UNCONDITIONALITY∗

1. Introduction

In 1797, Benjamin Constant published a pamphlet entitled “Political Reactions”. (Constant 1998) There, he criticised a “German philosopher” who had hold a view that would have made society impossible, namely, that truthfulness was a person’s unconditional obligation. (Constant 1998: 493) One year later, Kant replied to this pamphlet by arguing against the legal implications of Constant’s criticism, to wit, against “a supposed right to lie from philanthropy”. (RL 8: 425)3

Constant’s well-known objection was directed against the contention that “it would be a crime to lie to a murderer who asked us whether a friend of ours whom he is pursuing has taken refuge in our house”. (Constant 1998: 493) Indeed, Kant did maintain that “the duty of truthfulness, which is altogether unconditional and constitutes the supreme rightful condition in

Acknowledgements.

1 The text was delivered in 1819, and draws on ideas already published by Constant in the Spirit of Conquest and Usurpation and in the Principles of Politics. (Fontana 1988: 310)

2 The text was first published in April 1797, and not in 1796 as the editor of Kant’s Practical Philosophy claims (Kant 1996b: 607).

3 In citing Kant’s works the following abbreviations are used:
CPR: Critique of Pure Reason (Kritik der reinen Vernunft) (1781; 1787), in Kant (1996a).
G: Groundwork of the Metaphysics of Morals (Grundlegung zur Metaphysik der Sitten) (1785), in Kant (1996b: 37-108)

Pagination references in the text and footnotes are to the volume and page number in the German edition of Kant’s works, Kants gesammelte Schriften, edited by the Königlich Preußischen Akademie der Wissenschaften, subsequently Deutsche, now Berlin-Brandenburg Akademie der Wissenschaften (originally under the editorship of Wilhelm Dilthey) (Berlin: Georg Reimer, subsequently Walter de Gruyter, 1900 – ). References to the Critique of Pure Reason follow the A (first edition), B (second edition) convention. I am using the translations listed in the Bibliography.
statements” should not be transformed into a conditional duty since “it would directly contradict itself”. (RL 8:429) In other words, Kant argued that it was a crime to lie even under those circumstances.

Moreover, on Kant’s account,

if you had lied and said that he [the potential victim] is not at home, and he has actually gone out (though you are not aware of it), so that the murderer encounters him while going away and perpetrates his deed on him, then you can by right be prosecuted as the author of his death. (RL 8: 427)

Various attempts have been made in the literature to explain Kant’s position either by showing why it is not as implausible as it might sound or by arguing that it does not consistently follow from his moral theory, from which a more palatable position should be derived. Constant’s argument is directed against the unconditional character of Kant’s juridical norms on the ground that it would make society impossible. Recently, however, Marcus Willaschek argued that, in fact, unconditionality is in tension with other important elements of Kant’s moral theory and must be abandoned if we are to consistently maintain those other elements. (2002) In this way, he indirectly reinforced Constant’s objection to unconditionality, but on the basis of a stronger argument – an argument of internal inconsistency.

The view advocated by Willaschek is also significant in the context of recent debates concerning the relationship between the categorical imperative and the universal principle of right, and particularly concerning the relationship between ethics and right. According to the standard interpretation, the universal principle of right and our legally enforceable rights are derived from the categorical imperative; moreover, standardly, the domain of inner morality or ethics, where the agent’s reasons for acting in a certain way are essential for the rightness of the action, and the domain of outer morality or justice, where what counts are the outward aspects of the action, are in a relationship of dependence: the latter depends on the former.4

4 See, for instance, Gregor (1963), Habermas (1992), Höffe (2006). Note, however, that, while both Habermas and Höffe attribute this view to Kant, they don’t subscribe to it and think important aspects of Kant’s position are compatible with distinct view of this relationship. Habermas’s view on this score will be discussed in more details later on in this paper.
In marked contrast to this view, other authors claim that the domain of ethics and that of justice complement one another but are not dependent on each other; on the contrary, justice is independent from ethics. This view has recently received indirect support from several writers, who claim that Kant had no intention to derive the universal principle of right from the categorical imperative, but only tried to justify it on its own, as a rational, but not ethical, principle.

