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## A Weberian approach to the history of ethics: Aquinas and Kant

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### ABSTRACT

A distinction between hard-to-shake but rational convictions, on the one hand, and the rationality that calculates causal and logical consequences, on the other hand, can generate questions for the history of ethics. Most moral thinkers draw some such distinction but the contours of the line differ greatly, and, in drawing the line, past moral thinkers tend to be influenced by their own deeply held principles, which in turn tend to reflect their social world. Questions about where the line between values and instrumental calculation are drawn and about the effect on this of the moral thinkers own social world are applied by way of illustration to Thomas Aquinas and Kant. The paper attempts to use Weberian social theory to elucidate a theme in the history of ethics, making every effort to keep the two kinds of theory distinct.



### KEYWORDS

Values; Weber; Rationality; Kant; Aquinas

AQ1

Famously, Max Weber drew a distinction between instrumental and value rationality.<sup>1</sup> This distinction will be explained in more detail below, but it can be said without delay that the aim of this paper is to use it as a tool of analysis for the history of Ethics. Aquinas and Kant have been selected to illustrate the approach, but in principle, it could be used with any moral philosopher. Distinctions similar to Weber's within writings about Ethics will be analysed to establish where the line was drawn between negotiable and non-negotiable ethical criteria, and what answers were given to questions such as 'Is there a free space for instrumental calculation between the ideally good and the absolutely wrong, and what are the contours of this space?'; 'Does the end justify the means?'; 'May one actively choose a lesser of two evils?'; 'May one tolerate evil to avoid creating a situation that is even worse?'; 'What happens when two moral principles, both correct in themselves, collide?'; 'Is it permitted to do something licit in itself when the side effects are evil?'; 'May one go right up to the line between good and evil in order to promote some other good end?'. Each of these questions points towards an area where values or principles cannot supply all the answers, so that there is *Spielraum*, room for manoeuvre, for instrumental calculation. The dimensions and shape of that *Spielraum* have been differently interpreted, but it is hard to think of a moral philosopher who does not allow some place to each kind of rationality. As we shall see, even Kant accepts instrumental calculation. Conversely, even an out and out utilitarian has some bedrock convictions: 'the greatest good of the greatest number' presupposes that individuals count equally, given the same quantum of good, and the definition of good as 'pleasure and the absence of pain' is a core principle.

One can look at counterparts to Weber's distinction within the thought of moral philosophers, but one can also move outside their systems, so to speak, to ask how their reasoning was shaped by their own acceptance of the value rationalities of their times. The personal values and convictions

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<sup>1</sup>Max Weber, *Wirtschaft und Gesellschaft*, 5th ed., ed. J. Winckelmann, 3 vols. (Tübingen: J. C. B. Mohr, 1976), i. 12.

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of philosophers and their society will not necessarily map exactly on to the definition of non-negotiable principles within their systems. A philosopher might play with ideas about non-negotiable principles without being strongly committed to those principles personally. In general, though, one might expect personal and social convictions to affect the theoretical line they draw between inflexible postulates and negotiable ethical decisions. All these questions are historical – a way of setting ideas in context different from, though compatible with, say, questions about the writer's intention, or questions about reception.

To show how the sort of answers these questions can elicit, they will be put to Aquinas and to Kant, who are not so far apart as one might perhaps expect. There is an elective affinity between Kant and Aquinas<sup>2</sup> if they are read without preconceptions, very probably because of a common pervasive debt to Aristotle. All three believe in virtue ethics. The content of the idea of virtue in all three cases is *grosso modo* what the word means in modern usage ('virtue', 'vertu', 'Tugend') (by contrast with 'vertù' in Machiavelli and other humanists, for whom it means 'the indispensable quality which enables a ruler to deflect the slings and arrows of outrageous fortune and to aspire in consequence to the attainment of honour, glory and fame'<sup>3</sup>). All three thinkers give a content-rich account of virtues: they go far beyond 'meta-ethics' into specifics about what constitutes good behaviour or not. All three believed in a close connection between ethics, the virtues, and human nature, and all three believed that the laws of the state should foster ethical behaviour. In all three cases, this full and highly structured holistic value system is able to incorporate explicitly a major role for instrumental calculation about cases that cannot be solved simply by reference to a rule.

These continuities could be regarded as a legacy of Aristotelian (and perhaps also Stoic) ethics. Such influence was probably inescapable in the Middle Ages and after. But similar ideas have been developed independently in other cultures: the close link between nature, ethics, and the laws of the state is characteristic of classical Chinese and Hindu thought also. Obviously, it is impossible to explore these avenues here, or generally, hence the restriction to two main authors. In addition, Aristotle cannot be omitted altogether because of his influence on Aquinas, and Machiavelli gets a brief mention as an interesting contrast with the Aquinas and Kant, bringing out how much their attitudes to two kinds of rationalities – instrumental and value rationality – have in common, though even Machiavelli has some strong, if not necessarily ethical, values. As noted above, the suggestion is that a similar questionnaire centring on value and instrumental rationality could be brought to bear on other past moral thinkers. These key concepts will be used in their Weberian sense as recently interpreted in a historical study of rationalities.<sup>4</sup> As the following elucidations should make clear, 'instrumental rationality' is taken to mean something close to what many people mean by 'rationality' *tout court*, except that its parameters are set by values, and 'values' are understood in a sense that only partly overlaps with what philosophers used to mean when they contrasted facts with value.

## 1. Instrumental rationality

Instrumental rationality is to be understood here<sup>5</sup> as the calculation of practical and of logical consequences, whether in the market or the monastery.<sup>6</sup> This will frequently be shaped by values. It is not

<sup>2</sup>See here the insightful paragraphs of Terence Irwin, *The Development of Ethics. A Historical and Critical Study III: From Kant to Rawls* (Oxford: Oxford University Press, 2009), 163.

<sup>3</sup>Q. Skinner, *Foundations*, i, 121.

<sup>4</sup>See D. L. d'Avray, *Rationalities in History: A Weberian Analysis* (Cambridge: Cambridge University Press, 2010). Whether or not this is the correct interpretation of Weber does not in fact matter for our purposes, so long as the distinction as defined generates good questions.

<sup>5</sup>For an interesting analysis by a modern philosopher, see D. Papineau, 'The Evolution of Means–Ends Reasoning', in his *The Roots of Reason: Philosophical Essays on Rationality, Evolution, and Probability* (Oxford: Clarendon Press, 2003), 83–129.

<sup>6</sup>An anonymous reader for the journal perceptively suggested that communicative rationality, as defined and explained by Jürgen Habermas, can be regarded as a subset of instrumental rationality. Personally, I find this insight convincing, but matters are complicated by Habermas himself whose reading of Weber is different from mine and who specifically distinguishes between

useful to restrict the concept to the economic domain or to see its subject matter as purely egoistical calculation. One may, for instance, usefully speak of an instrumental rationality of asceticism. Weber made this clear in a passage about Hindu asceticism which undermines some common assumptions about his thought:

Indian asceticism was technically probably the rationally most highly developed in the world. There is hardly any ascetic method which was not exercised in virtuoso fashion in India and very often rationalized into a theoretical technical science, and many forms were only here carried all the way to their ultimate logical conclusions, which are often simply grotesque for us.<sup>7</sup>

For Weber, rationalization and instrumental rationality could take all sorts of different values as their starting points and premises. Thus, instrumental rationality per se should not be too closely linked with the modern West and with modernity, industrial capitalism and bureaucracy. Investigation of the connection may have been one of the original motives behind Weber's research, but it led him to appreciate a variety of different forms of instrumental rationality. Here, our concern is with its role in the ethical domain, as understood by selected philosophers.

So a quick definition: instrumental rationality in ethics is the kind employed when the system allows for more than one option, rather than indicating a single right choice. That does not mean that the background value system of the author is irrelevant to how this *Spielraum* for instrumental calculation is defined.

## 2. Value rationality

Value<sup>8</sup> rationalities are understood here as world views and systems of conviction, secular and sacred: e.g. Communism, Liberalism, Catholicism or Hinduism. Examples of individual values might be 'to each according to their needs', 'men and women are equal', 'souls are reborn in different bodies', 'there is a continuum between humans and computers', 'there is a God', 'there is no God'. It should be stressed here incidentally that side-constraints (e.g. negative commandments) and premises, as well as 'ends', are values. It is unhelpful to collapse the 'value – instrumental' distinction into the 'ends – means' antithesis – an intellectual groove into which is easy to slip.<sup>9</sup>

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'instrumentelles Handeln' and 'kommunikatives Handeln': *Theorie des kommunikativen Handelns* (Frankfurt am Main, 1987, 2016) 2 vols., i. *Handlungsrationality und gesellschaftliche Rationalisierung*, 381–5. Correcting or reformulating Habermas's understanding of instrumental rationality to show that it can – contrary to his own view – accommodate his concept of communicative action is a level of complication too far for present purposes. The same (as I see it) over-narrow understanding of Weber's concept of instrumental rationality makes Jari I. Niemi, 'Jürgen Habermas's Theory of Communicative Rationality: The Foundational Distinction Between Communicative and Strategic Action', *Social Theory and Practice* 31 (2005), 513–32, unusable for present purposes.

