Dear seminar participants,

I am delighted about this opportunity to present my work in the Legal Theory Workshop at UCLA.

This is a descendent of a draft that was presented in July 2022 at the *Law and Morality in Kant* conference in Göttingen.

The first part of the paper sketches a radical version of non-positivism whose main characteristic is that it regards law-practices as *non-necessary* grounds of legal facts, or facts about the content of the law. To defend the possibility of radical non-positivism, I argue that the explanation of legal facts must begin with juridical relations, those being interactions among agents that are governed by pre-institutional standards of political morality. In the second part I appeal to Kant's Universal Principle of Right [UPR] to underpin radical, or *relations-first* non-positivism. There, I interpret UPR as the source of standards which are expressions of an omnilateral will, without requiring the presence of the state or its institutions. I conclude that UPR together with a wide array of interactions among agents generate full explanations of juridical relations without necessitating the involvement of law-practices.

The account of radical non-positivism in the paper is rough in many respects, and I would be grateful to explore some of its details and overall plausibility during the seminar. To facilitate discussion on this issue, I have appended a graph representing the structure of metaphysical explanation of legal facts, involved in the proposed version of non-positivism.

I look forward to the discussion of the paper!

Best wishes,

George

The Kantian Legal Relation as Radical Non-positivism[*]

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1. Introduction

Contemporary legal non-positivism remains still hostage to statist ideas of law. As such it shares with its rival, positivism, some deeper assumptions about the grounds of legal obligations mainly by subscribing to an account of legal rights and duties that rests on the existence of established legal practices and institutions.

The chapter suggests that Kant's relational account of legal obligation, enables us to push the boundaries of non-positivism beyond any established legal practices. Accordingly, over and above any other substantive contribution that Kant's Doctrine of Right may make to debates on law and morality, it effects a deeper and more radical change at the level of theory: it prioritises legal relations over law-practices in the explanation of legal obligations. Kantian non-positivism, this is the key claim of the chapter, supports a relations-first account of legal obligation. To defend the plausibility of this claim, I undertake to develop some of its key building blocks, even though I cannot do full justice to the complexity of the issues involved within the limited space I have here.

In part two, I discuss the positivist commitments of contemporary non-positivism[1] and demonstrate that a key consequence is the mischaracterisation of the existence conditions of legal relations. Legal positivism understands legal relations as obtaining when some institutional rule imposes an obligation on two or more parties. Accordingly, its explanation of legal relations

[*] [Acknowledgments]
[1] I shall limit the scope of the discussion to authors working in analytical legal theory broadly construed, owing to the centrality of this tradition in recent debates between positivism and non-positivism.

subsists on the standard positivist explanation of legal obligations, as obtaining exclusively in virtue of their social sources. As it turns out, non-positivists fail to challenge the positivist picture by assigning to legal relations a more prominent role in the explanation of legal obligations. And yet, as the evidence from both the phenomenology of legal practice and legal scholarship suggests, it is imperative to seek an independent explanation of legal relations which, in turn, would facilitate an account of the grounds and scope of legal obligations, in a radical non-positivist manner.

Part three uses a Kantian account of juridical relations to suggest a route for reversing the explanatory priority of institutional rules over legal relations in the account of legal obligations. To explore the possibility of a relations-first or radical non-positivism, I propose an avant-garde reading of Kant's Universal Principle of Right (UPR) as a pre-institutional moral principle that grounds omnilateral demands of rightful action. Meanwhile, I seek to remove two key obstacles which threaten to undermine the proposed reading: the first emerges from a more standard reading of Kantian right, according to which juridical relations rely on some prior notion of individual freedom or autonomy; to counter it, I follow the lead of Katrin Flikschuh who in recent work has launched a powerful challenge to this quasi-Lockean reading. Second, in response to the objection that the relational reading of Kantian right actually necessitates positivism, instead of combating it, I offer the preliminaries of an argument about how UPR can generate standards which are expressions of an omnilateral will, without requiring the presence of the state or its institutions.

Ultimately, the chapter points to the significance of legal relations for legal theory: when accounting for legal relations is made an independent explanatory task, then the current boundaries between positivism and non-positivism need to be redrawn differently, to accommodate the possibility of radical non-positivism. A Kantian, relations-first, account of legal rights seems to me to currently offer the best way forward for delivering this important task.

2. Legal relations: an explanatory challenge for legal theory

Much in the phenomenology of legal reasoning suggests that it's of independent value to take an interest in relations between parties to a legal dispute, when looking to determine what the law requires in terms of rights and obligations: take for instance cases in private international law which involve transnational dealings between private actors and which, when brought before a judge,

require the court to determine the applicable law.[2] Judges in this field operate under a requirement not to assume that the applicable law is the law of their own jurisdiction (*lex fori*) but to first locate the legal relation which would eventually licence an inference to the applicable law, often residing in the legal order of another jurisdiction. Or take any of the classic cases where courts develop legal principles in the interstices of established[3] rights and duties to determine the legal consequences of an interaction between parties. Thus, in *Donoghue vs Stephenson* – for many the case introducing the modern law of negligence in the common law jurisdictions – the relation between Ms Donoghue and the tortious manufacturer of poisonous ginger beer became the primary focus of the judicial enquiry, in the absence of any legal rights and duties rested in earlier institutional action.[4] More dramatically, when we move to the global context, international lawyers often depart from established understandings of international responsibility, whereby only states count as subjects of attribution, and instead investigate the relations among a variety of non-state actors to determine the relevant legal obligations.

This explanatory importance of relations resonates diachronically in the legal literature: Friedrich Carl von Savigny, writing in the 19th century, initiates a radical shift from state legal rules to pre-institutional relations between parties to a dispute, as determining factors of the choice of law methodology.[5] In a more contemporary key, Arthur Ripstein suggests that legal 'right(s) to security of person and property must be analysed in terms of your *already* standing in a certain type of relation to other people'.[6] Such reflections can be understood as recommending that one resist an outright reduction of relations that generate legal obligations to standards which rest on prior institutional action.[7] Meanwhile, they suggest the possibility of legal relations which escape a ready-made characterisation that traces them back neatly to a state-based legal order.

But if such relations can play some role in the explanation of legal rights and duties, we are in need of an account that does not pre-empt their dependence on practices of state officials or, for short,

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[2] See for examples in more detail A. Marzal and G. Pavlakos, 'A Relations-First Approach of Choice of Law', in R. Banu, M. Green and R. Michaels, *Philosophical Foundations of Private International Law* (OUP, forthcoming).

[3] In the present context I understand as established those legal obligations that have been created by institutional action (legislation or adjudication).

[4] Donoghue v. Stevenson [1932] A.C. 562; 1932 S.C. (H.L.) 31.

[5] This is the juridical methodology of that guides the choice of applicable law in disputes involving elements that extent across several jurisdictions, which typically comprise the subject matter of Private International Law. See, F. C. von Savigny, *System des heutigen römischen Rechts* (2nd reprint of the 1840 edition, Scientia Verlag Aalen 1981); see English translation of vol. 8 by William Guthrie, *Private International Law* (Edinburgh, T&T Clark Law Publishers 1880); and for discussion Marzal and Pavlakos, 'A Relations-First Approach of Conflict of Law'.

[6] See A. Ripstein, *Private Wrongs* (Harvard UP 2018) 81.

