149] This branch of argument is at Mill, *Liberty*, 229-43.

[150] Mill, *Liberty*, 232.

[151] Mill, *Liberty*, 231.

[152] Mill, *Liberty*, 231.

deem them false.[153] But one might reasonably object, Mill says, that while we cannot be absolutely certain our opinions are true, we can nevertheless be practically certain of many of them.[154] While all our knowledge is fallible, a rational recognition of that fallibility for practical purposes does not require us to have absolute certainty that our opinions are true. When governments or social authorities act to censor what they are practically certain are false opinions, the objection continues, they are acting on their opinions in a way that is no different from how anyone acts in light of what he or she rationally believes is true.[155]

Mill concedes the first part of this objection—that one need not have absolute certainty in one's opinions to nonetheless establish a practical assurance of their truth—but insists that acting to censor dissent is a special case of action because the liberty to criticize an opinion is the 'very condition which justifies us in assuming its truth for purposes of action.'[156] Hence censoring dissent destroys any rational assurance that we might otherwise have that our opinions are true, Mill claims.

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[153] Mill, *Liberty*, 230.

[154] Mill, *Liberty*, 230-31. As Mill puts the objection, 'There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of human life' (Mill, *Liberty*, 231). Mill rejects the 'intuitionist' view that some scientific or mathematical claims can be deduced *a priori* and so known infallibly, or with 'absolute' certainty. See subsection ('Two Epistemologies?') below.

[155] Mill, *Liberty*, 231.

[156] Mill, *Liberty*, 231.

1.1 A necessary condition for rational assurance

Now, if Mill's argument for freedom of discussion were that the lack of absolute certainty in our knowledge makes censorship *unreliable*, then one might raise the decisive objection that censorship need not be infallible to nevertheless substantially improve the veritistic mix of true and false opinions circulating in society. Even if we allow that mistakenly censoring a true opinion might corrupt that veritistic mix more than would permitting the free circulation of a false opinion—perhaps because of the distinctively negative critical power of free discussion to correct false opinions[157]—then, even so, a sufficiently conservative censorship regime should still lead to more truth and less error than would a regime that guarantees the absolute right of free discussion.[158]

But Mill does not argue that a regime that guarantees the absolute freedom of discussion instrumentally promotes truth better than would any competing regime that attempts to censor false claims. Mill argues, instead, that freedom of discussion is a *necessary condition* for establishing any rational assurance that our opinions are true:

> Complete liberty of contradicting and disproving our opinion is the very *condition* which justifies us in assuming its truth for purposes of action; and on no

[157] See Mill, *Liberty*, 231-32.

[158] This general point has been made by many readers of Mill's argument. For example, David Brink reviews the objection and adds, 'We would be on good ground in censoring flat-earthers' ('Mill's Deliberative Utilitarianism,' *Philosophy & Public Affairs* 21(1) (1992), 67-103, at 86). See also *Mill*, ed. Alan Ryan (New York: Norton 1977), xxxiv.

other terms can a being with human faculties have *any* rational assurance of being right.[159]

According to Mill, then, even the most conservative censorship regime would necessarily deprive us of 'any' rational assurance we might have had of the truth of remaining uncensored knowledge claims. The complete liberty to discuss even groundless opinions (such as that the earth is flat) is, according to Mill, the 'very condition' that grants us any practically rational assurance that our well-established contrary opinions (such as that the earth is round) are true. How are we to make sense of this claim?

1.2 Two epistemologies? *Logic* and *Liberty*

It is important at this juncture to recognize the profound tension between the negative or critical epistemology that Mill appears to espouse in this branch of his argument in *Liberty* and the positive, proof-driven philosophy of science that Mill defends at length in *Logic.*[160] Here in *Liberty* Mill seems to argue that human fallibility implies that our only test for a claim's truth is that it has withstood free criticism over time. We may merely presume a claim to be true, Mill says, when 'with every opportunity for contesting it, it has not been refuted.'[161] Hence for Mill in *Liberty* it would seem that no scientific claim

[159] Mill, *Liberty*, 231, emphases added.

[160] See Jacobs, 'From Logic to Liberty,' 752-54; see also Jacobs, 'Misunderstanding,' 204–5. Traditionally, Mill has suffered a poor reputation as a systematic thinker, and 'revisionists' in Mill studies such as Alan Ryan have labored to resolve this and other apparent inconsistencies across Mill's vast collection of writings (see Alan Ryan, *John Stuart Mill* (New York: Random House, 1970, Introduction, pp xi-xx).

[161] Mill, *Liberty*, 231.

could ever be positively proven, since there is always the possibility that the claim might be refuted in the future. Some therefore take Mill's (implicit) philosophy of science in *Liberty* to anticipate Karl Popper's fallibiilsm or perhaps even Paul Feyerabend's 'anarchic' pluralism and epistemological relativism in science.[162]

In *Logic*, however, Mill maintains that some scientific claims can indeed be positively proven true and sets out inductive and deductive methods whose purpose it is to achieve such proof.[163] These include experimental methods of induction by 'elimination' such as the 'method of difference,' and a 'deductive method,' among others.[164] We arrive by enumerative induction at the 'universal' law of causation, Mill says, which is 'certain' and 'is capable of imparting its certainty to all other inductive propositions which can be deduced from it,' such as Newton's laws of motion.[165] In *Logic* Mill refers to Newton's

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[162] See Alan Ryan, *J.S. Mill* (London: Routledge & Kegan Paul, 1974), 138, cited in Jacobs, 'From Logic to Liberty,' 753. Jacobs reviews and rejects Ryan's view that *Liberty* champions a version of Popperian fallibilism about science.

[163] Mill, *Logic*, 571, 314, 324; see Jacobs, 'From Logic to Liberty,' 755-56, and 754-65; see also Jacobs, 'Misunderstanding,' 202-203.

[164] Mill, *Logic,* 569, 393, 397, 461. These are the methods Mill thought potent enough by themselves to remove any reasonable possibility that a claim might be refuted in the future; for example, Mill refers to the 'rigorous certainty' the method of difference yields (Mill, *Logic*, 397; see Jacobs, 'From Logic to Liberty,' 755-56). Mill subsequently came to appreciate the importance of hypotheses to science, as well, and added a 'hypothetical method' in later editions of *Logic* (see Struan Jacobs,,'Mill on Induction and Hypotheses,' *Journal of the History of Philosophy* 29 (1991), 69–83; see also Geoffrey Scarre, 'Mill on induction and scientific method' in J. Skorupski, ed., *The Cambridge Companion to Mill* (Cambridge, 1998), 127-135).