<sup>7</sup>Max Weber, *Die Wirtschaftsethik der Weltreligionen: II. Hinduismus und Buddhismus*, repr. in *Gesammelte Aufsätze zur Religionssoziologie*, ii: (Tübingen: J. C. B. Mohr (Paul Siebeck) 1988), 149, my translation, from *Rationalities in History: a Weberian Essay in Comparison* (Cambridge: Cambridge University Press, 2010), 127.

<sup>8</sup>This is not the place for a sociological analysis of 'value', for which see d'Avray, *Rationalities in History*, chapters 2 and 3. For other approaches, from which I have derived stimulus, see S. A. Satris, 'The Theory of Value and the Rise of Ethical Emotivism', *Journal of the History of Ideas* 43 (1982), 109–28. (For a different perspective, see H. Joas, *The Genesis of Values* (Cambridge: Polity, 2000) – remarkably little overlap.) On fact and value, see, notably, B. Williams, *Morality: An Introduction to Ethics* (Cambridge: Cambridge University Press, 1976); D. Davidson, 'The Objectivity of Values', in his *Problems of Rationality* (Oxford: Clarendon Press, 2004), 39–57, at 49: 'we should expect people who are enlightened and fully understand one another to agree on their basic values. An appreciation of what makes for such convergence or agreement also shows that value judgements are true or false in much the way our factual judgements are'; it should be added that Davidson is very optimistic about the possibility of consensus, and also that the argument about 'fact and value' continues: see, e.g. J. J. C. Smart, 'Ruth Anna Putnam and the Fact–Value Distinction', *Philosophy* 74 (1999), 431–7. See also the issue of *Revue française de Sociologie*, 47–4 (2006) devoted to the sociology of values (with special reference to Europe), and, for an original approach, D. Graeber, *Toward an Anthropological Theory of Value* (New York: Palgrave, 2001). For remarks by Weber which clarify his own idea of value – 'that problem child of our discipline' ['jenes Schmerzenskindes unserer Disziplin'] as he called it – 'Die Objektivität sozialwissenschaftlicher und sozialpolitischer Erkenntnis', in *Gesammelte Aufsätze zur Wissenschaftslehre*, ed. J. Winckelmann (Tübingen: J. C. B. Mohr (Paul Siebeck), 1988), 146–214, at 209–10 – see *ibid.* 210–2.

<sup>9</sup>As with W. G. Runciman, *A Critique of Max Weber's Philosophy of Social Science* (Cambridge: Cambridge University Press, 1972), 14. Conversely, not all ends are values: one can choose an objective by inclination without attaching any special worth to it, as in 'girls just want to have fun' (Cindy Lauper).

It will be noted that I use the words values, convictions and value rationality broadly, to include some 'is' convictions as well as 'ought' convictions. This is because the phenomenology of convictions about, say, the reality or non-existence of human souls is very much like the phenomenology of beliefs in, say, the rightness or wrongness of polygamy.<sup>10</sup>

155 People do not readily give up values once they are committed to them, but this study follows Weber in allowing that such convictions can even so be rational.<sup>11</sup> For one thing, the reasons that justify them come from other elements of the world views to which they belong. Convictions can be highly durable in the face of attack because they form a whole in which each part supports the rest intellectually, so that the antecedent probability of an argument against any one element is diminished by that argument's incongruity with all the other elements: which it has not contested and – since it is hard to argue about more than one thing simultaneously – cannot easily confront at the same time. Empirical evidence for a miracle will cut little ice with someone in whose world view such occurrences have no place. For them, an overwhelming anterior probability, weighing against what the empirical evidence may seem to demonstrate, leaves their world view unshaken.<sup>12</sup>

160 The interdependence of different elements within value systems tends to give each of the latter a distinctive 'holistic' character. Though any two value systems are likely to have many individual elements in common – e.g. the Soviet Union and the USA accepted monogamy and material well-being as values, and Moslems, Jews and Christians share beliefs about Old Testament prophets – they tend to be quite distinctive in their overall 'Gestalt'. This distinctiveness is what anthropologists often mean when they talk of 'cultures' in the plural; which does not mean that all anthropologists deny the possibility of a common instrumental rationality.<sup>13</sup>

165 Values and convictions also derive their durability from the concrete experiences or simulacra of experiences which reinforce them. Thus, an orthodox Jew may take a certain view of the State of Israel's boundaries because of a reading of Biblical history, reinforced by empathetic awareness of astonishing survival of his people through centuries of suffering and persecution, and by experience of the power of the rituals which structure his family life. Concrete experiences and strong mental images give extra force and powers of resistance to value systems. Such experiences are rational arguments in their way, though of course two people with incompatible value systems can each feel that their convictions are borne out by their personal experiences, as also by the way that observance of rituals or principles make them feel. Per se, there is no doubt some degree of irrationality in the tendency of people to extrapolate too far from personal experiences and the like. On the other hand, a conviction reinforced in this way often does not depend only on the experiences or strong mental images. Its coherence with other elements in the person's world view may seem to provide independent verification of the message sent by the strong mental images. Thus, coherence provides the skeleton<sup>14</sup> but experiences and the like put flesh on the bones.

170 It may be felt that where values are concerned I have set the requirements for rationality too low. But if one sets the bar too high, not many people's convictions can be said to have rock solid rational

<sup>10</sup>Cf. *Rationalities in History*, 62, 68–9.

190 <sup>11</sup>For a different view, see Gavin Langmuir, who uses the phrase 'nonrational thinking' to mean what Weber calls 'value rational': contrast Weber, *Wirtschaft und Gesellschaft*, i. 12, with G. I. Langmuir, *History, Religion and Antisemitism* (Berkeley: University of California Press, 1990), 152 n. 18. They are clearly talking about the same thing but Langmuir does not regard it as rational. But on this line of thinking, convictions about, say, the equal rights of men and women must also be denied the designation of 'rational', as they are not easily demonstrable by simple logic or empirical testing, but, rather, convince us because of their coherence with our general *Weltanschauung*.

195 <sup>12</sup>Cf. J. I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650–1750* (Oxford: Oxford University Press, 2001); R. J. Fogelin, *A Defence of Hume on Miracles* (Princeton, NJ: Princeton University Press, 2003), 20, 34; compare the similar powers of resistance to empirical refutation of the Azande system of poison oracles as studied by Evans-Pritchard when it was still in operation: E. E. Evans-Pritchard, *Witchcraft, Oracles and Magic under the Azande*, abridged with an introduction by Eva Gillies (Oxford: Clarendon Press, 1976), 141–2.

<sup>13</sup>G. Obeyesekere, *The Apotheosis of Captain Cook: European Mythmaking in the Pacific* (Princeton, NJ: Princeton University Press, 1992, 1997); he was attacked by M. Sahlins, in *How 'Natives' Think: About Captain Cook, for Example* (Chicago: University of Chicago Press, 1995). For a good overall sense of the debate, see R. Borofsky et al., 'CA Forum on Theory in Anthropology: Cook, Lono, Obeyesekere, and Sahlins [and Comments and Reply]', *Current Anthropology* 38 (1997), 255–82.

200 <sup>14</sup>Cf. R. C. S. Walker, *The Coherence Theory of Truth: Realism, Anti-Realism, Idealism* (London: Routledge, 1988).

foundations, though they may stand firm because the subculture around them breaks the winds of criticism. In any case, the definitions proposed are descriptive of common states of mind, phenomenological, not normative. Once formulated, they should be recognizable, and once recognized, they suggest questions for the history of ethics. Questions deriving from this conceptual scheme can be turned into a way (among others) of situating intellectual history in social history. Instrumental rationality is the foreground concept, but the idea of value rationality is a bridge to a more sociological questionnaire.

### 3. Questions for the history of ethics

Two questions stimulated by the ideal-types of instrumental and value rationality will be proposed here.

1. *How much room do the respective systems allow for instrumental calculation in the ethical domain?* Moral philosophers could to some extent answer this question at the level of theoretical or abstract reasoning. They could clinically distinguish between absolute moral imperatives and decisions involving instrumental calculation, without their personal value rationality in Weber's terms, entering into the argument.