Although very distinct, these interpretations seem both plausible. Here, Willaschek’s view on the paradox of juridical imperatives can again shed light. He argues that the three features juridical imperatives are supposed to have – unconditionality, externality and prescriptivity – cannot all hold at the same time. In the context of the discussion on the relationship between ethics and justice, the existence of this paradox has the following implications. First, failure to see the tension between the three features of juridical imperatives may lead some authors to think that juridical imperatives are ethical imperative under conditions of externality and, hence, that justice depends on ethics. By contrast, those who take the tension seriously will argue that one of the features of juridical principles has to be abandoned. Since externality seems to be essential for juridical principles, the candidates are unconditionality or prescriptivity. Whether we abandon unconditionality or prescriptivity, we end up with a gap between the domain of ethics and that of justice. Hence, the assumption of dependence would have to be abandoned and, with it, also the assumption of a common source of practical normativity.

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6 See Wood (2002) and Willaschek (1997). In this essay, Willaschek argues for the independence of ethics and justice. In the later essay, which is being discussed here, his view changes and he sees justice as dependent on ethics, in the sense that juridical rights and duties follow from the categorical imperative. (Willaschek 2002: 87 n. 46)
7 To be sure, one can still regard juridical norms as the result of confining ethical norms to external relations between persons. Whether we take juridical norms to be unconditional or prescriptive, the situation would be one in which prescriptive (or unconditional) ethical norms are applied to external relations and, in this way, lose their prescriptivity (or unconditionality). But the same situation is compatible with a Habermasian interpretation of the relationship between ethics and justice. On the Habermasian relationship, see Section * of this paper.
My own view is that, between ethics and justice, there is a complex relationship of dependence. While (under certain conditions) justice depends on ethics, I think more emphasis should be put on the significance of enforceability and political power, as distinguishing features for juridical norms, without separating ethics and justice into independent domains; however, the view that there is a tension in Kant’s moral theory, a tension which could be resolved by the separation between ethics and politics, introduces additional challenges to such an account. Hence, in this paper, I propose to examine whether the paradox Willaschek presents can be solved. To be sure, he puts forward a partial solution which, he suggests, would “tame” the paradox. But this partial solution does not ease the tension between ethics and justice, and hence does not remove the reason for regarding them as independent domains. So, what I would like to do here is to examine whether it would be possible to do more than tame the paradox, to wit, whether it would be possible to dissolve it. This would remove the challenge to what I take to be the correct relationship between ethics and justice in Kant. Moreover, it would also remove the challenge to unconditionality, which I take to be a distinctive feature of Kant’s practical philosophy and indispensable for an understanding of the important role Kant thinks critical metaphysics plays in practical philosophy.

2. The Paradox

Briefly stated, the paradox is that, although it seems that the very notion of a juridical norm implies prescriptivity, juridical norms cannot be prescriptive. The argument, again briefly stated, is that “juridical prescriptions would have to be either categorical or hypothetical imperatives; as it turns out, on Kant’s conception of Right they can be neither”. (Willaschek 2002: 66)

On the one hand, juridical norms are prescriptive. They tell us what we ought/ought not to do. Willaschek calls this claim the “Prescriptivity Thesis”. Yet, on the other hand, as prescriptivity puts juridical norms in the category of imperatives, they must be imperatives of some sort;

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8 Among those who try to steer a path between these two positions, I mention Williams (1983) and Guyer (2002), although I do not subscribe completely to either of these views.
9 For the importance of a critical, non-dogmatic metaphysics in Kant’s practical philosophy, I have argued more extensively elsewhere. (Baiasu 2007 and 2009)
however, it turns out they cannot be imperatives at all. To begin with, let me present in more detail the conceptual background of the debate.