[7] Throughout the chapter, I will count as relevant institutional action any actions taken by state officials and proceed on the understanding that legal institutions and their practices are state-based; see further (n 7).

law-practices.[8] On a fairly neutral characterisation, which does not commit itself to the dependence of legal relations on law-practices, *that a relation between two or more parties is legal implies that their interaction is subject to one or more legal obligations.*[9] This formulation makes no assumption about which of either the relation or the obligation enjoys explanatory priority over the other, remaining thus open to two at least readings. On the first one, 'legal relation' is just another name for the range of persons that fall within the scope of antecedently established legal requirements; call this reading *scope-oriented*. In this version, legal relations subsist entirely on pre-existing law-practices and the obligations those engender. A more demanding reading would have 'legal relation' playing the role of a criterion for the obtaining of legal obligations, which is independent of law-practices; call this the *ground-oriented* reading.[10] On this reading, the fact that legal relations may serve as self-standing grounds posits a noteworthy demand on the explanation of legal obligations: namely, the requirement that law-practices be merely a *contingent* ground of the relevant legal obligations.[11]

To preserve neutrality in a manner that accommodates our earlier intuitions about legal phenomenology, we should opt for the demanding, ground-oriented reading. For, the scope-oriented reading appears to operate under a key disadvantage: it forecloses the obtaining of legal relations independently of law-practices because it regards them as mere accessories of one or other institutional obligation that is the result of actions taken by the officials of some legal system. Accordingly, the scope-oriented reading leaves no space for relations to play any role in the explanation of legal obligations, suggesting instead that any explanation of the latter necessarily rests on facts of law-practices. In contrast, the demanding reading allows that those legal relations may become independent, self-standing grounds of legal obligations, taking over from law-practices which are demoted to merely possible grounds. It is only on the ground-oriented reading that we can avoid begging the question against the neutrality of legal relations, in violation of the role those play in legal phenomenology. I will proceed to suggest that the main theoretical accounts of legal obligation in contemporary legal philosophy assume a scope-oriented understanding of legal relations and end up violating the *neutrality constraint,* by begging the question in favour of law-practices *qua explanatia* of legal obligations.

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[8] I adopt here standard use, whereby the term 'law-practices' refers to collections of ordinary empirical facts about the sayings, doings, and mental states of members of constitutional assemblies, legislatures, courts, administrative agencies, and the like. See Mark Greenberg, 'How Facts Make Law', *Legal Theory* 10 (2004); S. Chilovi and G. Pavlakos, 'Law-Determination as Grounding', *Legal Theory* 25 (2019).

[9] For convenience, I will use 'legal obligation' to also denote powers, rights, permissions and so on.

[10] Credit to Carsten, Luke.

[11] Accordingly, the 'ground-oriented' reading does not entirely exclude law-practices: it remains possible that law-practices are among the grounds of legal obligations, in which case the relevant legal relation will fall entirely within the scope of the relevant institutional obligations. Importantly, however, it submits that legal obligations may obtain even in the absence of law-practices. I am grateful to Marcus Willaschek for pressing me to formulate better this point.

Notwithstanding their explanatory potential, legal relations have not been subjected to extensive discussion by any of the dominant stands of contemporary legal theory, of either positivist or non-positivist orientation.[12] An early suspicion that the reason might relate to a breach of the neutrality constraint will be confirmed on closer inspection of the standard accounts from each camp. Following on from this diagnosis, I will argue that respect for the neutrality constraint supports a radical version of non-positivism, which regards relations as prominent explanatia of legal obligations. Kant's relational account of legal rights will be employed in the second part of the chapter to flesh out such a version of a relations-first account of legal obligations.

2.1 Positivism as question-begging

Positivist explanations violate neutrality in a more or less predictable manner: a positivist account of legal obligations cannot afford involving anything other than law-practices in their explanation, on pain of contradicting its own commitment to an understanding of legal phenomena exclusively in terms of their social sources. If positivism left space for legal relations to operate as self-standing grounds of legal obligations, it would be inviting the suspicion that the determinants of law might include elements other than law-practices. Instead, legal relations must be strictly understood as descriptions of the scope of rules which are grounded exclusively in law-practices. Here is Scott Shapiro confirming this picture in his book *Legality*:[13]

> [T]he normativity of law is "institutional" in nature, which is to say that the legal relations may obtain between people independently of the particular intentions of those people. *This institutionality is made possible by the structure of master legal plans*. Master plans […] contain authorizations […] (that) will typically set out formal procedures which allow people to exercise power even without the intention to do so. (Legality: 16, my emphasis)

Accordingly, and setting aside finer nuances of Shapiro's terminology, legal relations obtain when the law assigns rights, obligations, and powers on the basis of institutional rules whose existence or validity can be accounted for by exclusive reference to law-practices. In other words, from a

[12] A recent exception is A. Marzal and G. Pavlakos, 'A Relations-First Approach of Choice of Law' (n 2), albeit with a focus on doctrinal questions in the field of private international law. Some portions of the argument developed there are reemployed in expanded form in sections 2.1, 2.2 and 3.2, this chapter.
[13] S. Shapiro, *Legality* (Harvard UP, 2011), 16.

positivist perspective, there is no room for legal relations to play an independent role as grounds of legal obligations. Instead, any account of the grounds of legal obligations would need to revert to the typically positivist explanation, as exemplified by the long-standing tradition introduced by H.L.A. Hart. This familiar story submits that legal obligations are determined, at the most fundamental level, exclusively by social facts, even though a legal system might incorporate other normative (e.g., moral) considerations, on the condition that the standards of incorporation are laid down in a rule of recognition whose existence can be traced back to sources that are exclusively social.[14] In this landscape, the only role left for legal relations is that of describing the scope of whatever, on the positivist story, may count as a legal obligation.

Along these lines positivism embraces the scope-oriented understanding of legal relations and demotes them to descriptions of scope of rule-based obligations, which are ultimately grounded exclusively in law-practices. In ruling out any deeper explanatory role for legal relations, the positivist strategy is begging the question of the explanation of legal obligations in favour of law-practices and, ultimately, positivism. Conversely, to steer away from that fallacy, positivism would need to allow for explanations of relations that do not involve law-practices.

2.2 How non-positivism's inherits circularity

To a significant degree, contemporary non-positivism stands out from its predecessors by its effort to pinpoint the question-begging character of positivism.[15] 'Contrary to earlier critics of positivism, contemporary non-positivists "do not focus on the classical problem posed by a clash between positive law and natural, as epitomised in the Antigone story, to argue that the former is ultimately subject to an additional test of validity contained in higher morality".[16] Instead, they appeal to an explanatory gap between social sources and legal obligations to demonstrate the question-begging character of positivism.[17] The charge they level at positivism is that it cannot bridge the gap between social sources and legal obligations, in order to explain how the latter obtain. The thrust of these strategies is an argument *that law-practices cannot determine their own relevance to the content of legal*

[14] For a detailed discussion of this position, which has come to be known as inclusive legal positivism, see K. E. Himma, 'Inclusive Legal Positivism' in J. L. Colemann, K. E. Himma and S. Shapiro (eds), *Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004).

[15] Greenberg warns that relying on explanations that exclude pre-institutional evaluative facts would be question-begging in Greenberg, 'How Facts Make Law', 159.

[16] See Marzal and Pavlakos, 'A Relations-First Approach of Choice of Law', page nr.