In practice, however, philosophers are not just thinking machines, and their definition of the theoretical *Spielraum* for instrumental ethical calculation would usually be affected by personal convictions, which would normally coincide with the values of at least sections of the society in which they lived. We may therefore go on to ask:

2. *How does the value rationality of the philosopher and his social subculture affect his analysis of the scope of instrumental ethical reasoning?* It may do so directly insofar as the philosopher's own value rationality includes 'interface-values', that is to say, values directly relating to the border between value and instrumental calculation, such as the conviction that 'the end doesn't justify the means', or indeed the contrary conviction. Or again, the philosopher's personal convictions may indirectly shape theorizing about instrumental calculation by setting immovable limits to the room for manoeuvre allowed in the philosopher's system: thus, personal convictions about freedom of movement anchored in the philosopher's recent family history (refugee parents for example) may set value rational limits to how much instrumental calculation is allowed in his or her analysis of the ethics of immigration.

### 4. Starting point

Aristotle is a natural starting point as he discusses ways of reasoning that map on to instrumental rationality as defined above.<sup>15</sup> They also fit into his value system, which took the *polis* to be the natural form of civilized life. The *polis* is the setting for the individual's progress towards fulfilling his *telos*, the virtuous life.

For Aristotle, the ethical role of *polis* law is linked to instrumental rationality through the principle of *epieikeia*. The laws are designed to promote virtue, and they do so *grosso modo*. From time to time, however, their formulation will frustrate their very function. In such cases, the *epieikeia* of the ruler comes into play. The law may be suspended temporarily to serve its own end better. This is set out clearly in his *Rhetoric*:

<sup>15</sup>This section abridges the discussion in *Rationalities in History*, 138–140 (*epieikeia*); see also d'Avray, *Medieval Religious Rationalities: A Weberian Analysis* (Cambridge: Cambridge University Press, 2010), 116.

[Equity] makes up for the defects of a community's written code of law. For equity is regarded as just; it is, in fact, the sort of justice which goes beyond the written law. Its existence partly is and partly is not intended by legislators; not intended, where they have noticed no defect in the law; intended, where they find themselves unable to define things exactly, and are obliged to legislate universally where matters hold only for the most part; or where it is not easy to be complete owing to the endless possible cases presented, such as the kinds and sizes of weapons that may be used to inflict wounds – a lifetime would be too short to make out a complete list of these.<sup>16</sup>

He says something similarly more succinctly in the *Nicomachean Ethics*:

And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact is this the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law, so that a decree is needed.<sup>17</sup>

This concept of *epieikeia* is also in harmony with an idea of ethical instrumental calculation that transcends the more specific problem of *polis* legislation. According to Aristotle, general principles cannot provide solutions to every concrete ethical problem:

the whole account of matters of conduct must be given in outline and not precisely, as we said at the very beginning that the accounts we demand must be in accordance with the subject-matter; matters concerned with conduct and questions of what is good for us have no fixity, any more than matters of health. The general account being of this nature, the account of particular cases is yet more lacking in exactness; for they do not fall under any art or set of precepts, but the agents themselves must in each case consider what is appropriate to the occasion, as happens also in the art of medicine or navigation.<sup>18</sup>

In this respect, he is perhaps out of tune with a common modern philosophical view which has been called the 'standard model' (by a philosopher who disagrees with it), viz., that 'the aim of moral theory will be to settle all moral questions and make all moral decisions, as far as possible, by a rigorous derivation from precisely stated moral principles'.<sup>19</sup> Aquinas, on the other hand, is close to Aristotle's views.

## 5. Aquinas

Aquinas articulates his essentially similar attitude through a distinction between a primary and secondary moral law. The primary law is at a high level of generality and leaves no room for exceptions. The secondary kind is more specific but still will not solve every concrete problem.

For with everybody it is right and true, that one should act in accordance with reason. But from this principle follows like a logical application [*quasi conclusio propria*] that things entrusted to someone should be given back. And this is indeed true for the most part: but it can happen in a particular case that it is harmful, and consequently irrational, if things entrusted be returned: say if someone asks for it in order to attack [one's] native land. And this is found to be less and less comprehensively applicable, as it is applied with ever greater specificity: say if it is said that 'things entrusted to someone should be returned' with such and such a qualification [*cautione*], or in such and such a way: for the more specific conditions are added, the more ways there are in which it can be rendered inapplicable, so that the right should not consist in giving back, or refraining from doing so.

Thus therefore we should say that the law of nature is the same for all so far as its first general principles are concerned ... But with respect to certain particular things [*propria*], which are so to speak conclusions drawn from the general principles, it is the same for all for the most part ...<sup>20</sup>

<sup>16</sup>The *Complete Works of Aristotle*, ed. J. Barnes, ii (Princeton, NJ: Princeton University Press, 1984), 2188.

<sup>17</sup>*Complete Works of Aristotle*, ed. Barnes, ii, 1796.

<sup>18</sup>*Complete Works of Aristotle*, ed. Barnes, ii, 1743–4.

<sup>19</sup>A. W. Wood, *Kantian Ethics* (Cambridge: Cambridge University Press, 2008), 47.

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Apud omnes enim hoc rectum est et verum, ut secundum rationem agatur. Ex hoc autem principio sequitur quasi conclusio propria, quod deposita sint reddenda. Et hoc quidem ut in pluribus verum est: sed potest in aliquo casu contingere quod sit damnosum, et per consequens irrationabile, si deposita reddantur; puta si aliquis petat ad impugnandam patriam. Et hoc tanto magis invenitur deficere, quanto magis ad particularia descenditur, puta si dicatur quod deposita



It seems clear that for Aquinas there will be no general principle to cover all the exceptions to this secondary natural law, that is, to the natural law that consists of more specific and low-level principles deduced from the very abstract general principles of ethics. Only these latter admit of no exceptions. Instrumental rationality is left with the task of deciding cases too specific even for the low-level principles of the secondary natural law. Naturally, Aquinas would assume that virtuous habits would be important in ensuring that this specific instrumental reasoning was done well.

He also adopts Aristotle's idea that the laws of the state may be suspended in particular cases. In his usage, the concepts of *epieikeia* and of 'dispensation' come very close together. Compare the following passages. First, on *epieikeia*:

... when one is dealing with laws, since human actions, concerning which laws are given, consist in individual contingencies which are infinitely variable, it was not possible for any rule of law to be instituted which is not found wanting in any single case: but legislators are concerned with what happens for the most part, and pass a law with this in mind: but in some cases to keep this is contrary to even-handed justice, and against the common good, which law aims to serve. Just as the law lays it down that things entrusted to you should be returned, since this is the just thing on aggregate: sometimes however it happens to be harmful, for instance if a madman entrusts a sword to you and asks for it back when he is in a fit of madness, or if someone asks for something back after entrusting it to you when their aim is to attack your country.<sup>21</sup>

Aquinas is repetitive in his choice of illustrations, which helps us to tell when two passages are about the same concept. In the following passages, he raises and then discounts that argument that natural law does not admit of dispensation so human law should not either. The objection to meet is that:

... if human law, if it is righteous, must be in accord with natural and divine law ... But in divine and natural law, no man can grant a dispensation. There not in human law either.<sup>22</sup>

Aquinas replies that:

... natural law, insofar as it contains universal (*communia*) precepts, which never fail to apply, do not admit of dispensation. But with other precepts, which are as it were the conclusions drawn from universal precepts, human dispensation is sometimes possible: say when a loan is not repayed to a traitor to the country ... But every person stands in relation to divine law as a private person stands to the state law<sup>23</sup> to which he or she is subject. Therefore, just as in the law of the state only he from whom the law derives its authority, or someone to whom he has delegated this, can grant a dispensation, so too, in the commandments of divine law, which are from God, only God, can grant a dispensation, unless he has specially delegated this to someone.<sup>24</sup>

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sunt reddenda cum tali cautione, vel tali modo: quanto enim plures condiciones particulares apponuntur, tanto pluribus modis poterit deficere, ut non sit rectum vel in reddendo vel in non reddendo.

Sic igitur dicendum est quod lex naturae, quantum ad prima principia communia, est eadem apud omnes ... Sed quantum ad quaedam propria, quae sunt quasi conclusiones principiorum communium, est eadem apud omnes ut in pluribus ... (*Summa Theologica* (Madrid: La Editorial Catolica, S.A., 1961–1965), 1–2. q. 94. art. 4, Respondeo section. [This edition follows the text of the critical edition by the Leonine Commission.]