Kant defines imperatives by contrasting them with laws. Whereas imperatives prescribe actions for imperfect beings like us, laws refer to the principles purely rational beings necessarily follow. (Willaschek 2002: 67) In the case of purely rational beings, there is no need to *prescribe* actions through moral laws. In this sense, prescribing actions cannot be a matter for laws, but only for imperatives.

Kant distinguishes between hypothetical and categorical imperatives by reference to their respective validity. Hypothetical imperatives express a command conditionally or under a specific hypothesis. One example of such a hypothetical imperative Kant offers is that one must work and save in one’s youth in order not to want in one’s old age. (MM 5:20) The validity of the command to work and save in one’s youth, Kant says, depends on the desire to live to old age, on the fact that one does not foresee other resources than the means acquired by oneself or on that one does not think in case of future need one can do with little. (MM 5:20) The validity of the imperative depends therefore on such conditions’ being met.

By contrast, categorical imperatives assert that a particular action is right unconditionally, whether or not persons have particular feelings, desires or beliefs. Kant’s example is the maxim of never making a lying promise. (MM 5:21) This imperative, he says, only has to do with her will, regardless of whether the purposes the person may have can thereby be attained. (MM 5:21) There is no third type of imperative – if the imperative is not hypothetical, then its validity is not dependent on any condition and, hence, it is unconditional and, thus, categorical. If it is not categorical, then its validity is not unconditional and the condition or set of conditions on which it depends represent the hypothesis which is part of the hypothetical imperative.

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10 Kant distinguishes further between hypothetical imperatives of skill and of prudence. The former refer to possible ends or purposes, the latter, to actual ones. (G 4: 415-6) A possible purpose is defined as “everything that is possible only through the efforts of a rational being”. (G 4: 415) On his account, there is one purpose which is not only an actual purpose for human beings, but which is a necessary purpose “by a natural necessity”. (G 4: 415) This is happiness.
Recall that, according to Willaschek, juridical norms can be neither categorical nor hypothetical imperatives. But Kant exhaustively divided imperatives into these two categories; hence, juridical norms cannot be prescriptive, since they cannot be imperatives. Yet, Willaschek seems to regard juridical norms as categorical imperatives or at least he suggests that juridical norms share the categorical imperatives’ unconditionality. Thus, he calls the Unconditionality Thesis the claim that juridical norms “hold unconditionally”, that is, that “they do not bind only those who share certain ends, but everyone”. (Willaschek 2002: 71) So, assuming that a juridical prescription must be an imperative, why can it be neither a categorical nor a hypothetical imperative? To answer this question will be the task of the next two sections.

3. Two Distinctions

Two distinctions presented by Willaschek must be introduced at this point. The first one is the distinction Kant draws between the domains of right and ethics within moral theory. On Willaschek’s account, the main difference between these domains concerns the relationships between their respective incentives and norms.  

Juridical norms only require that we act in accordance with them or, in other words, they require ‘legality’. Ethical norms require legality, but, in addition, also require ‘morality’. This means that ethical norms prescribe not only that we perform certain types of action, but also that we perform them with the appropriate incentive. The idea here is that, in the case of ethical norms, but not in that of juridical norms, we need to be prompted in our actions by the norms’ rightness. The claim that juridical norms only require legality is called by Willaschek the “Externality Thesis”. (Willaschek, 2002: 69)

A related feature of juridical norms, on Willaschek’s account, is that they can be enforced. This is why, for him,
juridical laws can only require external behaviour, but not motivation, since external coercion (as the specific incentive connected with juridical laws) does not (reliably) affect the inner attitude or motive. (Willaschek, 2002: 68)

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

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

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

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12 This, however, is not altogether unproblematic. One could perhaps reliably condition persons to form motivations through some form of brainwashing or by similar methods. See Newey (2009).
So, we have a person who has saved himself on a plank (the shoved) and a person (the shover) who is in danger and must shove the first person off the plank thus putting him in danger. If we follow Kant’s argument, the shover, in spite of thus risking his own life, has no right to do something that will cause the death of the shoved. Moreover, if the shover does something which will cause the death of the shoved, this action is unlawful. According to Kant, there is no legal authorisation to do anything which endangers the life of the person on the plank and, if the shoved dies as a result of the shover’s taking him off the plank, the shover is legally accountable for the consequence of his action. And, yet, the action is not enforceable, since it is not punishable.  