[165] Mill, *Logic*, 571.

physics as the 'true theory of the causes of the celestial motions' and regards it as an exemplar case of scientific knowledge proven with such methods.[166]

Some argue, therefore, that Mill abandons the proof-driven, verificationist epistemology of science he had set out in *Logic* in order to embrace an anticipatory form of Popperian fallibilism (or perhaps even a Feyerabendian pluralism) about scientific knowledge in *Liberty*.[167] The exegetical conflict is easily misunderstood, however. Mill's arguments in

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[166] Mill, *Logic*, 461. While some may think this view embarrasses Mill, one should keep in mind that Newton's laws of motion remain verifiably true within specifiable limits of (low) gravity and speed. Any philosophy of science that would dismiss Newton's laws as refuted falsehoods is much too simplistic.

[167] Paul Feyerabend ignores *Logic* and celebrates Mill in *Liberty* as setting out a form of methodological pluralism and epistemological relativism in science, thus intensifying the exegetical conflict with *Logic*, which Feyerabend acknowledges exists (see Paul Feyerabend, *Against Method,* 3rd edition (New York, 1993), Chapter Four, p.31-32, especially 34n2, 39; 152; see also Jacobs, 'Misunderstanding'). Steffen Ducheyne contends that the history of the revisions Mill made between early and late editions of *Logic* show that the 'late Mill' of *Liberty* shifted to a 'fallibilist epistemology' for science in late editions of *Logic* (Steffen Ducheyne, 'J.S. Mill's Canons of Induction: From True Causes to Provisional Ones,' *History and Philosophy of Logic* 29 (Nov. 2008), 361-76, 362). Ducheyne cites Jacobs ('Mill on Induction,' 1991) as support for this contention, but Jacobs specifically rejects it in more pertinent articles. Jacobs points out, for example, that Mill maintains the claim that inductive methods of proof yield 'certain' knowledge throughout all eight editions of *Logic* (Jacobs, 'Misunderstanding', 202; see also Jacobs, 'From Logic to Liberty,' 765). The minor changes that Mill makes to later editions of *Logic* concerning the certainty of proven scientific claims (e.g., from their 'absolute' certainty to their 'certainty' *tout court*), Jacobs explains, reflect Mill's continuing efforts to distinguish his empiricism from that of contemporary intuitionists for whom scientific laws were 'absolutely' certain (see Jacobs, 'From Logic to Liberty,' 754-763; see also Jacobs,

Logic (or in *Liberty)* are in no way responsive to Hume's skepticism about inductively proven knowledge, which Mill did not take seriously.[168] Mill's main concern in *Logic* (continuing in *Liberty*) was, instead, to repudiate the infallible or 'absolute' certainty that contemporary 'intuitionists' such as William Whewell thought was possible.[169] Mill presses his case against the intuitionists by arguing that not even simple truths of arithmetic or geometry can be deduced a priori and so known infallibly, but must be learned inductively and so can be known only fallibly.[170] Mill's usage of 'fallibility' in

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'Misunderstanding,' 202-203).

[168] See Geoffrey Scarre, *Logic and Reality in the Philosophy of John Stuart Mill* (Boston, 1989), chapter four, especially 82-88; see also Scarre, 'Mill on induction,' 116-125. Scarre's discussion intimates that Mill's failure to engage seriously with Humean skepticism may constitute a significant flaw in Mill's philosophy of science, but I do not address the issue here.

[169] See Ryan, *John Stuart Mill*, xii-xiii; see also note 30 above. Repudiating intuitionism was also Mill's prime concern in *An Examination of Sir William Hamilton's Philosophy* in J.M. Robson, ed., *The Collected Works of John Stuart Mill*, vol. 9 (Toronto, 1979). There, Mill attacks Hamilton's intuitionism and, in the course of doing so, defends his own reductive phenomenalism, which is the metaphysical view that reality reduces to sensations or the possibilities of sensation, and that assertions about reality are thus complex counterfactuals about what sensations would follow from others. Mill's polemics in *Examination* against intuitionism should not be understood to contradict his proof-driven epistemology of science in *Logic*, which Mill says is compatible, at any rate, with a number of different metaphysical views on the nature of reality (*Logic*, 62n7). Mill refers in passing in *Examination*, for example, to the natural 'system of which Newton discovered the laws' and marvels at how Newton had 'partially unravelled' a portion of the universe (*Examination*, pp.489-499). In all of his works, including in the *Examination*, Mill consistently maintains that Newton's laws of motion have been proven to be true.

[170] *Logic*, book two, chapter 5-6, 224-62. In his *Autobiography*, Mill is explicit that his motivation for making this claim is to 'drive [intuitionism] from its stronghold' in mathematics and in the physical

Logic and in *Liberty* is thus the complement of the intuitionists' 'infallibility' and has little to do with Humean skepticism or with Popper's responsive brand of 'fallibilism.' For Mill, rigorously proven claims such as Newton's laws of motion or the Pythagorean theorem is no less certain for its 'fallibility.'

But while the exegetical conflict between *Logic* and *Liberty* is not properly drawn over Mill's varying responses to Humean skepticism about inductive proof, the conflict between the works is no less acute. For if Popperian methods of conjecture and refutation preclude proof of the certainty of scientific knowledge, the loose method of negative criticism that Mill adumbrates in *Liberty* seems even less capable of establishing it. Hence the critical problem persists: How can it be the case both that 1) a censor might hold scientific knowledge that has been rigorously proven to be true, and yet that 2) censoring dissent would destroy *any* rational assurance we might have had of the truth of that very knowledge? That is, equivalently, how is the absolute freedom of discussion a necessary condition for having any rational assurance that scientific knowledge has indeed been proven true?

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sciences (John Stuart Mill, *Autobiography and Literary Essays* in J.M. Robson, ed., *The Collected Works of John Stuart Mill*, vol. 1 (Toronto, 1981), 232-233; see Ryan, *John Stuart Mill,* xiii). Mill's claim accords with his thoroughgoing naturalism, however (see Phillip Kitcher, 'Mill, mathematics, and the naturalist tradition,' in J. Skorupski, ed., *The Cambridge Companion to Mill* (Cambridge, 1998).