[17] Greenberg, 'How Facts Make Law'; M. Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' in S. Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006); M. Greenberg, 'On Practices and the Law', *Legal Theory* 12 (2006), 113; Stavropoulos, 'Legal Interpretivism'. For critical discussion see, H. Dindjer, 'The New Legal Anti-Positivism' *Legal Theory* 26 (2020) 181.

obligations unless further elements are added. As the argument goes, there are multiple (epistemically) possible mappings from the social facts of law-practices to the content of legal obligations, the result being that what we know about the facts of the practice cannot settle which of the alternative candidate mappings from a set of social facts to possible meanings is actual.[18] This indeterminacy is then used as a *reductio* of the positivist notion of validity. Conversely, to counter the threat of indeterminacy the proposed solution is to supplement substantive moral principles which can determine the relevance of social facts and, thus, block the possible deviant mappings.[19]

However, despite early appearances, the non-positivist strategy fails to set itself altogether free from the predicament of circularity, in the form of a commitment to law-practices at the most fundamental level of law-determination. I will argue that the reason for that failure is closely tied to non-positivism's reluctance to conceive of legal relations independently of law-practices and assign to them an autonomous role in the explanation of legal obligations (what I earlier called the ground-oriented reading of legal relations). As I will turn to demonstrate next, the dominant strand of non-positivism departs only marginally from the positivist understanding of legal obligation, by continuing to regard law-practices as necessary, albeit partial, grounds of all legal obligation.[20] In effect, these non-positivists end up sharing the basic positivist premise which binds legal requirements to law practices, and merely supplement it with an additional premise requiring moral facts as additional grounds. While the adding of a moral component evades partially the charge of circularity in the explanation of obligations, it does not with respect to relations. For, in confirming the role of law-practices as necessary grounds of legal obligations such accounts also uphold the limited role of legal relations, which continue to appear as the shadows of institutional rules, incapable of materialising outside law-practices. Ultimately, as it turns out, the non-positivist idea of legal relations violates the neutrality constraint as much as its positivist counterpart.

To illustrate the point, think of the broadly Dworkinian strategy[21] of involving principles of political morality to 'close' the gap of indeterminacy that arises when social sources are considered

[18] See for detailed discussion, Chilovi and Pavlakos, 'Law-Determination as Grounding'.
[19] See Greenberg, 'How Facts Make Law I' (n 8) and Greenberg, 'How Facts Make Law II'. And for a detailed discussion of the role moral facts play in the grounding of legal facts, see S. Chilovi and G. Pavlakos, 'The Explanatory Demands of Grounding in Law', *Pacific Philosophical Quarterly* [2021] (early online view at: https://doi.org/10.1111/papq.12393).
[20] Another way to put it is to say that while positivism takes law-practices to be necessary and sufficient grounds for the obtaining of all legal obligation contemporary non-positivist rivals regard them as always necessary but never sufficient grounds of legal any obligation.
[21] Although Dworkin and his epigones represent what it arguably the dominant strand of contemporary non-positivism, other influential accounts share the same predicament: Robert Alexy's influential account considers the 'claim to correctness', which is raised by legal propositions, to be at the centre of an argument for linking law and morality. The claim to correctness is relevantly raised by propositions which count already as legal, on the basis of

as the exclusive determinants of legal obligations. Although involvement of moral considerations might be suitable for tackling indeterminacy, it does not cure circularity entirely. Because, in any of the known renderings of the interpretivist strategy, the relevance of any pre-institutional moral considerations, appeal to which is rendered necessary for law-determination, is itself conditioned by the law-practices of some legal system. For, to specify in any given case whether and in what manner political morality is involved in law-determination, we need first to refer to the actions taken by legal institutions, including other relevant aspects of the law-practices of a legal system. Be it in terms of a demand for justification that those actions raise, or in terms of their normative footprint on the overall moral profile, these actions together with further aspects of law-practices *determine* the relevance and extent of the inclusion of moral facts in law-determination.

But this strategy is glaringly weak to escape circularity, if what is needed – when facts of law-practices are absent or cannot steer the explanation of legal obligations – are grounds whose existence does not rely directly on any law-practices.[22] For no sooner our appeal to a moral principle of duty of care, which governs the relation between Ms Donoghue and the tortious manufacturer of ginger-beer, has been framed by the law-practices of the system – say, the actions taken by the judges – than the relation between the parties fails to operate as an independent explanation.[23] It is precisely because this strategy leaves no room for legal relations to operate as independent grounds for legal obligations that contemporary non-positivism ends up conceding the primacy of positivist ontology. By this I mean an account of legal obligations that is, at the most fundamental level, determined by law-practices or a collection of social facts that count as legal in virtue of a master rule of recognition.[24]

2.3 Law-practices as a basic structure of governance

available law-practices. See R, Alexy, *A Theory of Legal Argumentation* (Clarendon Press, 1989); idem, *The Argument from Injustice* (Clarendon Press, 2002).

[22] For examples, see earlier this chapter (section 2).

[23] The explanatory demands of grounding in law do not favour standard non-positivism over positivism, as we have argued in Chilovi and Pavlakos, 'The Explanatory Demands'. Things might turn out differently when the target of the explanation is refocussed on legal relations and a more radical form of non-positivism is taken on board. Section 3 discusses the contours of a Kantian version of radical non-positivism, without however addressing in detail questions of law-determination and grounding.

[24] Non-positivists discuss and reject this picture by saying that the key difference between positivists and them is at the most fundamental level of legal determinants – there the non-positivist, but not the positivist, would include moral facts. But if, as I claim, the reason for inclusion of non-positivist moral facts are law-practices (because they trigger principles, or because they are determining the relevant moral footprint) then the primacy of the positivist ontology remains intact!

Although non-positivists disagree with positivists about the full range of facts contained in the grounding base of legal obligations, they seem to agree that law-practices form a necessary part of that base. How is this convergence of the two camps to be explained? Simplifying a lot, both camps think of law-practices as forming a basic structure of public governance [for short, *basic structure*], which we usually identify with the existence of law and political association.[25] While the positivist account focuses on the description of the basic structure, what excites non-positivist imagination is its normative impact on the reasons for action of those governed by it. Meanwhile, both approaches agree that the scope of all relations characterised in terms of legal rights and duties must be confined within the site of a basic structure of law-practices.[26]

As it turns out, the disagreement of the two camps is not about the site or the grounds of the basic structure; it is only about *how* (the site of) the basic structure contributes to the content of legal obligations. According to the non-positivist account, any determination of legal requirements that cites exclusively collections of facts in the basic structure would be incomplete. For, *in virtue of* imposing centrally terms of interaction to everyone living under it, the basic structure triggers the morality that regulates the governance of political association.[27] Although not stated in so many words, an implied premise of the non-positivist line of argument seems to be that individuals are endowed with pre-institutional autonomy or freedom which triggers a demand of justification, when impacted by the centrally imposed acts of governance of the basic structure. Notably, any such instance of interference with individual autonomy requires that one make additional reference to the justificatory grounds for the interference, in order to work out the obligations imposed by the basic structure. Such grounds consist in so-called principles of political morality (such as justice, fairness, due care, democracy and so on) and are typically evoked to justify collectively distributed interferences with individual autonomy. Consequently, the *way in* which the basic structure of public governance contributes to the production of legal obligations is through its

[25] Positivists place the emphasis on the basic structure as an expression of the publicity of legal authority, while non-positivists view it as a condition for political association and a trigger for the joint moral reasons its members owe to each other.

[26] This follows the scope-oriented reading of legal relations, according to which these are merely descriptions of the scope of the legal obligations generated by law-practices. On this reading, the scope of legal relations is merely a reflection of the scope of legal obligations.