The second distinction that must be mentioned in order to understand the paradox of juridical imperatives is Willaschek’s distinction between obeying, and merely acting in accordance with, an imperative. Obeying an imperative implies that one acts as one does “because this is what the imperative demands”; by contrast, acting in accordance with an imperative may even be an accidental occurrence. (Willaschek, 2002: 70) To obey an imperative, Willaschek adds parenthetically, does not mean that no other motives may be present, but only that, in the absence of such motives, the imperative would be sufficient to motivate compliance. In the next section we will see why, on Willaschek’s account, juridical norms can be expressed by neither categorical nor hypothetical imperatives.

4. Non-prescriptive Imperatives

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

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

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13 For discussion of this case, see Uniacke (1996) and (2005).
At first glance, it may perhaps seem possible to obey a categorical imperative not for its own sake, but for some other reason – for instance, out of fear of punishment. But in fact, this is a conceptual impossibility: since obeying a categorical imperative means that one would have followed its prescription anyway, even if no threat of punishment were connected with it, complying with it exclusively out of fear of punishment precisely means not to obey it. (Willaschek 2002: 70)

Therefore, since it is possible to act on juridical norms out of fear of punishment, juridical norms cannot be expressed by categorical imperatives. Since juridical norms are imperatives and since imperatives can either be categorical or hypothetical, if juridical norms cannot be expressed by categorical imperatives, the only possibility left is that they be expressed by hypothetical imperatives.

And, yet, according to the Unconditionality Thesis, juridical norms cannot be expressed by hypothetical imperatives either, since they would then bind only those for whom the conditions associated with the imperatives would be valid, which contradicts this Thesis. To say, for instance, that a policy of taxation must be observed, since it is going to benefit those who need public medical services implies that those who use private hospitals need not observe the policy, although the policy is intended as valid and applicable to all. Now, if juridical norms can be expressed neither as hypothetical nor as categorical imperatives, then they cannot be seen as imperatives. Yet, since imperatives are commands or prescriptions, it should be possible for them to be expressed in imperatival form. Otherwise, they turn out to lack precisely a feature which, according to the Prescriptivity Thesis, should be defining for them.

Not only does the argument seem convincing, but Willaschek also argues that this tension in Kant’s moral philosophy can explain some difficult claims we find in Kant’s texts. The paradox is not only supported in these two ways – namely, by the conceptual reconstruction leading to a paradox and by the textual confirmation of the difficulties the paradox seems to bring about in Kant’s texts; Willaschek also considers one possible solution to the paradox and, then, goes on to show that the problem is much deeper than the considered solution suggests. I will briefly present this argument in the next section.
5. Habermas’s Solution

On Willaschek’s account, in *Between Facts and Norms*, Habermas (1996) puts forward a possible solution to a paradox, which is “essentially the same” as the paradox of juridical imperatives; the paradox is the following:

The moral acceptability of juridical laws is a necessary condition for their normative validity; but still, they differ from moral norms in that compliance with them does not require a moral stance and thus can, and may, be enforced by coercion. This is paradoxical in that the reason why juridical laws are normatively valid seems to be unconnected to the only motivation for compliance the law itself supplies. (Willaschek 2002: 73)

Habermas’s solution makes appeal to Kant’s notion of legality. Juridical norms can both be coercive and express freedom, depending on the perspective from which they are regarded. (Willaschek 2002: 73) From one perspective, the same juridical norm can be regarded as a factual constraint and, hence, can be observed out of prudential reasons. In this case, we perform actions which are legal, but do not have morality, that is, actions which are not ethically worthy. From a different perspective, however, the norm is regarded as a law which can freely be observed in virtue of its rightness or out of respect for its rightness.