1.3 The social-epistemic rationale

After arguing that free discussion and criticism is a necessary condition for us to have any rational assurance of the truth of our opinions, Mill continues with the following remarks that refer explicitly to proven scientific knowledge:

> If even the Newtonian philosophy were not permitted to be questioned, mankind could not feel as complete assurance of its truth as they now do. The beliefs which we have most warrant for have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded.[171]

I propose the following social-epistemic reading of this important passage, one that harmonizes the discordant epistemologies of *Liberty* and *Logic* and accords with similar points Mill will make subsequently in the second (justification) 'branch' of his argument in *Liberty* (see section two).[172] Mill here implicitly distinguishes between the *social,* testimonial warrant that non-expert 'mankind' holds for the truth of the knowledge 'they' have and the *direct*, evidentiary (non-testimonial) warrant that an expert scientist such as Newton holds for his knowledge. The expert natural philosopher Newton holds direct, empirical evidence that provides him with complete assurance of what he knows in physics, in accordance with the epistemology Mill set out in *Logic*.[173] But non-expert

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[171] Mill, *Liberty*, 232.

[172] Compare my reading with that of Jacobs, who regards it as problematic because it appears to apply the negative, critical epistemology of *Liberty* directly to scientific knowledge, while Jacobs argues that in *Liberty* Mill treats only normative or 'non-empirical' knowledge claims (Jacobs, 'From *Logic* to *Liberty*,' 765). The social-epistemic reading resolves the exegetical problem.

[173] Mill regarded Newton's physics as an exemplar proven scientific knowledge (Mill, *Logic*, 461). See note 27.

members of mankind do not possess the direct warrant for Newton's physics and, instead, hold (primarily) only the testimonial warrant for Newton's physics that rests on the 'safeguard' of the absolute freedom to discuss objections and evidence. Hence while 'mankind' (which also includes Newton and other experts) does have 'complete' assurance of the truth of Newton's physics because of the direct warrant, this assurance would not be 'as complete' in the absence of the additional social warrant underwritten by the right of freedom of discussion. Mankind cannot feel '*as complete* assurance' of the truth of Newton's physics, Mill says, in the absence of the freedom to criticize it.[174]

Mill should not be understood in this passage to suggest that the direct warrant for the truth of scientific knowledge such as Newton's physics is established by its ability to withstand free criticism over time. Mill had already set out in *Logic* the methods by which scientists such as Newton establish direct warrants for their knowledge. Mill's point is that even when scientific knowledge has been proven true by the systematic application of such methods, the *social* warrant that 'we' (non-experts) hold for the truth of that knowledge still depends on our freedom to dispute it. Direct and social warrants for expert scientific knowledge have different necessary and sufficient conditions. Without the freedom to dispute expert knowledge, we non-experts cannot establish a rational assurance that the opinions that expert scientists report to us as knowledge have indeed been proven true, Mill claims.

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[174] Mill's characterization of certainty here as being comparatively more or less 'complete' echoes similar usage in *Logic*; for example, Mill says, 'We may...regard the certainty of that great induction [the law of causation] as not merely comparative, but for all practical purposes, complete' (Mill, *Logic*, 573).

Mill does not elaborate here precisely how this social-epistemic dependence might work, but what Mill has in mind becomes clearer when he makes the same point again more explicitly in the second (justification) branch of his argument. I now turn to that branch. I again begin with a brief introductory synopsis before reviewing the dialectic of Mill's argument with objections and responses.

2. The Justification Branch

In the second (justification) branch of Mill's argument in Chapter Two of *On Liberty*, Mill argues that we lack justification for what we believe unless we have a complete understanding of the grounds and evidence both for and against our opinions, which we can achieve only through a robust debate with critics.[175] But then Mill *concedes* the objection that this requirement for justification is too strenuous because it entails that most people would have few if any warranted beliefs, as most people lack the time or ability to thoroughly review and understand all the evidence and argument relevant to their opinions. Mill, therefore, recasts his argument for an absolute right of free discussion social-epistemically. Instead of insisting that we (non-experts) must be able to completely vindicate our true opinions in critical debate, Mill allows that we could learn the main evidence for our opinions ourselves but then complete the warrant for our true opinions socially by rationally relying upon knowledge domain experts who have explored and rebutted all objections to expert knowledge. The right of free discussion is necessary to underwrite this social warrant, Mill argues.

[175] This branch of argument is at Mill, *Liberty*, 243-52.

2.1. Mill's basic argument

To have 'proper' knowledge of a truth, Mill argues, one must struggle with the best reasons both for and against the true opinion: 'he who knows only his own side of the case, knows little of that,' Mill says.[176] Mill insists, moreover, that it is not enough that one merely listen to teachers who present objections together with immediate refutations; one must struggle with the best counterarguments and puzzles as earnest critics might raise them in order to 'bring them into real contact with [one's] own mind.'[177] Since such critical discussion is rare, however, Mill asserts that consequently 'ninety-nine in a hundred of what are educated [persons]...do not in any proper sense of the word, know the doctrine which they themselves profess.'[178] Hence there should be an absolute right of free discussion of dissenting arguments and opinion, Mill argues, even if we assume, as Mill does in this 'branch' of argument, that dissenting opinions are false.

2.2 The strenuousness objection

But one might object, Mill says, that most people ('mankind in general') cannot learn complete justifications for all of their true opinions, as they have neither the time nor likely the capability to learn everything that an expert such as a scientist must learn in order to properly warrant what he or she believes.[179] People in general (non-experts), the objection goes, need not be able to respond to 'all the misstatements or fallacies of an

[176] Mill, *Liberty*, 245.

[177] Mill, *Liberty*, 245.

[178] Mill, *Liberty*, 245.

[179] Mill, *Liberty*, 246.

ingenious opponent' who attacks proven expert knowledge but, instead, 'it is enough if there is always somebody capable of answering them.'[180] While people in general ought to learn the main grounds for their opinions, the objection continues, they must ultimately trust that experts have considered all objections that might be raised to true opinions and have answers for them.