[27] See for standard accounts of the mechanics of associative obligations, R. Dworkin, *Law's Empire* (Fontana Press, 1986), 192-195; 197-198; 208-215. Idem, *Justice for Hedgehogs* (Harvard UP, 2011), Ch. 14; T. Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs* 33 (2005), 113. For detailed discussion of associative obligations, see G. Pavlakos, 'Revamping Associative Obligations' in S. Khurshid et al. (eds.) *Dignity in the Legal and Political Philosophy of R Dworkin* (Oxford University Press, 2018), 337-360.

moral impact, i.e., the way in which actions taken within its remit affect or modify the all-things-considered reasons that pertain to individuals.[28]

Notice, however, the modesty of the non-positivist argument: it draws attention to the relevance of political morality but does not challenge the site of its application. True enough, for any determination of legal rights and duties a contribution from political morality is necessary, but no legal relation can obtain outside the site of the basic structure, precisely because political morality cannot make any contribution to the determination of legal obligations outside that structure. The basic structure delineates the scope of legal relations because it marks the boundaries of the relevance of political morality. Outside the site of the structure, questions about whether some relation is legal or not, do not even take off the ground.

Adding moral facts to law's determinants, amounts only to a modest modification of the positivist picture, making as a result contemporary non-positivist positions vulnerable to the same predicament of circularity that is endemic to positivist reasoning. Instead, to overcome these problems, a radical non-positivist strategy must overcome the straitjacket of positivist ontology, or the view that legal relations are limited by the site of the basic structure of law-practices.[29] To do so, it must reverse the order of the inquiry by posing the question about the grounds of legal relations *directly*, and only after answering that question to proceed and specify their site. At the same time, a relations-first strategy would need to preserve the valuable intuition that not any moral facts, but only those that pertain to public forms of governance are relevant grounds for legal obligation.

But in the absence of a basic structure of public governance, how can relations trigger facts of political morality and together with them ground the kind of rights and duties that govern legal relations? I will argue in the next section that Kant's Doctrine of Right provides us with a valuable insight[30]: his Universal Principle of Right (UPR) may serve as the moral footprint of public governance, independently of the ontology of the specific structure that may exemplify it. As such it serves the role of a 'compass' for identifying as legal any relations which can trigger it. Accordingly, it steps in the place of a formal ontology of governance and explains the idea of

[28] These are the bare bones of a much longer and intricate argument expounded in M. Greenberg, 'The Moral Impact Theory of Law', *Yale Law Journal* 123 (2014), 1288.
[29] There is a question whether what needs to be bypassed is ontology altogether, or the particular kind of ontology proposed by positivism. Thanks to Katharine Jenkins for bringing to my attention this issue.
[30] Although most of the proposed account can be attributed to Kant, the value of the argument is independent of its exegetical accuracy. For that reason, it is more apposite to talk of a Kantian argument.

political association and public governance by imposing a threshold demand on interactions between agents: 'any interaction that triggers UPR counts as an instance of public governance, which is accountable to principles of political morality'. The Kantian strategy, in refocusing the explanation from legal facts to rightful relations, gives explanatory priority to the grounds over the site of legal relations and thereby enables a radical form of non-positivism to take hold, which steers clear of the question-begging positivist ontology of legal relations. To that extent the Kantian legal relation paves the way to a *relations-first* and *radical* non-positivism.

3. Kantian legal relations

Legal relations become explanatorily less load bearing if their own explanation relies on an institutional basic structure, or so I have argued. Meanwhile the reason why contemporary non-positivists are wedded to the idea of a basic structure is that reference to a system of *public* or *omnilateral* justification serves as remedy to the coercive effects of pre-political autonomy. Exploring the possibility of a radical non-positivism, I will suggest that Kant's *Doctrine of Right* can be understood as supporting a relations-first account of law, which does not rely on further intermediaries, originating in state-bound institutions.[31] Although I do not aim at exegetical accuracy, I will assume throughout that my view reflects sufficiently Kant's key concern to explain the demands of right as constitutive of the type of moral freedom that ought to characterise interactions among agents (external freedom or freedom as independence).

The proposed *relational reading* of Kant will eventually be contrasted with a more standard one, which takes the demands of Kantian right to be the downstream effect of pre-institutional autonomy and freedom, much like the moderate forms of non-positivism discussed earlier.[32] In conclusion, I will point at some of the strengths of the radical non-positivist version.

3.1 The relational reading

[31] A potential objection to the proposed approach is that it violates common understanding of Kant's methodology: often Kant moves from common experience to the necessary conditions for that experience. But attributing radical non-positivism to Kant, would require setting aside actual legal institutions and practices. A sceptical reply to this criticism proceeds to draw a distinction between the actual contribution that Kant made to the philosophy of law and his own understanding of that contribution. A more constructive reply, and one I aspire to in this project, would aim to show that radical non-positivism is supported by the phenomenology of legal reasoning which does not disregard actual law-practices altogether, but reassigns them to the role of non-necessary grounds of legal obligation. I am indebted to Tom Bailey and Luke Davies for raising this point and to Luke Davies for suggesting the contours of the sceptical reply.

[32] See section 2, this chapter.

Kant's account of legal right centres around his Universal Principle of Right [UPR], which aims to explain legal obligations through the notion of rightful action conceived of in relational terms:

> '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.'[33]

This makes UPR a direct account of legal relations which moves beyond both positivist and those among the non-positivist accounts which rely for the explanation of legal rights and duties on the priority of a basic structure. With respect to positivism, UPR reverses the order of explanation between law-practices and legal relations, by opening the possibility of an explanation of legal obligations that dispenses with appeals to formally ordained legal sources *qua* necessary grounds. Meanwhile, against those non-positivist accounts that remain wedded to an institutional basic structure of governance, the Kantian UPR offers a way out of the priority of individual autonomy over omnilateral authorisation, which otherwise would require a reference to law-practices and the state. I turn next to discuss each of these contributions. Taken together they encourage a full-blown turn to a relations-first account of law.

Against positivism: UPR as pre-institutional and moral

UPR supports the explanatory priority of legal relations over a legal basic structure because it understands them as moral relations, which are not tied down to any specific institutional arrangement. On a widespread understanding, UPR is a pre-institutional moral principle that specifies standards of interaction among a plurality of persons.[34] Acting on these standards enables each to act consistently with the freedom of others in the sense of remaining independent from the way others exercise their choice. To that extent, the morality of independence takes centre stage in Kant's account of law as the condition for any act to count as 'rightful'.

Ultimately, this reading supports an understanding of law as forming that domain of morality which is dedicated to external freedom, understood as independence from the choice of others.

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[33] Immanuel Kant, 'The Metaphysics of Morals' in Mary Gregor (ed), *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (Cambridge University Press, 1996) 6:230.

[34] Among Kantian scholars who agree on the moral nature of UPR are B. Herman, 'Juridical Personality and the Moral Role of Juridical Obligation', in T. Shapiro et al. (eds.), *Normativity and Agency: Themes from the Philosophy of Christine Korsgaard* (Oxford University Press, 2022); K. Flikschuh, 'Human Rights in Kantian Mode: A Sketch', in R. Cruft, M. Liao and M. Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015), 662; and A. Ripstein, *Force and Freedom* (Harvard University Press, 2009), 9. It cannot be overemphasised, however, that this view is far from mainstream. There is a large body of influential literature that disputes the moral character of UPR. See, instead of others, the influential paper by M. Willaschek, 'Which Imperatives for Right?', in Mark Timmons (ed.), *Kant's Metaphysics of Morals. Interpretative Essays* (Oxford University Press, 2002).