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... cum de legibus ageretur, quia humani actus, de quibus leges dantur, in singularibus contingentibus consistunt, quae infinitis modis variari possunt, non fuit possibile aliquam regulam legis institui quae in nullo casu deficeret: sed legislatores attendunt ad id quod in pluribus accidit, secundum hoc legem ferentes; quam tamen in aliquibus casibus servare est contra aequalitatem iustitiae, et contra bonum commune, quod lex intendit. Sicut lex instituit quod deposita reddantur, quia hoc in pluribus iustum est: contingit tamen aliquando esse nocivum, puta si furiosus deposuit gladium et eum repositat dum est in furia, vel si aliquis repositat depositum ad patriae impugnationem. (2-2 q. 120 art. 1, Respondeo section)

<sup>22</sup> ... lex humana, si sit recta, oportet quod consonet legi naturali et legi divinae ... Sed in lege divina et naturali nullus homo potest dispensare. Ergo nec etiam in lege humana' (1–2 q. 97. art. 4: 3).

<sup>23</sup> 'legem publicam'.

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... lex naturalis in quantum continet praecepta communia, quae nunquam fallunt, dispensationem recipere non potest. In aliis vero praeceptis, quae sunt quasi conclusiones praeceptorum communium, quandoque per hominem dispensatur: puta quod mutuum non reddatur proditori patriae ... Ad legem autem divinam ita se habet quilibet homo, sicut persona privata ad legem publicam cui subiicitur. Unde sicut in lege humana publica non potest dispensare nisi ille a quo lex auctoritatem habet, vel is cui ipse commiserit; ita in praeceptis iuris divini, quae sunt a Deo, nullus potest dispensare nisi Deus, vel si cui ipse specialiter committeret. (1–2 q. 97. art. 4 ad 3)

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In this last passage, Aquinas is thinking of something almost identical to Aristotle's *epieikeia*, i.e. suspension of the law on the direct or indirect authority of the ruler, but the example of the madman whose sword is not returned implies that individuals too can make these instrumental calculations.

Both with human law and Ethics generally, then, Aquinas sees room for instrumental calculation in a sphere of secondary moral laws distinct from the one ruled by truly universal precepts.<sup>25</sup> Such precepts do exist and they are not all so abstract as to be vacuous, but beyond them, there is still room for ends–means rationality. This formula may be ‘un-packed’ by listing the following examples.

- 1) As an example of a specific but absolute general ethical principle, according to Aquinas, one may take concubinage, sleeping with a woman outside marriage. Concubinage Aquinas judged to be always wrong as a matter of universal law.<sup>26</sup> The apparent counter-examples in the Old Testament are explained away by the argument that they were actually wives.<sup>27</sup> It should be said that a plurality of wives in the Old Testament could be admitted because Aquinas did not think that monogamy was not on the same fundamental natural law as the ban on concubinage.
- 2) Old Testament polygamy is thus one step removed from absolutely universal moral law. Before Christianity, monogamy was a *secondary* natural law from which God himself dispensed with the Old Testament patriarchs.<sup>28</sup> He explains with regard to polygamy (he has the Old Testament patriarchs in mind) that the dispensation can only be granted by God, by internal inspiration.<sup>29</sup>
- 3) Moving further from absolute ethical principle, and returning to the passages already discussed: Aquinas argues that human rulers too can make exceptions from secondary natural laws, say, by deciding that a loan to an enemy of the country need not be repaid despite a law that says it should.
- 4) Finally, he implies individuals too will use instrumental reasoning to decide when property should not be returned (the sword and madman case), despite the usual principles of justice, which would *in general* require that they be returned.

If Aquinas's distinction between primary and secondary natural laws creates a space for the exercise of instrumental calculation in ethics, there is another large space for it higher up the hierarchy of ethical actions, in specifically Christian ethics. This is the gap between the minimum required to avoid wrongdoing and the maximum ethical achievements: perfection. It is the area between counsels and precepts. Aquinas explains the distinction thus: ‘a precept brings with it necessity, while a counsel is left to the choice of the person to whom it is given’.<sup>30</sup> He goes on to explain that these counsels are poverty, chastity and obedience, which can be observed *tout court* or on an ad hoc basis.<sup>31</sup>

Whether or not to observe the counsels becomes a judgement call: ‘the aforesaid counsels are per se expedient for everyone, but because some people are not suited to them<sup>32</sup> it happens that they are not expedient for such a one, since their<sup>33</sup> temperament<sup>34</sup> is not inclined to these things’.<sup>35</sup> Deciding whether to observe the counsel in a particular case (as in the example of ad hoc ‘obedience’ given just above) would be one of those particular calculations impossible to reduce to a universal rule.

<sup>25</sup> use for convenience the *Supplementum* to the *Summa Theologica*. This was put together after the death of Aquinas, but cut and pasted verbatim from his *Sententiae Commentary*.

<sup>26</sup>Suppl. q. 65 arts. 3–5.

<sup>27</sup>Suppl. q. 65 art. 5 Respondeo section.

<sup>28</sup>Suppl. q. 65 art. 2 Respondeo section.

<sup>29</sup>‘in hoc a solo Deo dispensatio fieri potuit per inspirationem internam’ (Suppl. q. 65 art. 2 Respondeo section).

<sup>30</sup>1–2 q. 108 art. 4 Respondeo section.

<sup>31</sup>Ibid.

<sup>32</sup>‘ex indispositione aliquorum’.

<sup>33</sup>In this sentence, Aquinas wavers between singular and plural.

<sup>34</sup>‘affectus’.

<sup>35</sup>1–2 q. 108 art. 4 ad 1.

For those whose temperament was suited to a whole life pursuing the counsels of perfection, there would still be room for instrumental calculation in choosing which form of it to adopt. A religious order would be the natural choice, but which religious order? There was a great variety of legitimate choice, with no value to impose a decision. Choice of which order to join would therefore be an instrumental calculation.

Religious orders themselves could be regarded as alternative instrumental choices, different technologies for the pursuit of perfection, as Aquinas brings out in unmistakably *zweckrational*, instrumental, language<sup>36</sup>:

... granted such and such an end, a greater or lesser degree of poverty is appropriate for a religious order; and each religious order will be the more perfect so far as poverty is concerned the more its poverty is proportionate to its end. For it is evident that for the external and bodily works of the active life a person needs a large supply of external goods; for contemplation, however, few are required. ... Thus therefore it is clear that a religious order which is directed towards physical actions in the active life, say towards military activity or providing hospitality, would be imperfect if it lacked collective wealth. Religious orders which are directed towards the contemplative life, however, are the more perfect the more their poverty diminishes their preoccupation with temporal things. For the more a religious order requires preoccupation with spiritual things, the more preoccupation with temporal things is an impediment in that order. For it is evident that an order which is instituted for contemplation and for passing on to others the fruits of contemplation through teaching and preaching [he is obviously talking here about his own Dominican order] requires more preoccupation with spiritual things than a religious order instituted solely for contemplation. Therefore for the former sort of order the sort of poverty which causes the least preoccupation is appropriate.

It is evident that the maintenance of things necessary for human use and procured at a suitable time is what causes the least preoccupation.<sup>37</sup>

Instrumental calculation thus has a large place in the ethical thought of Aquinas, between the bedrock of primary natural law and the pinnacle of Christian perfection. The quotations to illustrate his ideas are abstract and notional, and philosophers and theologians may be happy to leave them on that level, but the theory clothed values integral to the corpus of doctrines and practices to which Aquinas was committed. His value rationality was embodied in a form of life, the religious practices of a friar of his day. These practices are the sociological context of his thought.

So, the ethical instrumental calculation is constrained by deeply rooted values which are more concrete than his mere verbal statements of general principle perhaps show. To put it another way, these values were the 'lived' parameters of his ethical theory. No special erudition is needed to elucidate them.

The sacrament of confession was part of his life. That some actions like fornication and adultery were wrong *per se* was taken for granted by confessional practice. Thus, it was natural for him to think that concubinage was always wrong, against primary natural law. On the other hand, he accepted the Old Testament and the sanctity of its patriarchs: hence the need to find a rationale to explain why divorce and polygamy were allowed to them, which he did by distinguishing a secondary natural law from the primary one. As for *epieikeia*, there was an established tradition of

<sup>36</sup>Cf. d'Avray, *Medieval Religious Rationalities*, 111–2, where this passage is discussed together with two others, which are closely related.