Mill *concedes* this objection, although somewhat reluctantly, characterizing it as one that an 'enemy of free discussion' might make.[181] Mill in fact had set out and endorsed the objection himself in an early essay, 'The Spirit of the Age:'

> [Those experts who] dedicate themselves to the investigation and study of physical, moral and social truths...can alone be expected to make the evidences of such truths a subject of profound meditation, and to make themselves thorough masters of the philosophical grounds of those opinions of which it is desirable that all should be firmly persuaded, but which they alone can entirely and philosophically know. The remainder of mankind must...take the far greater part of their opinions on all extensive subjects upon the authority of those who have studied them.[182]

In *Spirit* Mill did not think that such trust in expert authority is irrational, however, nor that it should be given without any independent consideration of the evidence. Mill argues, instead, that each individual should learn the basic grounds for her opinions to the

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[180] Mill, *Liberty*, 246.

[181] Mill, *Liberty*, 246.

[182] John Stuart Mill, 'The Spirit of the Age, II' (1831) in *Newspaper Writings*, J.M. Robson, ed., *The Collected Works of John Stuart Mill*, vol. 23 (Toronto, 1986), 242.

extent she can, '[b]ut, when all is done, there still remains something which they must always and inevitably take upon trust: and this is...that every objection which can suggest itself has been duly examined by competent judges, and found immaterial.'[183] Mill endorses a similar idea in his later *Principles of Political Economy*, where he argues that while the lower classes of society will increasingly govern themselves as they become better educated, '[i]t is quite consistent with this, that they should feel respect for superiority of intellect and knowledge, and defer much to the opinions, on any subject, of those whom they think well acquainted with it.'[184] In both *Spirit* and *Principles*, Mill appears to envision an extended warrant for one's knowledge that combines one's own understanding with a rational reliance upon the testimony of expert sources.[185]

Whether and to what extent one must rationally rely on trusted expert sources to complete the extended warrant for one's true opinions socially seems largely a matter of the degree of expertise required to fully comprehend direct, evidentiary justifications of those opinions. In *Spirit* Mill appears to assume that 'moral' or 'social' knowledge, like scientific ('physical') knowledge, requires a significant degree of expertise to acquire. But Mill is considerably more skeptical about moral expertise in later works such as *Liberty*, and that is why Mill characterizes the objection here as one an 'enemy of free discussion' would make. If moral knowledge is not subject to expertise, then the

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[183] Mill, 'The Spirit of the Age,' 243.

[184] John Stuart Mill, *Principles of Political Economy* in J.M. Robson, ed., *The Collected Works of John Stuart Mill*, vol. 3 (Toronto, 1986), 764-65.

[185] For an analytic account of extended epistemic warrants that may be similar to what Mill has in mind, see Paul Faulkner, 'The Social Character of Testimonial Knowledge,' *The Journal of Philosophy* 97, no. 11 (2000), 581-601.

objection must fail for such knowledge, and Mill's basic argument for free discussion applies. The objection thus assumes moral expertise, perhaps somewhat disingenuously. Mill never doubts the possibility of *scientific* expertise, however, and the objection must thus be conceded with respect to expert scientific knowledge.

2.3. Mill's response: the social-epistemic rationale

Most people could not be expected to learn the complete grounds of expert knowledge such that they could answer every reasonable objection, Mill concedes. But Mill insists that the argument for an absolute right of free discussion 'is no way weakened' and recasts it social-epistemically:[186]

> [M]ankind ought to have a rational assurance that all objections have been satisfactorily answered; and how are they likely to be answered if that which requires to be answered is not spoken? or how can the answers be known to be satisfactory, if the objectors have no opportunity of showing that it is unsatisfactory?[187]

Mill argues here that (non-expert) 'mankind' can have no rational assurance of the justification of (expert) knowledge without the guarantee of the right of free discussion and criticism; otherwise, Mill asks, how could non-experts have any rational assurance that experts have been exposed to all the relevant reasons for and against their opinions and so possess sufficient justification for them? Under a regime of censorship, some objections cannot be spoken, Mill says, and while many censored objections may be

[186] Mill, *Liberty*, 246.

[187] Mill, *Liberty*, 246.

irrelevant to the warrant for expert knowledge, non-experts (by definition) cannot judge whether censored objections undermine expert justifications or not. When any objections are censored, then, non-experts can no longer have a rational assurance that experts have answers for them, Mill argues. Freedom of discussion is therefore a necessary condition for the rational assurance that non-experts have that expert opinions are completely warranted.

By contrast with 'mankind in general,' Mill says, experts 'even in natural philosophy' (i.e., science) must consider all objections to expert knowledge in order to properly justify what they know:[188]

> [P]hilosophers and theologians [viz., experts] must be familiar with the most difficult puzzles and arguments against their view, but they cannot be unless they are freely stated and in their most advantageous light.[189]

Mill thus distinguishes the direct warrant that expert 'philosophers' possess for their knowledge from the *social,* testimonial warrant that non-expert members of 'mankind' hold, where the latter warrant rests in large part on the rational assurance that 'all objections have been satisfactorily answered' by experts. While experts must be familiar with all objections telling against their knowledge, Mill says, *non-experts* need not be to establish a sufficient level of rational assurance that expert testimonial knowledge is completely justified. But non-experts can have no such rational assurance that experts

[188] Mill, *Liberty*, 244.

[189] Mill, *Liberty*, 246.

have considered the most difficult objections in the absence of an absolute right of freedom of discussion, Mill argues.[190]

Direct and social warrants for expert knowledge such as scientific knowledge are therefore established in different ways for Mill, and free discussion plays a different role for each. Direct warrants for scientific knowledge are established by systematically applying the inductive methods of proof that Mill had set out in *Logic*. But 'even in natural philosophy,' Mill says, where knowledge can be completely proven true using such methods, scientists still must be able to freely discuss and answer critical objections in order to fully justify and so 'properly' know what they know. Only mathematical knowledge (e.g., of geometry), Mill says, can be fully comprehended without considering any competing arguments or evidence at all.[191]

Social, testimonial warrants for expert scientific knowledge, on the other hand, depend on free discussion in a different way, according to Mill. Since non-experts cannot be expected to learn complete justifications for expert knowledge, they must to some significant degree rely on expert testimony to warrant their true opinions. Such reliance is irrational, however, in the absence of the absolute right of free discussion, Mill argues,

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[190] When Mill speaks of experts such as 'philosophers,' his meaning is often ambiguous as to whether he means individual experts or the *community* of experts. It would appear to be sufficient for the social warrant that someone in the *community* of experts is able to answer any given objection, not that every expert in the community is able to answer every objection (see Faulkner, 'The Social Character of Testimonial Knowledge,' 597-601).