Rather than assuming law's dependence on state institutions and regard its relationship with morality only as derivative, the constitutive role law plays for freedom should be regarded as the strongest proof of its moral quality. Explaining the constitutive contribution of law for freedom, facilitates an understanding of law's moral nature: freedom materialises through the law precisely in the sense that rightful conduct consists of synergetic patterns whose components are act-tokens of individual agents, each of whom is comporting themselves in accordance with the recommendation of UPR for freedom-consistent action. Individual act-tokens can only contribute to a rightful pattern of action if they are 'carved out' in ways that help them to latch on to each other, with an eye to forming composite rightful patterns of action. But notice that for this to happen, each individual act-token must already have in view the shape of the final rightful product, which is described by the Kantian UPR and the principles that instantiate it.[35]

Notably, this picture is not one where the freedom of choice of each is *ex post* subjected to rightful constraints of an institutional pedigree. It is the freedom consistent exercise of the purposiveness/choice of each from which the choice of an interacting party inherits its freedom. As such the choice of each can be free not as some *state* but only as *performance*: i.e., when it is performed or exercised in a freedom consistent manner. Its freedom is *constituted* in rightful performance. Accordingly, free action is constitutively law-governed, i.e., governed by the standards that instantiate the demands of UPR, or in Katrin Flikschuh's words: 'UPR is constitutive of external freedom; it is not an external constraint upon external freedom'.[36]

Ultimately, the picture painted by UPR can explain legal relations as obtaining when two or more individuals stand under the demand of engaging in structured tokens of action requiring their mutual contribution. Accordingly, legal relations can be employed in direct explanations of legal facts (facts about legal obligations)[37], without any residual need to refer to preordained legal institutions.

Radicalness: UPR as source of omnilateral demands

Meanwhile the relational reading of UPR, in exemplifying freedom as independence, can purge the lingering commitment to positivist grounds, which brands many contemporary non-positivist

[35] By principles I mean what UPR denotes as 'universal laws'. In developing this picture, I am relying heavily on recent work by A.J. Julius, specifically his 'Independent People' in S. Kisilevsky and M. J. Stone (eds), *Freedom and Force: Essays on Kant's Legal Philosophy* (Hart Publishing 2017), 91-110.
[36] K. Flikschuh, 'Non-Individualist Innate Right', in idem *What is Orientation in Global Thinking?* (Cambridge University Press 2017), 84.
[37] I am following here the definition of 'legal fact' proposed by Mark Greenberg in his 'How Facts Make Law' (n 8).

accounts. Recall that a key reason for resorting to law practices and a pre-ordained structure of governance was a concern about unilateral exercises of coercion in the name of a pre-institutional right to individual autonomy. Thus, in contrast to positivists who prioritise institutionalised legal sources over relations for the explanation of the content of the law, the non-positivist appeal to institutions has a different source: the basic structure of governance becomes now necessary because pre-institutional legal rights are, in the absence of a scheme of public authorisation, bound to generate unilateral coercion.

This concern with state institutions often assumes different guises: for Dworkin and other broadly interpretivist accounts of law, appeal to law-practices as grounds serves the purpose of triggering principles of political morality, which may legitimise the coercion exercised by the state on behalf of individual claims of autonomy. A less demanding view, and one that is of consequence for a Kantian account of legal relations, departs from a thinner requirement of legitimacy. In contrast to interpretivist non-positivism this view does not require any thick political morality to legitimise coercive exercises of individual autonomy, but merely appeals to the public structure of state coercion as a source of omnilateral authorisation of enforceable claims of individual autonomy. I will coin the expression 'quasi-Lockean reading' for this interpretation of the Doctrine of Right and postpone its discussion until the next section, where I will also touch upon the idea of omnilaterality in more detail.

Meanwhile, on the relational reading, UPR demands that subjects undertake 'structured' actions which are composed by mutual contributions of the interacting parties. In that respect UPR offers a direct moral backing or justification for the recommended course of action, leaving no residual need for reference to an institutional basic structure. Let us revert to our example of Ms Donoghue, the unlucky consumer of poisoned ginger-ale, and ask how UPR would structure her relations with the careless manufacturer. Under its authority the manufacturer, Mr Stevenson, should be making ginger-beer consistently with the freedom of Ms Donoghue; i.e., in such a manner that his act-tokens and those of Ms Donoghue compose a joint pattern of action, which enables Mr Stevenson and Ms Donoghue to interact in a mutually independent manner; which is to say, in a manner that the actions of each becomes a 'step' or a 'landing' for the actions of the other to lean on; or in more poetic terms, for performing together a dance 'in the steps of independence'. Here, the much celebrated 'duty of care', which was found to determine the relevant obligations in this landmark case of negligence, is but one among the principles that

describe the structure of the pattern of independence which each of the parties must anticipate in performing their acts. In the celebrated words of Lord Atkin:

> '[…] I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. […] The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; […] You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? […] this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used […] to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act'.[38]

On this occasion, any reference to law-practices, as enablers of an invitation for moral justification, is redundant. The legal relation between Donoghue and Stevenson comes first and is itself the source (or ground) of the relevant legal obligations.

The crux of radicalness in the proposed reading consists in the fact that UPR does not require the state and its institutions to ground its moral contribution to legal demands.[39] With respect to interpretivist non-positivists, Kantian right serves directly as ground of the moral content of the law, leaving no space for a basic structure to play a role in the justification. Equally, when confronted with the quasi-Lockean reading, the relational reading of Kantian right rejects individual autonomy as an antecedent moral demand, relinquishing the burden of justification that accompanies it. Significantly, as I am going to suggest in the closing section, omnilaterality is already involved in the demands of independence, with no need to appeal to some source external to UPR to retrieve it.

3.2 The quasi-Lockean reading

The defended reading of Kantian right clashes with a standard interpretation, which for expository reasons I shall label 'quasi-Lockean'. On this standard reading, independence is grounded in a pre-

[38] Donoghue v Stevenson, [1932] AC 562 (n 4).

[39] Tom Bailey has objected that my argument establishes at most that UPR grounds one pre-institutional legal obligation: the Kantian duty to enter the civil condition. All other legal obligations must lie downstream of that one and be grounded in the institutions of the civil condition (or law-practices, in the terminology of the paper), because they presuppose the existence of an omnilateral will, which in Kant cannot be conceived of independently of the civil condition. In part 3.3 of the chapter, I discuss the requirements of a pre-institutional conception of omnilaterality, which would counter at least in part the above objection. I am indebted to T Bailey for raising this important point.

institutional principle of individual autonomy, which partly overlaps with Kant's idea of innate right (IR):

> '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.'[40]

This reading affirms the priority of individual autonomy qua IR and seeks to understand UPR's relational account of right as derivative. However, in its more sophisticated version, the quasi-Lockean reading introduces an interpersonal dimension to Kantian independence by suggesting that, although grounded in an absolute innate right, it cannot materialise independently of the public institutions of a political community.

To understand why, one must appreciate that pre-institutional autonomy is merely *provisional*. In contrast, for a full enjoyment of independence persons must acquire *conclusive* property titles in the material means of their actions. This requirement, eloquently defended by Arthur Ripstein in recent years, relies on an understanding of action whereby securing the means is conceptually prior to setting the ends of the action. To that extent, setting the ends of one's action independently of the choice of others would require having secured the relevant means: 'I can choose to Φ only if I can set about doing Φ, which requires that I have a right in the means that enable me to Φ'.[41] Accordingly, the negation of independence is a state of affairs in which others are equally entitled, in virtue of their innate right, to use the same means when they come to physical possession of them. Importantly, independence breaks down because any act based on the provisional entitlements of each, is rendered an instance of unilateral coercion toward others.