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... praesupposito tali fine, paupertas maior vel minor est religioni accommodata: et tanto erit unaquaeque religio secundum paupertatem perfectior, quanto habet paupertatem magis proportionatam suo fini. Manifestum est enim quod ad exteriora et corporalia opera vitae activae indiget homo copia exteriorum rerum: ad contemplationem autem pauca requiruntur ... Sic igitur patet quod religio quae ordinatur ad actiones corporales activae vitae, puta ad militandum vel ad hospitalitatem sectandam, imperfecta esset si communibus careret divitiis. Religiones autem quae ad contemplativam vitam ordinantur, tanto perfectiores sunt, quanto eorum paupertas minorem eis sollicitudinem temporalium ingerit. Tanto autem sollicitudo temporalium rerum magis impedit religionem, quanto sollicitudo spiritualium maior ad religionem requiratur. Manifestum est autem quod maiorem sollicitudinem spiritualium requirit religio quae est instituta ad contemplandum et contemplata aliis tradendum per doctrinam et praedicationem, quam illa quae est instituta ad contemplandum tantum. Unde talem religionem decet paupertas talis quae minimam sollicitudinem ingerat. (2-2 q. 188 a. 7 respondeo section, transl. as in d'Avray, *Medieval Religious Rationalities*, 111–2)

dispensation within the religious life, articulated with great clarity by Bernard of Clairvaux<sup>38</sup> and in the Church generally.<sup>39</sup> The variety of religious orders and their different rules and regulations were a fact on the ground, and Aquinas's own order was very conscious of the need to adapt rules to its special objectives of study and preaching.

Sociologically speaking, the lives of a thirteenth-century member of the Dominican order and of a philosopher in a fourth-century *polis* seem far apart, yet the assumptions behind their respective institutional settings were not quite so different as one might at first think. Medieval religious orders and classical city-states shared an assumption that makes them more alike than either are with a modern liberal state or university: viz., that the function of laws or rules was the promotion of virtue, without their being coterminous with the moral law. This makes the striking similarity between Aristotle's *epieikeia* and Bernard of Clairvaux's idea of dispensation – a similarity that can hardly be explained by 'the Philosopher's' influence, since his ethical writings had not yet been translated – entirely comprehensible.<sup>40</sup>

## 6. Kant

Kant tends to be a by-word for ethics based on absolute and inflexible values, but this is to underestimate the attention he pays in his ethics to instrumental calculation. For one thing, he gives a clear-headed analysis of instrumental rationality in its pure form, as detached from any given value. In his *Grundlegung*, he calls this *Geschicklichkeit*.<sup>41</sup> He specifies a separate category, *Klugheit*, for the effective pursuit of happiness.<sup>42</sup> This too is a form of instrumental rationality. Kant separates these two categories very sharply from ethical principles proper – from the *Gebote* or *Gesetze der Sittlichkeit*. *Geschicklichkeit* and *Klugheit* operate in a value-free zone. This may be a difference from Aristotle and Aquinas, and even from Machiavelli, for whom cynical instrumental calculation was ultimately ordered to order and, better still, to republican liberty (as will be briefly discussed below). Kant does, however, show value- and instrumental rationality working in a more symbiotic relationship in the sequel volume, *Die Metaphysik der Sitten*.

Kant thinks that there is ethical *Spielraum*, room for manoeuvre, when different *Pflichtmaxime*, maxims of duty, intersect.<sup>43</sup> Taken in themselves, it is true, maxims of duty do not admit of exceptions.<sup>44</sup> Yet, one maxim of duty can be restricted by another<sup>45</sup>: for instance, when love of one's neighbour and love of one's parents taken in isolation dictate different courses of action, but one has to decide between the different courses in a concrete case.<sup>46</sup> This interplay of different maxims means that their observance leaves a certain space (*Spielraum*, *latitudo*, room for manoeuvre) for free choice

<sup>38</sup>Bernard of Clairvaux, *Tractatus de praecepto et dispensatione*, 1.2, in *Sancti Bernardi opera*, iii, ed. J. Leclercq et al. (Rome, 1963), 255–6.

<sup>39</sup>M. A. Stiegler, *Dispensatio: Dispensationswesen und Dispensationsrecht im Kirchenrecht* (Mainz: Franz Kirchheim, 1901), and J. Brys, *De dispensatione in iure canonico, praesertim apud Decretistas et Decretalistas usque ad medium saeculum decimum quartum*, Universitas Catholica Lovaniensis Dissertationes ad gradum doctoris in facultate theologica consequendum conscriptae, II/xiv (Bruges & Wetteren: J. De Meester et Filii, 1925); cf. also A. Van Hove, *De privilegiis, de dispensationibus*, Commentarium Lovaniense in Codicem Iuris Canonici I/v (Mechlin: Dessain, , 1939), esp. 293–330.

<sup>40</sup>On Bernard, Dispensation, and *epieikeia*, see d'Avray, *Medieval Religious Rationalities* 109–10.

<sup>41</sup>I. Kant, *Grundlegung zur Metaphysik der Sitten*, ed. T. Valentiner (Reklam: Stuttgart, 1984), Zweiter Abschnitt, 59–60.

<sup>42</sup>Kant, *Grundlegung*, Zweiter Abschnitt, 60.

<sup>43</sup>Cf. Wood, *Kantian Ethics* (Cambridge University Press, 2008), 63.

<sup>44</sup>'nicht eine Erlaubnis zu Ausnahmen von der Maxime der Handlungen' (I. Kant, *Die Metaphysik der Sitten*, ed. H. Ebeling (Stuttgart, 1990) Einleitung zur Tugendlehre, VII, 265).

<sup>45</sup>'Einschränkung einer Pflichtmaxime durch die andere' I. Kant, *Die Metaphysik der Sitten*, ed. H. Ebeling (Stuttgart: Reklam, 1990) Einleitung zur Tugendlehre, VII, 265.

<sup>46</sup>*Ibid.*, 266. On Kant and casuistry, with recent bibliography, see Soo Bae Kim, 'The Formation of Kant's Casuistry and Method Problems of Applied Ethics', in *Kant-Studien: philosophische Zeitschrift der Kant Gesellschaft* 100 (2009), 332–45, and H.-D. Kittsteiner, 'Kant and Casuistry', in *Conscience and Casuistry in Early Modern Europe*, ed. Edmund Leites (Cambridge: Cambridge University Press, 1988), 185–213 (I owe this reference to Emily Corran). Kittsteiner tends to play down Kant's interest in casuistry, seeing him as part of a move away from Lutheran casuistry, a move to which his contribution added impetus. Presumably, Kittsteiner wants to present the casuistry one finds in Kant as a left-over. To me, however, it looks as though Kant took casuistry more seriously as time went by.

(*Willkür*).<sup>47</sup> The law ‘cannot precisely specify, how and how far action should be activated to implement the end which is also a duty’.<sup>48</sup> Kant seems to envisage the possibility that one might be required to do something sinful to avoid a foreseen greater evil.<sup>49</sup>

The casuistical questions belong to the *Tugendlehre*, virtue ethics, part of the *Metaphysik der Sitten*, not to the *Rechtslehre* which constitutes so large part of the whole. What is the difference between the remits of these two sections? As Terrence Irwin has commented, it is not so clear how Kant distinguishes the realm of law (*Recht*) from that of virtue (*Tugend*), ‘since he seems to rely on a number of non-equivalent contrasts’.<sup>50</sup> Irwin elucidates. ‘The doctrine of law prescribes certain actions that the state must compel citizens to do if the state is to follow the prescriptions of the categorical imperative. ... The state enforces only what is “possible”’. By ‘possible’, Kant usually seems to mean ‘physically possible’. He suggests ... that while the state can compel me to act, it cannot compel me to act from a certain motive. ... [For a distinct reason] the use of compulsion to produce virtue is not possible ... ; being virtuous depends on the free choice of a maxim and an end, in some sense that excludes external compulsion. Here, the impossibility seems to be logical. Kant seems to mean that no one can compel me to change my motives freely. ... Someone might conform to the law for fear of punishment ... The virtuous person, however, accepts the moral duties imposed by law because they are moral duties. She would not steal her neighbour’s property (an action forbidden by law) even if she could steal it with impunity and no one would find out. ... virtuous people also aim at ends that go beyond the moral demands of the law. Since they accept the categorical imperative as their principle, they acknowledge ends that are also duties. ... (67) ... In some cases, Kant believes that virtue prescribes actions that are not prescribed by the moral law to the non-virtuous person. But virtue does not add more duties of the same kind to duties of law. It prescribes ‘duties of wide obligation’, whereas law prescribes duties of narrow obligation ... . The law enjoins respect for other people’s property and lives without exception. It does not allow me to choose to leave one person alive rather than another, but it requires all the actions of the relevant type. Virtue, however, allows us some freedom to choose which of the actions that fall under a rule we will do. [Significantly, Irwin here, 67, note 45, gives a reference to Aquinas.] In enjoining charity, virtue does not require me to do every possible act of charity that might be open to me. Virtue prescribes an appropriate maxim ... but it does not necessarily imply a given particular action that falls under the maxim. ...<sup>51</sup> After pointing apparent tensions between different distinctions between virtue and law drawn by Kant, Irwin concludes that:

the one that is most relevant for separating conformity to law from virtue is the one that relies on an appropriate end. ... The notion of an obligatory end captures the central features of a virtue ... [Irwin points out the affinity with Aristotle’s thought] ... virtue requires us to aim at certain characteristic ends ... Aiming at an end does not give us precise guidance about what to do in every specific situation, and it goes beyond the types of actions that can reasonably be demanded as matters of strict obligation.<sup>52</sup>