[191] Mill, *Liberty*, 244. Mill does not imply that such truths are known infallibly, however (see previous note 33).

because when any objections are censored, non-experts can then have no rational assurance that experts have heard all reasonable objections and have answers for them. An absolute right of freedom of discussion is therefore necessary to underwrite social warrants for expert knowledge, Mill claims.

2.4 A right of free discussion for experts only?

Now, one might wonder whether a fully public freedom of discussion is necessary to socially warrant expert knowledge. Suppose that censors allow experts to discuss objections in private and then let the experts decide which objections ought to be censored from public discussion. Under such a regime, non-experts presumably might retain their rational assurance that expert knowledge is completely justified, since experts would be free to discuss all objections and evidence in private. Thus one might wonder whether a right of free discussion restricted to experts only might be sufficient to underwrite the social warrant that non-experts hold for proven expert knowledge.

Mill anticipates this objection in the next step of his argument in *Liberty*, when he considers the Catholic Church's practice of allowing clergy to read heretical works forbidden to the laity.[192] Mill rejects the Catholic practice as incompatible with what he characterizes as a more independently-minded Protestant religious culture.[193] Mill then argues that 'in the present state of the world,' it would be practically impossible to keep

[192] Mill, *Liberty*, 246.

[193] Mill, *Liberty*, 246.

speech and writings intended only for experts away from the public.[194] Any attempt to do so, Mill adds, would impede the expert community's ability to consider objections to true opinions.[195]

Mill's response may seem unsatisfying because one might think that in the present state of our own world, advanced technologies could very well enable an expert censorship regime refined enough to practically insulate the public from debates conducted within expert knowledge communities, while at the same time allowing experts access to all objections and evidence relevant to that debate. Moreover, Mill's appeal to the contrast between Catholic and Protestant religious cultures may seem parochial and unduly limiting. But Mill's point, I take it, is not that it is practically or technically impossible to restrict written works critical of official views in a modern society but, instead, that it is practically impossible do so in a way that would preserve social warrants for expert knowledge.

Suppose the scientific community of climatologists were to determine in a private debate that sunspots and solar wind cannot account for geologically recent global warming, which climatologists have proven is caused by anthropogenic greenhouse gas emissions.[196] Suppose a government authority on the advice of climatologists then censors the sunspot hypothesis of global warming because it is false and misleading. If

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194 Mill, *Liberty*, 246-47.

195 Mill, *Liberty*, 247.

196 See 'The Role of Sunspots and Solar Winds in Climate Change,' EarthTalk, *Scientific American* <https://www.scientificamerican.com/article/sun-spots-and-climate-change> (2017).

that censorship were not completely effective, then the sunspot hypothesis would circulate uncertainly in the background of public discussion, and non-experts encountering the hypothesis (communicated perhaps in hushed whispers or by sharing banned writings) would wonder whether it has any merit and whether experts had evaluated it.[197] Experts could not satisfactorily address such concerns, however, without the freedom to publicly discuss the sunspot hypothesis. Even if censorship were completely effective in blocking discussion, motivated or curious non-experts might still spontaneously conceive the sunspot hypothesis and wonder whether expert climatologists had considered it. Such doubts would undermine the social warrant for expert knowledge of anthropogenic global warming because non-experts would have no way of knowing whether experts had answered those doubts within the expert community's private debate.

This hypothetical scenario presupposes a modern society composed of people educated to think critically and independently. And Mill explicitly limits the scope of his epistemic argument in *Liberty* to societies composed of those who 'in the maturity of their faculties' are capable of productive critical discussion.[198] Mill's point is that in such societies, non-expert critical thinking about expert knowledge is unavoidable and, therefore, that no censorship regime practically will be able to confine debate to an expert community without undermining non-experts' rational assurance that experts have answers to all objections. A right of free discussion restricted to experts only is insufficient, therefore,

[197] Mill had earlier observed that 'to shut out discussion entirely is seldom possible' (Mill, *Liberty*, p.244). 244).

[198] Mill, *Liberty*, 224.

to underwrite non-experts' social warrants for proven expert knowledge in a modern, educated society.

Conclusion

The social-epistemic rationale for the freedom of discussion of expert scientific knowledge extracted in this chapter offers a fresh approach to the exegetical conflict between *Logic* and *Liberty* and new answers to common but potent objections to Mill's epistemic argument for the freedom of discussion in Chapter Two of *Liberty*. In both *Logic* and *Liberty* Mill holds that scientists such as Newton can achieve a 'complete' assurance of the truth of some of their scientific knowledge. Scientific claims can be proven certain, Mill says, though not with the 'absolute' certainty that contemporary intuitionists such as William Whewell would claim. While Mill does appear to apply a critical, even dialectical form of epistemology to the truth and justification of moral knowledge-claims in *Liberty*, Mill never abandons the positive, proof-driven epistemology he had set out in *Logic* for scientific knowledge.

What Mill argues in *Liberty* is that in the absence of an absolute right of free discussion we (non-experts) cannot rationally trust the testimony of scientists such as Newton that their claims have been completely proven to be true. Without the right of freedom of discussion, our ('mankind's') assurance that such scientific claims are true would not be 'as complete,' Mill says, and our trust that expert scientists have heard and rebutted all objections would be irrational, Mill argues. As a result, we non-experts would lack any

testimonial scientific knowledge, even if that knowledge had been proven to scientists in accordance with the rigorous methods of proof that Mill had set out in *Logic*. Direct and social warrants for expert knowledge thus have different necessary and sufficient conditions for Mill, and in *Liberty* Mill argues that censorship destroys conditions necessary to underwrite *social* warrants of proven scientific knowledge.

CHAPTER 8

CONCLUSION

In this dissertation, I have defended two Kantian rationales for the duty of veracity: (1) First, Kant argues that we cannot exercise our freedom in the robust way that the right of freedom requires without the power to 'intelligibly' possess (i.e., own) external things. In an analogous way, I argued that we cannot exercise our practical reason to make choices free of the interference of others without the power to trust certain expert sources of testimonial knowledge. The duty of veracity is necessary to underwrite that trust. (2) Second, the possible universal consent standard of rightfulness requires that certain formally necessary conditions be met to establish the normative authority of consent as a moral power. Since possible universal consent to law is juridically necessary for law's legitimacy, the formally necessary conditions for possible universal consent are themselves, therefore, juridically necessary. The duty of veracity is one such formally necessary condition because without it, one is generally deprived of access to expert social knowledge, which one needs to authoritatively consent to public law. Veracity thus protects an epistemic condition of possible universal consent, I argued.