This understanding of action, and the idea of independence that informs it, consider conclusive property titles as enabling the independence of an actor *because* they alone can ground legitimate exclusion of others from the means of her action. The condition of legitimacy requires in turn a system of public law which finalises provisional entitlements and enforces them in an omnilateral manner, i.e., in the name of all those who belong to the same political community. To that extent, pre-institutional individual autonomy (innate right) plays the role of a background structuring ground of legal relations, which however can only be fully constituted by the public institutions of

[40] Kant, 'The Metaphysics of Morals', 6:230.
[41] Ripstein, *Force and Freedom*, 14; 40. This leads to a fundamental distinction between actions and their contexts; and between choosing and wishing: I can only choose something only if I take it to be within my power to pursue. Otherwise, I am only whishing it.

state-based law.[42] Thus, we read in Ripstein: 'People are entitled to independence simply because they are persons capable of setting their own purposes.'[43] And elsewhere, '[…] the consistent exercise of the right to freedom by a plurality of persons cannot be conceived apart from a public legal order.'[44] Taken together, these statements amount to the standard liberal understanding of independence and freedom, according to which law is a legitimate external constraint on a pre-existing, unconstrained notion of individual autonomy.[45]

The rejection of the quasi-Lockean reading

Appealing as it might appear at first sight, the standard reading struggles to withstand closer scrutiny, as recent work has suggested. For, it seems to subsist on a mischaracterisation of the relation between the two central principles of Kant's account of legal rights i.e., the UPR (universal principle of right) and IR (innate right). In contrast to the relational reading defended earlier, the standard reading suggests that individual autonomy operates as an antecedent ground of independence which does not rely on the juridical relations between parties. Accordingly, a key strategy for resisting this move requires the inversion of the explanatory priority between the two principles, as I read Katrin Flikschuh to suggest in recent work.[46]

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[42] The *locus classicus* is Arthur Ripstein's, *Force and Freedom*, which has set the agenda of the debate on Kant's philosophy of right. Although Ripstein proposes to understand Kantian right in a relational manner, his focus on innate right ultimately renders his account a version of the quasi-Lockean reading. See for related criticism of the philosophical premises of the quasi-Lockean reading: K. Flikschuh, 'Non-Individualist Innate Right' (n 36), 69-99; Flikschuh, 'Human Rights in Kantian Mode: A Sketch'; K. Flikschuh, 'Justice without Virtue" in Lara Denis (ed), *Kant's Metaphysics of Morals. A Critical Guide* (CUP 2010); and the contributions by Katrin Flikschuh and George Pavlakos to a symposium on Force & Freedom: K. Flikschuh, 'Innate Right and Acquired Right in Arthur Ripstein's *Force and Freedom*', *Jurisprudence* 1 (2010), 295; G. Pavlakos, 'Coercion and the Grounds of Legal Obligation: Arthur Ripstein's *Force and Freedom*' *Jurisprudence* 1 (2010), 305; as well as Ripstein's response there, 'Reply to Flikschuh and Pavlakos', *Jurisprudence* 1 (2010), 317. In a similar critical vein, but less explicitly, see AJ Julius, 'Independent People'.

[43] Ripstein, *Force and Freedom*, 17.

[44] Ibid, 9.

[45] I take some version of this view to inform a tradition of eminent Kantian scholarship whose exponents derive juridical demands from the categorical imperative: see, O. Höffe, *Kategorische Rechtsprinzipien* (Suhrkamp, 1990); W. Kersting, *Wohlgeordnete Freiheit* (Suhrkamp, 2nd ed. 1993); B. Ludwig, 'Kants Verabschiedung der Vertragstheorie', in *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics* 82 (1993); P. Guyer, *Kant on Freedom, Law and Hapinness* (Cambridge University Press, 2000). For a more recent statement of the liberal interpretation, see L.-P. Hodgson, 'Kant on the Right to Freedom', in *Ethics* 120 (2010), 791; and critical discussion in Flikschuh, 'Non-Individualist Innate Right' (n 36), 76.

[46] Flikschuh, 'Non-Individualist Innate Right' (n 36). A caveat is in order: in this and related work Flikschuh's main aim is to question foundational rights talk with respect to innate right as an ultimate ground of the system of legal rights. Her view seems to be that acquired rights are at least on par with innate right when it comes to questions of what founds what. I take this to suggest that UPR, as the principle that advances a relational concept of right and plays a constitutive role for freedom, also assumes a grounding role for IR. Flikschuh's account can be contrasted to another, equally powerful, critique of the autonomy-based derivation of Kantian right developed in C. Horn, *Nichtideale Normativität* (Suhrkamp, 2014). Horn's focus is less the relational character of UPR and more the fact that it operates as the source of a distinct form of non-ideal normativity for the social world. In contrast to Flikschuh, Horn seems to regret law's non-ideal normativity as deficient, whereas Flikschuh regards juridical duty as a valuable source of normative relations, which morality would be unable to generate.

On her proposal, UPR subjects the interacting parties to standards that secure the consistency of the action of each with the independence of everyone else.[47] Meanwhile, innate right does not constitute an additional ground of UPR or the relation it specifies, but merely announces or summarises the moral status enjoyed by anyone who is subject to the requirements of UPR, i.e. the status of an agent as independent of the choice of others, because everyone is under an obligation of acting on principles that secure consistency with each other's independence. Providing ample textual evidence, Flikschuh argues convincingly that UPR specifies the central moral relation in Kant's account of legal rights, while innate right captures the moral status that pertains to anyone who stands in that moral relation.[48] Accordingly, the general concept of right pertains to a 'formal, external, strictly reciprocal moral relation'[49]:

> [T]he concept of right, insofar as it is related to an obligation corresponding to it, has to do, *first*, only with the external and indeed practical relation of one person to another […] But *second*, it does not signify the relation of one's choice to the mere wish of the other, but only in relation to the other's *choice*. *Third*, in this reciprocal relation of choice no account at all is taken of the *matter* of choice […] All that is in question is the *form* in the relation of choice on the part of both…[50]

Flikschuh's reconstruction consolidates a reading of Kantian right that moves away from the quasi-Lockean picture and closer to the relational reading that was defended earlier: on the standard view independent persons are understood as 'each [having] an equal right to exercise [their] power of choice consistently with everyone else having an equal such right.[51] Conversely, her reading highlights the *constitutive role* of UPR for independent action: 'each has a right to being treated by all others as someone who is capable of right action',[52] in manner that supports the relations-first reading of Kantian Right.

Another notable account that underscores the constitutive priority of UPR over IR has been recently advanced by Rafeeq Hasan and Martin Stone.[53] On this proposal, what distinguishes juridical right within Kant's division of morality is its provisionality. Importantly, this property grounds a *conceptual link* between pre-relational entitlements (including innate right) and their fully

[47] Much in line of what was argued in section 3.1, this chapter.
[48] See Flikschuh, 'Human Rights in Kantian Mode'; also 'Non-Individualist Innate Right' (n 36), 82-87, where however the emphasis is on showing the interdependence between innate and acquired right.
[49] Flikschuh, 'Human Rights in Kantian Mode', 662.
[50] Kant, 'The Metaphysics of Morals', 6:230, edited quote reproduced in Flikschuh, 'Human Rights in Kantian Mode', 662.
[51] Flikschuh, 'Non-Individualist Innate Right' (n 36), 85.
[52] Ibid, 85.
[53] See M. Stone and R. Hasan, 'What is Provisional Right?', in *Philosophical Review* 131 (2022), 51-98. Their account is much more nuanced than my summary suggests, which however should suffice for present purposes.

realised instantiations (as specified by UPS), because a complete explanation of anything that is provisional must involve as ground the conditions of its possibility: 'provisional right expresses the intrinsic connection between rightful relations and political association by marking the defective character of rights where a state is absent'.[54] Ultimately, on their account, UPR 'grounds and unifies the domain of juridical principles by exhibiting them as stages of its own explication (p93). [55] Here, as with Flikschuh earlier, the *provisionality account* vindicates a relational reading of Kantian right, which takes the ultimate ground of independence to be the relation in UPR rather than some self-standing notion of individual autonomy (which in the authors' account can only be thought of as provisional).