<sup>47</sup>I. Kant, *Die Metaphysik der Sitten*, ed. H. Ebeling (Stuttgart, 1990) Einleitung zur Tugendlehre, VII, 265; cf. Soo Bae Kim, ‘Formation’, 342; Allen W. Wood, *Kantian Ethics* (Cambridge: Cambridge University Press, 2008), 63–4, 152–3.

<sup>48</sup>nicht bestimmt angeben könne, wie und wieviel durch die Handlung zu dem Zweck, der zugleich Pflicht ist, gewirkt werden sollte’ (Kant, *ibid.*, 265).

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‘Ist es z. B. zur Zeit der Schwangerschaft, – ist es bei der Sterilität des Weibes (Alters oder Krankheit wegen), oder wenn dieses kein Anreiz dazu bei sich findet, nicht dem Naturzwecke und hiermit auch der Pflicht gegen sich selbst an einem oder dem anderen Teil, ebenso wie bei der unnatürlichen Wohl lust, zuwider, von seinen Geschlechtseigenschaften Gebrauch zu machen? oder gibt es hier ein Erlaubnisgesetz der moralisch-praktischen Vernunft, welches in der Kollision ihrer Bestimmungsgründe etwas an sich zwar Unerlaubtes, doch zur Verhütung einer noch größeren Übertretung (gleichsam nachsichtlich) erlaubt macht?. (Ibid., ‘Tugendlehre’, 1. Teil. 1. Buch. 1. Hauptstück, 2. Artikel. #7, Kasuistische Fragen, 308)

On ‘Übertretung’ as sin, *peccatum*, see *ibid.*, Einleitung zur Tugendlehre, VII, 266.

<sup>50</sup>Irwin, *Development*, 66.

<sup>51</sup>Irwin, *Development*, iii., 66–7.

<sup>52</sup>*Ibid.*, 68.

This helps to explain why casuistical questions come under virtue, *Tugendlehre*, not law, *Rechtslehre*. The counterpart in the sphere of law would have been *epieikeia*, in the Aristotelian sense of exceptions made to positive law when it is actually working against the intentions that created it. As we shall see below, however, Kant does not believe in this kind of *epieikeia*.

There are signs that he was also somewhat sceptical of casuistry until near the end of the eighteenth century: that he may have come to take casuistry more seriously as his thought developed. In lecture courses given before he published the *Metaphysik der Sitten*, he presents it as being about essentially trivial and indifferent things:

If conscience is burdened with many small scruples on matters of indifference (*adiaphora*) it becomes a micrological conscience, and the questions laid before it are the subject of casuistry, e.g. whether one should tell lies to a person, to make an April fool of him? Whether in certain rituals one should perform this action or that? The more micrological and subtle the conscience is over such trivialities, the worse it is in practical matters<sup>53</sup>;

or as relating to manmade positive law rather than to true moral law: 'such people are chiefly given to speculating over questions of positive law, and in all else the door is left open'.<sup>54</sup> In a 1785 lecture, Kant used the word 'micrology' in connection with casuistry and associated it with the Jesuits:

What has no relationship to morality, is the *indifferentia actionis, adiaphoron*, and is expressed by (0) [= zero], for here there is neither merit nor aberration; this is also called *casuistry*, and is a sort of micrology in regard to the *rectitudo actionis*. Casuistry was at one time a major component in the teaching of scholars of the Jesuit order. It is so called, because it has to do with specific and particular cases. Are there, then, *adiaphora* as such? We have many actions that we perform merely for physical sustenance, and these are *adiaphora*. So if there are such, we also have actions whose worth is equal to nothing (zero).<sup>55</sup>

Jesuit casuistry gets another unfavourable mention in a lecture course begun in 1793:

Are there such trifles as could be seen as transgressions, but which, on account of their unimportance, would not be accountable, and thus might even be permitted? But there are absolutely none such, though in Jesuit casuistry they are accepted *sub voce* peccadillo (from which we get the word 'bagatelle').<sup>56</sup>

In the same lecture course, Kant does say that:

It would certainly be desirable to establish a system of casuistics in morals – a procedure in order to determine in every kind of situation what would be rightful or otherwise, depending on differences in the action. Such *casus dubii* cultivate a man's understanding and also his morality.<sup>57</sup>

What follows is less positive: we are back with the idea that casuistry deals with trivial things:

But cases of conscience commonly have to do, not with duties themselves, that we seek to determine, but with *adiaphora*, that are made analogous to duty; at least what are merely duties in the broad sense are made into strict duties, e.g. refraining from all work on Sundays, fast-days etc. In such usages we fabricate a morality. According to the critic of actions, such a casuistic is sophistry, a procedure of deceiving or quibbling with conscience by sophistry, insofar as we endeavour to lead it astray; e.g. when we invent good intentions in actions that involve a transgression of duty, or also turn into cases of conscience what can only be called introductory means thereto.<sup>58</sup>

More positive, and still in the same lecture course, is his comment that a

moral casuistic would be very useful, and it would be an undertaking much to the sharpening of our judgement, if the limits were defined, as to how far we may be authorized to conceal the truth without detriment to morality.<sup>59</sup>

<sup>53</sup>Lectures on Moral Philosophy, Winter Semester, 1784–5, according to notes taken by Georg Ludwig Collins: (Immanuel Kant, *Lectures on Ethics*, ed. Peter Heath and J.B. Schneewind, translated by Peter Heath (Cambridge: Cambridge University Press, 1997), 134–5.

<sup>54</sup>*Ibid.*, 135.

<sup>55</sup>Kant, Lecture on Baumgarten's practical philosophy, Winter Semester, 1785, according to notes taken C. C. Mrongovius, *ibid.*, 235.

<sup>56</sup>Lectures on the metaphysics of morals, begun 14 October 1793, according to notes taken by Johann Friedrich Vigilantius, *ibid.*, 312.

<sup>57</sup>*Ibid.*, 362.

<sup>58</sup>*Ibid.*, 362–3.

<sup>59</sup>*Ibid.*, 428.

Even so, the *Metaphysik der Sitten* gives casuistry a much more central place in moral reasoning, and a very positive spin.

It is true that some of the cases discussed in the *Metaphysik der Sitten*, too, have been described by Kittsteiner as ‘ethical micrology’.<sup>60</sup> That may be a valid observation about ‘whether or not the phrase “most obedient servant” at the close of a letter can be let through as a mere politeness or if it has to be considered a lie’,<sup>61</sup> but it leaves a false impression of Kant’s estimate of casuistry in 1797, when he wrote the *Tugendlehre* part of the *Metaphysik der Sitten*. Not trivial, *pace* Kittsteiner, is Kant’s discussion of whether ‘it is morally right to make use of a woman’s sexual characteristics when in so doing the intention of nature, the preservation of the human species, is parried in one way or another’.<sup>62</sup> The question of whether one may be vaccinated may possibly be described as one of his ‘odd cases of conscience’,<sup>63</sup> but hardly the question of whether a monarch may carry the equivalent of a suicide pill in case he might be captured and agree to terms damaging to his country to obtain his release.<sup>64</sup> Kant does not give an answer. He means the reader to reflect. In doing that, it seems to me that he may be implying that the monarch needs to weigh up the *extent* of the harm that might follow from his capture. There could be no generalizable answer to that. We are back with Aristotle and cases too specific to be covered by any general law.<sup>65</sup>

In the introduction to the *Tugendlehre*, Kant calls casuistry an ‘exercise in how to discover the truth’, which sounds a pretty serious enterprise.<sup>66</sup> He seems to be saying that casuistry is not a body of knowledge but a skill. In the *Tugendlehre*, it begins to look like a rather crucial moral skill. Kant seems to have rejoined the tradition of serious casuistry that has medieval origins, going back at least to Peter the Chanter around 1200.<sup>67</sup>

There is an affinity between medieval theology and Kant, all the more striking, in that Kant is unlikely to have read any directly. It is evident in his doctrine of chastity (*Keuscheit*) as a virtue and a sexual ethics reminiscent of medieval moral theology. For him, ‘marriage was the only permissible locus for procreation’.<sup>68</sup> We find in him the same tension between belief in procreative marriage as a good institution and distrust of sexuality: for Kant, there is something about sexual which is ‘contemptible and contrary to the dictates of morality’.<sup>69</sup> As an astute commentator has put it, ‘For unmarried couples, intercourse was denial of human dignity’ according to Kant, and ‘Male and female homosexuality came under the category of “carnal crimes against nature.”’<sup>70</sup> He uses strong words about masturbation, apparently so repulsed by the subject as to find it difficult to talk about.<sup>71</sup> Where conflicts of maxims are not involved, Kant seems to be a rigorist and willing to lay down highly specific moral norms. Like Aquinas, he situates instrumental calculation within a strong framework of values. This takes us to the personal values that Kant imbibed from his own social setting.