Both rationales depend on the claim that the power to trust is generally necessary to acquire knowledge via expert testimony. I defended this claim by examining and recasting the assurance theory of testimony. First I examined assurance theory's strong

claim that trust can provide a non-evidentiary but nevertheless epistemically justifying reason to accept speaker testimony made in the deal of trust. I criticized this claim and recast assurance theory as an evidentiary, non-reductionist theory of testimony in which the presence of the deal of trust in a civil society is itself taken as evidence sufficient to establish the default global presumption that expert testimony given in the deal of trust is true. I argued that the duty of veracity is needed to underwrite this presumption because the epistemic rationality of the presumption depends on justifying the belief that expert speakers will be properly trust-responsive. I argued that the direct and indirect social costs that violating the duty of veracity in civil society would impose on speakers are enough to motivate them to be trust-responsive. Finally, I suggested that the epistemic profile that a civil society under a duty of veracity has on the consent-based account of Kantian justice may help vindicate the stronger claim of assurance theory to provide a non-evidentiary reason to accept trusted testimony. The two Kantian rationales for veracity developed in prior chapters do not depend on the success of this stronger claim, however.

While each of the rationales developed here for veracity can be taken independently, the second may also be understood to subsume the first. The freedom of individuals to enact their choices and life plans that is the focus of the first account of Kantian justice is in fact a necessary condition of the freedom to consent to a system of public laws that is protected on the second account of Kantian justice. Veracity on the latter, consent-based account is not merely concerned with the proper functioning of institutions necessary to protect the free choices of persons as individuals but is, in addition, a necessary condition

for the exercise of the universally legislative will of persons in their role as citizens. This idea could be developed considerably further than I have here. My aim was to provide enough of such an account to form the foundation for a defense of the duty of veracity.

Finally, I highlighted and clarified the social, epistemic rationale that Mill develops for the freedom of discussion of proven expert knowledge in *On Liberty.* The purpose of this last chapter was to show that the classic and best liberal defense of free discussion rights is social and epistemic when it concerns proven expert knowledge such as scientific knowledge, thus clearing a path to meet the potential objection that there could be a right of free speech for experts to lie about such knowledge. Mill's theory of justice thus appears to make room for a duty of veracity similar to that I have argued is needed in Kant's theory. Determining whether it does and its relationship (if any) to Kant's theory of justice must await future work, however.

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APPENDIX TO CHAPTER FOUR: AN INFORMAL LOGICAL ANALYSIS OF HOHFELDIAN JURAL RELATIONS

In this appendix, I clarify the nature of the logical relationships between deontic terms employed in this chapter and more generally in the law. Kant's own terms are often equivocal (e.g. 'authorization') and it is essential to clarify them to makes sense of his argument in support of the PPRRR.

Wesley Newcomb Hohfeld critically distinguishes legal duties, permissions, claim-rights, and 'no-rights', as well as powers, liabilities, immunities and disabilities. In a juridical context all relations of duties or powers are external in the sense that they exist *between individuals* and so can be characterized in terms of the one who performs an action, or alternatively in terms of the one for whom or with respect to whom the action is performed. Moreover, in any relation between two individuals, there either is or is not a duty to perform the action, and there either is or is not a power that one or the other could exercise. Hence Hohfeld's analysis yields two sets of four possible jural relations between persons, for a total of eight possible jural relations. I will refer to the first set as the *permission (or duty) set* and the second as the *power set*.

The permission (duty) set

For any two persons and an act, there either is or is not a duty to perform the act, and the duty can be characterized with respect to the one who performs the act or for whom the

act is performed. This generates four possible legal relations that one person may have with another, and thus four juridical concepts: 1) duty, 2) claim-right, 3) permission, and 4) 'no-right.' (Hohfeld uses the term ‘no-right’ as a logical placeholder; what he means is simply the absence of a claim-right.) Hohfeld defines these terms by setting out what he refers to as 'jural correlatives' and 'jural opposites' (see tables below).

The jural correlatives are as follows: Person x has a *duty* to perform action P with respect to person y if and only if person y has a *claim-right* that person x perform P; person x has a *permission* to perform P with respect to y if and only if person y has a *no-right* with respect to x that *not* P.

Table 1: Jural Correlatives (Permission Set)

person x:	duty	permission
person y:	claim-right	no-right ~P

Jural opposites are not defined reciprocally in terms of another person, though each deontic term is still obviously relational. Jural opposites are defined as follows: Person x has a *duty* if and only if x does *not* have a *permission* to not P; person x has a *claim-right* if and only if x does *not* have a *no-right*.

Table 2: Jural Opposites (Permission Set)

person x:	duty	claim-right
person x:	permission ~P	no-right

While there are four possible juridical relations, any concept in the set (e.g., duty) may be taken as logically basic and used to define the others. For example, x has a claim-right that P iff y has a duty to perform P for x; x has a permission to P iff x has no duty not to P

with respect to y; x has a 'no-right' that P with respect to y iff y has no duty to not-P with respect to x.