Both these accounts cast serious doubt on the quasi-Lockean reading of Kantian right.[56] Importantly, they identify and remove the misconceived priority of IR over UPR in the explanation of Kantian freedom as independence, which was responsible for demoting legal relations to tools for 'realising' antecedent claims of individual autonomy. In contrast, when the order of explanatory priority between UPR and IR is restored, a compelling new understanding emerges of the relation between rights and legal relations: rights are then grounded in the relation specified by UPR, the legal relation. In this context innate right functions merely as a signpost for the moral status of each of the interacting persons, *once they are parties to legal relations*.[57]

3.3 The publicity of legal relations

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[54] *Ibid.*, 53.

[55] *Ibid.*, 93. The authors supplement the 'centripetal' role of UPR, of unifying the juridical domain by grounding itself in its instantiations, with a claim about the necessary role of institutions in the juridical domain: because UPR is a purely formal principle, it affords nothing that can play the role of a unifying end; accordingly, accessing the requirements of right can only be a matter of its specification via additional principles and determinate judgements applying those principles, both of which need to be procured by legal intuitions and officials occupying roles in them; see, ibid, 92. This further claim is clearly not necessitated by the *provisionality* thesis, as I will argue in the last section of the chapter, even though it might be valid as an exegetical point about Kant.

[56] In recent work Barbara Herman develops a holistic reading of Kant's practical philosophy, according to which the Doctrine of Right complements his earlier moral philosophy. Her view, rich and subtle in its detail, resists an easy classification under either of the camps suggested here. In a nutshell, she takes duties of right to 'flesh out' moral agency by providing standards for action which enhance our moral powers as autonomous persons. To that extent, her view seems to side with quasi-Lockean readings that affirm the primacy of Innate Right. Meanwhile, on a par with relational strategies that subsist on institutionalisation, Herman argues that the obligation to act as law requires is instantiated only if everyone is equally constrained – and not just obligated – to conform; see, B. Herman, 'Juridical Personality and the Moral Role of Juridical Obligation' (n 34).

[57] In often overlooked work, Karl Larenz has argued for a view that supports a relational interpretation of Kant. Relying on passages from the *Metaphysics of Morals*, he appeals to a pre-institutional, fundamental legal relation [*das rechtliche Grundverhältnis*] to specify who may count as a person, in the sense of becoming the subject of regulation through legal norms. Importantly for our purposes, Larenz understands the relevant relation to be based on a reciprocal duty between interacting agents to respect each other, which obtains antecedently to the institutions of any state-based legal order. See K. Larenz, *Allgemeiner Teil des Deutschen Bürgerlichen Rechts* (CH Beck, 1967), 56-61. I owe thanks to Paul Sourlas for bringing this work to my attention.

Despite the progress made by recent defenders of relational strategies of Kantian right, there remains a key difference with the version put forward in this chapter, whose identification will help us consolidate the possibility of a *relations-first,* or *radical* non-positivism. Both the account of Flikschuh and the *provisionalist* one, read Kant's universal principle of right [UPR] as necessitating the existence of a basic structure of legal institutions [basic structure[58]]. In doing so they hold juridical relations to be constitutively dependent on the law-practices of the basic structure.[59]

This belief is equally shared by the quasi-Lockean reading of Kant but also other moderate versions of non-positivism, as previously indicated. In these accounts the basic structure is a means for evoking a collective 'we' – agent, on whose name pre-political individual claims can become binding on others.[60] While the significance of omnilateral justification and the institutions that procure it is obvious for modest non-positivists, it is less clear why a relational account (including those of Flikschuh and the provisionalists) should commit to them. I turn next to two reasons why a relational reading of Kantian right does not necessitate the presence of a basic structure in its explanation of legal relations.

To begin with, any retreat to the basic structure would struggle to account for legal relations as an independent explanatory tool in line with the phenomenology of legal practice.[61] In particular, making reference to the basic structure, qua necessary ground of legal obligations, would revive the problem of circularity that we encountered in positivist accounts of law. Meanwhile, if the requirements of juridical relations are ultimately grounded in institutional sources, then a fresh need to appeal to pre-institutional considerations would arise, in order to counter the indeterminacy of institutional sources.[62]

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[58] For the definition of basic structure, see section 2.3, this chapter.

[59] For a similar approach, see Herman, 'Juridical Personality and the Moral Role of Juridical Obligation' (n 56).

[60] Flikschuh also appeals to a version of the basic structure argument to ground the idea of an omnilateral will as the source of legal obligations. In her case, however, the concern is not to legitimise legal restrictions on antecedent, pre-political individual rights, but to demonstrate that omnilateral willing is fundamental in the explanation of legal rights and, therefore, not reliant on any antecedent notions of individual willing or autonomy. Specifically, she argues that the omnilateral will is constituted by the subordination relation that obtains between a commander and their subject(s), making facts of authority the basic determinants of legal rights. See, Flikschuh, 'Justice without virtue', 63-69. Below I propose a constitutive account of omnilateral will that avoids grounding legal rights exclusively in authoritative institutions while, at the same time, steers clear of the fallacies committed by the non-relational readings of Kant.

[61] See section 2, this chapter.

[62] See section 2.1, this chapter. Although there is no space to discuss in detail, this seems to me to be the upshot of Flikschuh's account. After having disentangled UPR from innate right, she reverts somewhat puzzlingly to public institutions. But this is too quick; UPR, as she has argued, is a moral principle that explains what counts as rightful action among a plurality of persons and should not be collapsed into the conditions of an institutional legal order. The two issues should be kept analytically distinct, even though UPR can be employed to support the Kantian duty

The second reason is deeper and demonstrates why the relational reading of Kantian is uniquely suited to vindicate the possibility of radical positivism. It points at the redundancy of state law in the context of the relational reading: why turn to law-practices to establish the inter-personal or public dimension of juridical demands if we have *already* established that the pre-institutional grounds of legal relations are public? Recall our discussion of freedom as independence from earlier. Freedom as independence is premised on a particular kind of *interdependence* from others: one obtaining when each of the interacting parties is acting with a view to the freedom of everyone else. If that's the kind of demand that is grounded by the UPR, then why appeal to an additional source of publicity?

To put it differently, the question of publicity arises about the range of those who can partake in relations of independence. It asks: 'who can be included in the scope of collectives whose members act on demands that help each to act consistently with the freedom of others?' It was demonstrated earlier that a typical route for answering this question looks to identify a 'collective' agent in whose name the said demands can become binding for all those involved. But there is no symmetric demand to resort to an institutional public structure once we have adopted the relational interpretation of legal rights. For, the UPR bestows on juridical demands a public dimension in virtue of recommending them 'in the name of' all those who are parties to the relation.[63] It does so because the demands of independence stipulated by UPR, define those requirements as the features of a pattern of interaction whose subject is the joint agent made up by everyone who is under the general, abstract obligation to interact with others in a freedom-consistent manner.[64]

But perhaps one might object that a more precise understanding of the omnilateral scope of UPR is needed, for the reason that by removing altogether institutions as necessary grounds of legal relations, we also remove the possibility of accounting for the scope of legal relations through the idea of an omnilateral we-subject. For, that possibility would ultimately require a scaffolding

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to enter the civil condition. Ultimately, her suggestion invites two criticisms: apart from reviving the thread of circularity, it is also redundant, as I explain next. See Flikschuh, 'Non-Individualist Innate Right' (n 36).