<sup>60</sup>Kittsteiner, in Leites, *Conscience*, 191–2.

<sup>61</sup>Kittsteiner, in Leites, *Conscience*, 191.

<sup>62</sup>Kittsteiner, in Leites, *Conscience*, 190–1.

<sup>63</sup>Kittsteiner, in Leites, *Conscience*, 190.

<sup>64</sup>Kant, *Die Metaphysik der Sitten* ‘Tugendlehre’, 1. Teil. 1 Buch. 1. Hauptstück. 1. Artikel # 6, Ebeling edn. 305.

<sup>65</sup>Cf. Wood, *Kantian Ethics*, 64. Suicide may be another area where Kant’s views evolved, as he seems ‘from remarks in his lectures’ to condemn it unequivocally: *ibid.*, 173. Incidentally, suicide is one of the issues where Wood feels he understands Kantian ethics better than Kant (*ibid.*).

<sup>66</sup>‘Die Kasuistik ist also weder eine Wissenschaft noch ein Teil derselben; denn das wäre Dogmatik und ist nicht sowohl Lehre, wie etwas gefunden, sondern Übung, wie die Wahrheit solle gesucht werden’ (Kant, *Die Metaphysik der Sitten*, Einleitung zur Tugendlehre. XVIII, Ebeling edn., 291).

<sup>67</sup>Cf. Emily Corran, *Lying and Perjury in Medieval Practical Thought* (Oxford: Oxford University Press, 2018).

<sup>68</sup>A. J. La Vopa, ‘Thinking about Marriage: Kant’s Liberalism and the Peculiar Morality of Conjugal Union’, *Journal of Modern History* 77 (2005), 1–34, at 11. La Vopa comments that Kant’s “‘rationalist disdain” for sexuality not only places him squarely in a long tradition of spirit-body dualism; it also resonates with centuries of Christian asceticism’ (12).

<sup>69</sup>Kant, *Lectures on Ethics*, quoted by La Vopa, ‘Thinking’, 11.

<sup>70</sup>La Vopa, ‘Thinking’, 28.

<sup>71</sup>Kant, *Die Metaphysik der Sitten*, Tugendlehre, I. Ethische Elementarlehre, 1. Teil. 1 Buch. 1 Hauptstück. 2 Artikel. # 7, 306–7. It is clear that masturbation must be what he is talking about in this section on ‘Selbstschändung’.

When it came to practical ethics, medieval values survived the Reformation and, with some thinkers such as Kant at least, the Enlightenment too. This is particularly true where attitudes to sexuality are concerned. Kant does not appear to have retained his parents' Pietist religious convictions.<sup>72</sup> Though he was 'deeply skeptical of popular religious culture, severely disapproving of religious ceremonies, and downright hostile to the whole idea of ecclesiastical authority',<sup>73</sup> we need to remember that in the context of the German Enlightenment 'this did not mean that he was unbelieving or irreligious; it merely signified that his religious temper was enlightened rather than conservative or enthusiastic'.<sup>74</sup> He was 'far from being the only figure in the German Enlightenment to entertain unorthodox religious opinions', but 'German thinkers seldom went as far as the atheistic materialism current in the radical French Enlightenment'.<sup>75</sup> Kant had no time for the God of petitionary prayer and official church authority, but in his unorthodox way, God is important to him: closely linked to morality.

Morality alone ... gives me a *determinate* concept of God. It teaches me to recognize him as a being having every perfection; for that God who has to judge, according to the principles of morality, whether I am worthy of happiness ... must be acquainted even with the most secret stirrings of my heart, because this chiefly determines the worth of my conduct; he must also have the whole of nature under his power if he is to be able to order my future happiness in its course according to a plan; finally, he has to arrange and direct the consequences of the different states of my existent. In short, he must *be omniscient, omnipotent, eternal, and not in time*.<sup>76</sup>

Kant's brand of Enlightenment Deism went with strong ethical values not very different from those of the Protestant orthodoxy whose structures and rituals he rejected.

For all the tensions between hardline Lutheranism and Enlightenment Rationalism – conflicts in which Kant arguably played a mediating role<sup>77</sup> – eighteenth-century Prussia continued largely to accept morality which, in the sexual domain at least, differed very little from the one proposed to the laity by the medieval church, with a few exceptions such as the possibility of divorce on grounds of adultery. That this major continuity from the medieval period into the Enlightenment and indeed even into the first half of the twentieth century is one of those facts so basic and fundamental that scholars sometimes seem hardly to notice it. This moral tradition was contested by a strand of radical Enlightenment thought, but 'Kant's view of sexual intercourse is at the opposite extreme'.<sup>78</sup> Usually, Kant is perceived as a harbinger of 'modern values' as indeed he was in some respects, but he also bought into an unbroken if not unchallenged tradition of convictions about marriage and sex going back to the Middle Ages and indeed to Augustine of Hippo. It has been suggested that disgust with if not fear of sexual intercourse may have 'figured in his renunciation of the "gallant" life [of a man about town – a phase in Kant's career] and its popular authorial persona and in his commitment to the relentless pursuit of systematic rigor in philosophy'.<sup>79</sup> That change of direction no doubt gave his attitude to sex existential force, but the ideas themselves are woven into the texture of his philosophy,<sup>80</sup> as well as supported by centuries of mainstream thought about sex and marriage.

In at least one respect, Kant is even more rigorist than the medieval Church, and precisely in this respect, there is a close match with the social norms of his immediate society. Kant believed that 'left-

<sup>72</sup>M. Kuehn, *Kant: A Biography* (Cambridge: Cambridge University Press, 2001), 40: so one must take with a pinch of salt the interpretation in, say, R. Norman, *The Moral Philosophers: An Introduction to Ethics*, 2nd ed. (Oxford: Oxford University Press, 1998), 70.

<sup>73</sup>Allen W. Wood, 'General Introduction', in *Immanuel Kant: Religion and Rational Theology*, ed. and trans. Allen W. Wood and George di Giovanni (Cambridge Edition of the Works of Immanuel Kant; Cambridge: Cambridge University Press, 1996), xi–xxiv, at xxiii.

<sup>74</sup>Ibid.

<sup>75</sup>Ibid., xvi.

<sup>76</sup>Kant, 'Lectures on the Philosophical Doctrine of Religion', Second part: 'Moral Theology, First section: On the Moral attributes of God', in Wood and di Giovanni, *Immanuel Kant: Religion*, 407–8.

<sup>77</sup>For a reading of Kant's role in the conflicted period following the death of Frederick the Great, see S. Lestition, 'Kant and the End of the Enlightenment in Prussia', *Journal of Modern History* 65 (1993), 57–112.

<sup>78</sup>La Vopa, 'Thinking', 23.

<sup>79</sup>Ibid.

<sup>80</sup>As La Vopa's important paper shows – he is certainly not trying to explain Kant's attitude to sex simply as a rationalization of a private psychological problem.



hand marriages' were wrong. He explains that by natural law, there was no difference between concubinage and the use of inequality of social status for the greater power of one partner over the other'.<sup>81</sup> Here, he is very close to the 1794 Prussian Law.<sup>82</sup>

Though evidently influenced by the same attitude to inequality as the Prussian Law, Kant is actually even more rigorous than it is: he will not admit of any kind of *epieikeia*, or dispensation from the law, except when the judge is prepared to forego something due to himself.<sup>83</sup> Kant's rejection of *epieikeia* is a significant difference between him and Aquinas or Aristotle. The law he knew best was that of the Prussian state under its enlightened despot Frederick II; Aquinas lived in a Church where dispensations had a rational place<sup>84</sup> (curiously close to what Aristotle had wanted for the *polis*). The lived reality of papal dispensation practice all around him may explain why Aquinas is happier with ad hoc suspensions of positive law. Prussian Law did in fact have a place of dispensations,<sup>85</sup> so Kant's would presumably think that the law was too soft here in ethical terms.