The following cube, whose faces are traditional ‘square of opposition’ diagrams (where diagonals on faces indicate contradictions), illustrates all possible correlations and oppositions in the set, where front (dark) and back faces of the cube may be read as a square of opposition for person x and person y, respectively, and where lines running from front to back are therefore correlatives for x and y:

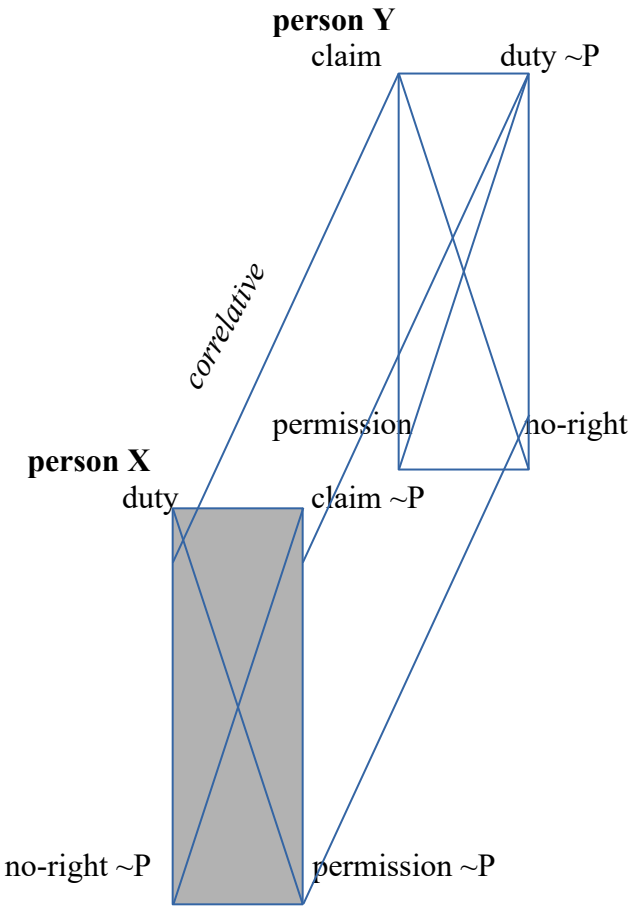

Figure 1: Permission Set Cube

The power set

Between any two individuals, one person also either has or does not have a *power* to change the juridical relationship between them, and this generates four possible jural relations, and so four juridical concepts: 1) power, 2) liability, 3) immunity, and 4) disability. Hohfeld again defines these concepts in terms of jural correlatives and jural opposites (see tables below).

The correlatives are as follows: Person x has a *power* to make some change in the juridical relationship to person y if and only if y has a *liability* with respect to x making that change; person x has an *immunity* with respect to person y making some change P in their juridical relationship if and only if y has a *disability* with regard to x making that change.

Table 3: Jural Correlatives (Power Set)

person x:	power	immunity
person y**:**	liability	disability

The opposites are as follows: Person x has a *power* if and only if x does *not* have a *disability*; person x has an *immunity* if and only if x does *not* have a *liability*.

Table 4: Jural Opposites (Power Set):

person x:	power	immunity
person x:	disability	liability

Again, any one term in the set (e.g., power) may be taken as logically basic and used to define the rest; for example, x has a liability with respect to y iff y has a power with

respect to x; x has an immunity with respect to y iff y has no power with respect to x; x has a disability with respect to y iff x has no power with respect to y.

A ‘square of oppositions’ cube can again be constructed to illustrate all possible correlatives and oppositions:

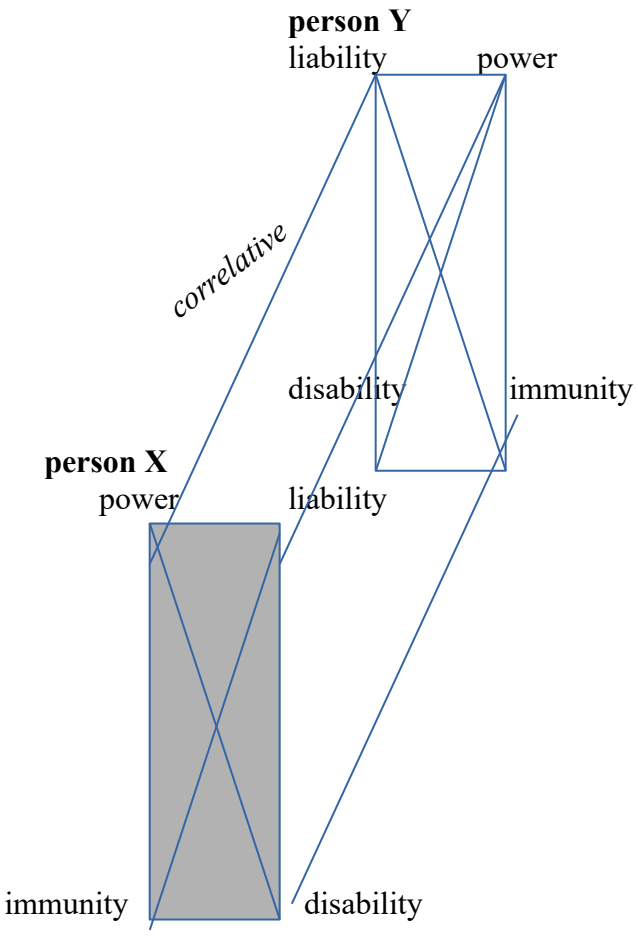

Figure 2: Power Set Cube

APPENDIX TO CHAPTER FIVE: THE LOGICAL DIFFERENCE BETWEEN STANDARDS OF POSSIBLE AND HYPOTHETICAL CONSENT

Thomas Hill suggests that there is no logical difference between standards that test what agents (modally) 'could will' and what agents (hypothetically) 'rationally would will:'[199]

> To apply [the possible-consent test] we must make assumptions about the context of choice and the rational principles that determine what it is possible, in the relevant sense, for us to will. When the assumptions necessary to make the standard plausible are made explicit, it turns out that, in effect, the possible-consent standard can be expressed as a hypothetical-consent standard.[200]

> The rational standards on which the 'could will' test relies can (though they need not) be expressed in terms of what rational agents necessarily 'would will if rational.[201]

In this appendix, I show that there is a logical difference between the standards, and that this difference has at least one significant implication.

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[199] Thomas Hill, 'Hypothetical Consent in Kantian Constructivism,' Chapter Three in *Human Welfare and Moral Worth* (Oxford, 2002).

[200] Hill, 94-95.

[201] Hill, 65.

Let Wp: 'One wills P.' Let Rp: 'It is rational to will P.' (And '◊' = 'it is practically possible that...' and '□' = 'it is practically necessary that...') Hence

> (POSSIBLE-WILLING) (1) '[what one] 'could will": '◊Wp' That is, 'It is practically possible that one wills P.'

Applying a standard Kripkean possible worlds semantics for modal logic, what this means is that there is at least one possible world (or one way the actual world could be) where one does will P. Assume for now universal accessibility between all possible worlds (S5). Thus in the actual world: *it may or may not be the case that one wills P,* even if it is rational to will P:

> (HYPOTHETICAL-WILLING) (2) 'what [one] necessarily 'would will if rational": '□(Rp → Wp)'[202] That is, 'It is practically necessary that: if it is rational to will P, then one wills P.'