[63] Notably, in his theory of citizenship, Kant does not include every subject of the state in the citizenry. Instead, he takes citizenship to require *Selbständigkeit* (civil self-sufficiency) as the specific aspect of independence that comprises not only the rights and powers of persons but also the conditions for their exercise. The importance of this move cannot be overrated: in suggesting that independence operates as an autonomous normative threshold for citizenship, Kant questions the role of the state as the primary source of public standards for independent interaction. My reading of the relation between Citizenship and *Selbständigkeit* follows the illuminating discussion in N Vrousalis, 'Selbständigkeit as Self-Imposed Independence' (unpublished MS, on file with author).

[64] See A. J. Julius *Reconstruction* (book MS, version 7 December 2013, at www.ajjulius.net/reconstruction.pdf), especially chapters 7, 9 and 11.

enabling the interpersonal relevance of a domain of interactions. Here the issue is not one of (omnilateral) *justification*, but the simpler and more basic one about the *boundaries and relevance* of the legal domain.

To this we must reply by looking closer at how 'omnilaterality', qua joint authorship of standards of rightful action, is *already* incorporated in the normative meaning of UPR. Key in this context is to realise that publicity is part of the practical necessity of UPR: the Kantian principle, in virtue of constituting independence, involves a notion of universalisation which is specific to independence. When UPR enjoins: '[…] according to a universal law' the stated universality is not the universality of autonomy (as affirmed by the categorial imperative) but the universality of independence which, I would like to suggest, involves omnilaterality.[65] This is a robust claim whose full demonstration would have to wait for a future occasion. Within the confines of this short chapter, I can only limit myself to a sketchy demonstration. To reflect on the separateness of the universalisation that pertains to independence, just think that many of the maxims that would pass the test of universalisation under the categorical imperative, may fail under the test of independence. In other words, the set of valid moral maxims of autonomy is not coextensive with the set of maxims of independence. That much might already be familiar and not terribly surprising. My further suggestion is that the universal test of independence *is that of omnilaterality*: only omnilateral maxims can pass it. Here is an example:[66] I am standing in a room with others and there is only one chair. Striving toward autonomy, I act on the maxim: 'occupy chair'. I think this is perfectly consistent with the demands of autonomous agency. But it would, arguably, fail on the demands of independence, precisely because it fails to ground a rightful course of action (i.e., if abided by, it would violate independent interaction among those present in the room). In its stead, a different maxim is in the offing that would enable each one of us in the same room to engage in patterns of action consistent with the freedom of everyone else; perhaps something like: 'occupy chair, unless unoccupied'; or even better, 'occupy chair, consistently with the freedom of others'.

I suggest that omnilaterality is this version of universalisation that considers (explicitly) the freedom of others, and as a result cares for maxims that require from a plurality of persons to act

[65] Due to lack of space, I cannot here elaborate on the complex relation between universality (in autonomy) and omnilaterality (in independence). By way of quick comment, I am inclined to understand them as interdependent parts in a unified conception of practical thinking, whereby independence plays the role of a *condition* on autonomy, much in the way the 'reasonable' can be thought of as a constrain of the 'rational' in Rawls's account of the original position. Here I draw on the Micha Gläser's recent proposal on the problem of practical unity in Rawls's account of justice as fairness, see M Gläser ,'the reasonable and the rational in general and in particular' (MS, on file with author).
[66] Both the example and the argument of this paragraph are inspired by Julius' seminal paper 'Independent people'.

as an interdependent or omnilateral subject.[67] If this is not an outlandish suggestion, then omnilaterality and freedom as independence come out to be co-original. And the Universal Principle of Right, as a pre-institutional moral standard, comes out as constitutive of both.

Where does this leave us? In contrast to the liberal reading, legal rights are not antecedent entitlements that need to be mutually reconciled within an institutional matrix that is acceptable to all. Legal rights, on the relational reading, are grounded from the outset on the interpersonal normative demands of the legal relation.[68] Although a more detailed analysis of these demands escapes the confines of this chapter, they will typically include a principle of fair distribution and a collective duty of care, alongside the class of responsibilities that apply reciprocally to each party to avoid engaging in wrongdoing and other *pro tanto* unjustifiable acts that one person might commit against another on a particular occasion.[69] Taken together these standards formulate the central qualitative features of patterns of action through which each of the parties to the legal relation acts consistently with the principled actions of the others.[70] Acting on such patterns, safeguards the *distinctness between persons*[71] among pluralities of interacting agents, each of whom is typically in the pursuit of separate systems of ends.

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[67] A potential concern arising with respect to the idea of pre-institutional omnilaterality submits that it would violate the requirement of formality of Kantian right, because individuals must a) either assume unilateral authority to interpret the demands of UPR or b) defer such authority to others; however, the objection continues, neither of these options would be consistent with Kantian independence. In reply, I note that the above worry presupposes that outside the state everyone is endowed with some form of pre-institutional autonomy, whose unilateral exercise threatens their independence. In contrast, the picture I am developing here aims to show that precepts of right remain formal, but their formality is omnilateral: in acting on these laws none of the agents is deferring to the other's ends; instead, they are all willing together principles that afford each right exercising actions, consistent with the freedom of others. In consequence, these principles commit interacting parties to deliberative practices of interpretation and application which do not require the presence of state institutions or law-practices. I am especially grateful to Luke Davis who pressed me to discuss this issue during his brilliant commentary in Göttingen.

[68] Figuratively speaking, while the liberal reading sees rights as part of a Natural Private Law, the relational reading I propose defends something akin to a Natural Public Law. See in the same vein, Julius, 'Independent People'; G. Pavlakos, 'Redrawing the Legal Relation' in J. L. Fabra-Zamora (ed.), *Jurisprudence in a Globalised World* (Edward Elgar 2020), 173; Pavlakos, 'Agent-Relativity without Control: Grounding Negligence on Normative Relations', in V. Rodriguez-Blanco and G. Pavlakos (eds.), *Negligence, Agency and Responsibility* (Cambridge University Press 2021), 118. Alexander Somek has put forward a sophisticated account of legal relations which resembles the one here in two at least respects: it is non-positivist and is inspired by a conception of freedom that is grounded on relations of mutual dependence. For all the similarities, however, Somek's account departs from the one defended here in interpreting mutual dependence as the result of a prudential argument: 'You make yourself into an instrument for the realization of […] others […] for the reason that you have to make room for others to be given room by them in return'; see, Alexander Somek, *The Legal Relation* (Cambridge University Press 2017) 127.

[69] Cf. with Aaron James' account of the morality of social practices. Essentially, James develops principles of interpersonal morality which regulate interactions of a plurality of persons, when those interactions constitute a social practice, in virtue of passing a threshold test. Aaron James, 'Distributive Justice Without Sovereign Rule: The Case of Trade', in *Social Theory & Practice* 31 (2005), 533.

[70] See Julius, *Reconstruction*, 107. Notice that on the proposal I am defending, the requirements of legal relations are structural principles which aim to also safeguard conditions for the exercise of persons' normative powers, in addition to enforcing individual entitlements against others. Compare with the inclusive reading of civil independence developed by Vrousalis, 'Selbständigkeit as Self-Imposed Independence'.

[71] J. Rawls, *A Theory of Justice* (Oxford University Press 1972) par. 5.

4. Conclusion

I began by raising some concerns about the possibility of an explanation of legal relations in the contemporary landscape of legal theoretical positions. I am now a little more reassured that this might not be a doomed project, given the potential of Kantian right to hold out the possibility of radical non-positivism.

[draft 3] Glasgow, 05/09/2022