Though Kant is an outlier among the thinkers studied here when it comes to *epieikeia*, he shares with Aquinas (and Aristotle before him) the fundamental assumption that the laws of the state and morality overlap to a great extent, and that state law tends to embody moral law. To be sure, not all moral imperatives are enforceable by law (no law against masturbation, for instance, and Kant's comments on that come in his section on virtue rather than the section on law). Conversely, some laws go well beyond morality. That said, the common ground is large. The very fact that so much of the *Metaphysik* is about human law is evidence of this, marriage law being a particularly interesting example.

## 7. Alternatives

Such assumptions are obviously not human universals. Machiavelli does not share them, for instance. Given his social setting, one might have expected an ethical view of law. Italian city-states of the early renaissance did indeed share with the Greek *polis* assumptions about the ethical function of law, but this was not the aspect of his social setting that shaped Machiavelli's thought. At first

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Eben dasselbe gilt auch von der Ehe and der linken Hand, um die Ungleichheit des Standes beider Teile zur größeren Herrschaft des einen Teils über den anderen zu benutzen; den in der Tat ist sie nach dem bloßen Naturrecht vom Koonkubinats nicht unterschieden und keine wahre Ehe. <sup>[81]</sup> (I. Kant, *Die Metaphysik der Sitten*, Rechtslehre, 1. Teil, 2. Hauptstück, 3. Abschnitt, # 26, ed. Ebeling, 127)

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*Eheverbot wegen Ungleichheit des Standes.* §. 30. Mannspersonen von Adel können mit Weibspersonen aus dem Bauer- oder geringerem Bürgerstande keine Ehe zur rechten Hand schließen. §. 31. Zum hohem Bürgerstande werden hier gerechnet, alle öffentliche Beamte, (die geringern Subalternen, deren Kinder in der Regel dem Canton unterworfen sind, ausgenommen;) Gelehrte, Künstler, Kaufleute, Unternehmer erheblicher Fabriken, und diejenigen, welche gleiche Achtung mit diesen in der bürgerlichen Gesellschaft genießen. §. 32. Zu ungleichen Ehen eines Adlichen (§. 30.) kann das Landes-Justiz-Collegium der Provinz Dispensation ertheilen, wenn der, welcher eine solche Ehe schließen will, nachweist, daß Drey seiner nächsten Verwandten desselben Namens und Standes darein willigen. *Allgemeines Landrecht die Preußischen Staaten von 1794*, ed. H. Hattenhauer et al. (A. Metzner: Frankfurt am Main, etc., 1970), I, II.1 Zweyter Theil, Erster Titel, Erster Abschnitt, #31, 346.

<sup>81</sup>I. Kant, *Die Metaphysik der Sitten*, ed. Ebeling, Anhang zur Einleitung in die Rechtslehre I, 72, passage beginning: 'Hieraus folgt auch, daß ein Gerichtshof der Billigkeit ... ' and ending '... dagegen jede Frage Rechtens vor das bürgerliche Recht ... gezogen werden muß'.

<sup>84</sup>D. L. d'Avray, *Medieval Religious Rationalities: A Weberian Analysis* (Cambridge: Cambridge University Press, 2010), 151–63, with further references.

<sup>85</sup>E.g. *Allgemeines Landrecht die Preußischen Staaten von 1794*, ed. H. Hattenhauer et al. (A. Metzner: Frankfurt am Main, etc., 1970): Zweyter Theil, Erster Titel, Erster Abschnitt:

# 23. Doch soll dergleichen Dispensation vor Ablauf Dreyer Monathe, nach getrennter voriger Ehe, niemals ertheilt werden ... # 32. Zu ungleichen Ehen eines Adlichen (#. 30.) kann das Landes-Justiz-Collegium der Provinz Dispensation ertheilen, wenn der, welcher eine solche Ehe schließen will, nachweist, daß Drey seiner nächsten Verwandten desselben Namens und Standes darein willigen. # 33. Kann er dergleichen Einwilligung nicht beybringen, oder findet sich von Verwandten, die mit den Consentirenden gleich nahe sind, ein Widerspruch: so kann die Dispensation nur von dem Landesherrn unmittelbar ertheilt werden. (346)

sight, indeed, Machiavelli's thought does not seem to involve values at all: it looks like a pure instrumental rationality of power. In chapter 18 of *Il Principe*, he argues that the prince should seem to be a principled man, and indeed, to act accordingly<sup>86</sup> – but also to abandon these principles when circumstances require him to do so, and do evil when he has to.<sup>87</sup> Yet, it has been cogently argued that there was after all a bedrock of value rationality in Machiavelli's ethical thought. For one thing, most obviously, security of the State was itself a value.<sup>88</sup> Beyond that, however, if we take into account his *Discorsi* as well as *Il Principe*, there is the value of republican liberty. 'He has no doubt at all that the goal of maintaining the freedom and safety of a Republic represents the highest, and indeed the overriding, value in political life.'<sup>89</sup> Instrumental rationality had wide but not unlimited scope: it was ultimately there to serve republican freedom. Machiavelli himself had worked for the Florentine republic until 1512, so his values were not abstract but embedded in his life history. His humanist education provided reinforcement: in Livy's history of Rome, the subject of his *Discorsi*, he could see what a free Republic might achieve.

Other ethical theorists in the Western tradition, Utilitarians like Bentham and intuitionists like G. E. Moore, are far from the assumptions shared by Aquinas and Kant, in various directions. So, this syndrome of ideas is best explained as one of a fairly small range of possible attitudes to ethics, not exclusive to but prominently manifested by a *longue durée* tradition stretching from classical Greece to the Enlightenment. It was embodied at first in a value rationality in which the city-state was seen as the appropriate social form for the ethical life. The notion of positive law as a school of virtue then continued in the Middle Ages, only canon law now took over some of the task from the law of the state; furthermore, a sexual morality was added to the existing virtue ethics. The resultant package of virtue values continued robustly through the ideological transformations of the post-medieval period.

This paper has aimed to develop a questionnaire and illustrate its application rather than to argue the thesis about the history of ethics adumbrated in the previous paragraph. Behind it lies a view that could be summed up in the sentence: 'theory is a questionnaire'. Social theory may do a lot more than that, but this conception of its role at least should be reassuring to staunch empiricists. Insofar as any general thesis about the history of Ethics specifically does underlie the discussion, however, it is that every moral philosopher has to draw a line between values that are not up for negotiation and ethical areas open to instrumental calculation; and that the philosopher's personal values (often those of the society around) help determine where the line is drawn. This is, of course, not so much a conclusion as a starting point for investigations of moral philosophers, along the lines exemplified in a very exploratory way above with reference to Aquinas and Kant.

From that comparison, nonetheless, one salient finding can be underlined. Perhaps because of his famous text *What is Enlightenment*, perhaps because of his distance from organized religion, Kant is easily mistaken for a beacon of 'Enlightenment'. For most commentators, that is a 'good thing', but for Alistair Macintyre, who regarded the 'Enlightenment Project' as the turning point in a downward direction of Ethics, Kant is a pivotal figure, whom he blames for much of what went wrong with subsequent moral thought.<sup>90</sup> All the findings above, as well as the affinities with medieval thought, make him an unlikely poster boy for the Enlightenment. In some respects, he would have felt intellectually very comfortable in thirteenth-century Paris or fourteenth-century Oxford.

## Disclosure statement

No potential conflict of interest was reported by the author.

<sup>86</sup>'piatoso, fedele, umano, intero, religioso' (Niccolò Machiavelli, *Il Principe*, ed. G. Inglese (Turin: Einaudi, 1995), ch. XVIII [13], 118).

<sup>87</sup>'saper entrare nel male, necessitato' *Ibid.* [15], 118.

<sup>88</sup>Q. Skinner, *Foundations of Modern Political Thought*, I (Cambridge: Cambridge University Press, 1978), 156–7.

<sup>89</sup>Skinner, *Foundations*, I, 183.

<sup>90</sup>A. Macintyre, *After Virtue* (London, 1981), 42–5, 53; 190–8. Macintyre has a wonderful 'macro' sense of how philosophy fits into history, but his analysis of Kant is not his finest work.