Semantically, this means that, in every practically possible world, it is not the case both that it is rational to will P and yet that one does not will P ('~(Rp & ~Wp)'). That is, it is not possible that it is rational to will P and yet that one fails to will P. Again assume S5

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[202] Note that this is a counterfactual conditional. Tracking Hill's language, I have rendered it as a strict implication, but there are other ways of handling such conditionals. Note also that the translation ('Rp → □Wp'), is clearly incorrect (the 'modal fallacy'). Its meaning might be rendered as something like, 'If once we succeed in rationally willing P, then it is henceforth a necessary truth that we always will P.'

universal accessibility. Thus in the actual world: *one does will P*, if it is rational to will P.

Hence on this initial attempt to render the standards, there is a prima facie logical difference between them. According to the modal possible-willing standard, in the actual world one *may or may not* will whatever it is rational (or irrational) to will, whereas according to the hypothetical-willing standard, in the actual world *one does will* whatever it is rational to will. Note also, however, that on this initial rendering of the standards agents may will what it is *irrational* to will, as well, on either standard. On this initial rendering, on the possible-willing standard, it is possible to will what is irrational; and since the hypothetical-willing standard regulates only rational willings, agents may will what is irrational without violating that standard, either.

Hill suggests that any act of willing implies some set of rational standards for that willing, and that this implication is what renders the possible-willing and hypothetical-willing standards logically equivalent. If we interpret Hill's suggestion to mean that any act of willing strictly implies that one wills rationally

(3) '□(Wp → Rp)'

then, semantically, and again assuming universal accessibility, in the actual world one cannot will what it would be irrational to will. (3) thus bars irrational willings on either standard. On the hypothetical-consent standard, moreover, willing P and rationally willing P are now strictly equivalent; that is, in any possible world where one wills P, one rationally wills P, and vice versa.

While the addition of Hill's premise (3) brings the semantic meaning of the two standards closer together, the prima facie logical difference noted earlier persists. On the modal possible-willing standard, one *may or may not* will anything at all, though with the addition of (3) now whatever one does will is rational. By contrast, on the hypothetical-willing standard, *one does will* whatever it is rational to will. On the modal possible-willing standard, in the actual world one may will *some subset* (including none) of the rational willings that the hypothetical-willing standard entails that one does will.

Now if 'not willing P' is equivalent to 'willing not-P' and, moreover, if it is irrational not to will whatever it is rational to will (and per premise (3), irrational willings are disallowed), then the standards do converge logically, and Hill is correct that one can be re-expressed in terms of the other without loss. But neither of these assumptions seems to be true of willing. The reason is that willing, like consent, is a propositional attitude, but examples will clarify what this means.

Suppose I am eating dinner but have not yet decided whether to have dessert. I have not willed to have dessert, but this does not imply that I have therefore willed *not* to have dessert. I simply have not decided. Hence not willing P (to have dessert) is not the same as willing not-P (not to have dessert). Moreover, it seems possible for it to both be rational for me not to eat dessert (because it is unhealthy) and also rational for me to eat dessert (because it is pleasurable); hence willing either end may be rational. (At least, it does not seem irrational for me to will either end for these reasons.) Even in cases where

one option is clearly the rational choice, it still seems possible for me to fail to will that option (not will P) without therefore willing that I do not will it (willing not-P). Suppose it is clearly rational for me to avoid eating dessert but that doing so has never occurred to me, perhaps because I have always eaten dessert as a matter of course. I therefore do not will to avoid dessert (the rational choice), but I also do not will not to avoid dessert because it has never occurred to me to skip dessert. So in general it is not always irrational to fail to will whatever it would be rational for one to will. Acts serving mutually exclusive ends might both be rational to will, or one might not be aware that some alternative to what one wills is the rational choice.

Hence even if we accept Hill's premise (3), then for any act of willing that is rational, the modal test might permit one to fail to will the act, while the hypothetical test requires that one does will the act. If *possible* universal consent to public law is necessary, then one must will only those laws that guarantee necessary conditions for the exercise of that consent. If on the other hand *hypothetical* universal consent to public law is necessary, then one must will *every law that hypothetically everyone would rationally agree to will.* Some regimes of public law that meet the possible consent test will therefore fail the hypothetical consent test for justice. For example, suppose that all agents necessarily would hypothetically rationally consent to ban unhealthy desserts after dinner; a society that failed to do so would therefore be unjust on the hypothetical consent standard. But even if it would be rational to ban desserts for everyone, it is nonetheless possible to fail to consent to ban dessert (perhaps because one has not yet thought of it); hence a society

that failed to ban dessert would not be unjust on the possible consent standard, even if it were rational to ban dessert.

My main aim here was to show that the modal and hypothetical standards are not logically equivalent, even if we accept Hill's suggestion that possible willing implies a robust rational standard for the exercise of that will. I have achieved that aim, because even if we assume that the rational standards governing any possible willing are identical to those governing hypothetical rational willing, the possible consent standard does not require one to will everything that is rational, whereas the hypothetical consent standard does.

I have not yet criticized the idea that the rational standards appropriate to evaluating the modal test might be thought identical to the rational standards that define the hypothetical test. I assumed this to be true in order to render Hill's argument about logical equivalence as strong as possible. But it seems intuitive to think that the standards of rationality appropriate to the modal test are thinner, perhaps those of 'mere' willing (mere consistency of the will?), than the standards of rationality appropriate to the hypothetical test. It seems intuitive to think that there might be things that are possible for me to will that I nevertheless would not rationally will or would not will if fully rational, such as perhaps acts with short-term rewards but long-term disadvantages. For example, it seems possible for me to will to sleep late rather than get up for a workout, even if it is irrational for me not to get up for a workout because doing so is in my long-term self-interest. If so, then it seems 'possible' to will what would be irrational to will by the more stringent

standards of the hypothetical 'rational' willing test, and this gap between the standards may be a wide one. On the modal test, therefore, not only is it true that 1) one may will only a subset (or none) of what the hypothetical standard requires, but it may also be true that 2) one may will many other irrational or non-rational things that the hypothetical standard would bar as irrational.

However one judges the gap between the standards, however, they are not logically interdefinable.