Habermas’s solution has the following implications for Willaschek’s formulation of the paradox. First, what Habermas says suggests that the Unconditionality Thesis (that juridical norms do not bind only those who share certain ends, but everyone) concerns normative validity, not motivation, and, hence, that juridical norms do not depend for their validity on empirical motivation or “material ends”. Moreover, what

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14 It is important to emphasise here that Habermas’s paradox is that between freedom and coercion. It is, in fact, the paradox on which *Between Facts and Norms* (1996) centres, for the paradox between coercive laws and laws of freedom is that between the facts and norms in the title. (Habermas 1996: 28ff) In the context to which Willaschek refers, Habermas actually talks about a “paradox of rules of action”. (Habermas 1996: 29) Given the importance of the paradox for Habermas’s book and given the significance of the book itself, a separate study of Habermas’s attempt to solve the various formulations of this paradox would be worth undertaking; however, this would go beyond the scope of this paper. More on Habermas’s paradox and how his solution is different from the solution I defend here, see Section ...
Habermas says would suggest that the Externality Thesis (juridical norms only require legality) does not concern normative validity, but motivation; the claim here is that juridical norms do not require obedience for some specific reason, whether ethical or prudential. Finally, on Habermas’s account, the Prescriptivity Thesis (juridical norms tell us what we ought/ought not to do) would also refer to normative validity. The three Theses are reconciled because they refer to different perspectives: Unconditionality and Prescriptivity, to normative validity, Externality, to motivation. Thus, as Willaschek puts it,

While the Unconditionality and Prescriptivity Theses express a normative perspective on the law, the Externality Thesis expresses the possibility, and legitimacy, of a purely ‘strategic’ perspective on the law. By distinguishing between these two perspectives, it is possible to combine the three theses in question. (Willaschek 2002: 74)

The problem, Willaschek argues further, is that the distinction between the two perspectives (normative validity and motivation) is simply that between the ethical and juridical perspectives. There is indeed an available perspective from which it is possible to obey juridical norms out of respect for the norm’s validity. This is the ethical perspective. From the juridical perspective, however, the thought that the validity of a norm might motivate someone to act on the norm is not available. If the norm is legitimate, one is obligated to obey it, but not from some specific type of motive. The norm cannot require one to obey it for its own sake. Nor can the norm require one to obey it under the condition that one pursue some material end or other (since it is of unconditional validity). (Willaschek 2002: 74-5) Hence, juridical norms are not prescriptive, the Prescriptivity Thesis notwithstanding.

The argument against Habermas’s solution is supplemented by the claim that Kant is an “internalist” about moral obligation, in the sense that to be morally obligated to do something implies the existence of a corresponding motive (namely, the motive of respect for the moral law).15

15 As an aside, I mention references are made here to two of Mark Timmons’s articles. (1985 and 2002) I find the second reference puzzling. The section Willaschek refers to in Timmons’s article only claims that Kant requires ethical norms, insofar as they are ethical, to be performed for the sake of their rightness. If, as Willaschek acknowledges, the moral domain for Kant includes the ethical and the juridical spheres, then, strictly speaking,
Since juridical norms seem to impose an obligation without requiring the corresponding motive, we still have a tension between the need for the motive, as given by the Prescriptivity Thesis, and the impossibility of requiring this motive, as imposed by the Externality Thesis.

In other words:

Of course, Kant wants to be able to say that one is obligated to obey the law in any case. But, since this obligation, as such, does not provide a motive to act accordingly, [...] it cannot be understood as prescribing or requiring something, but merely as indicating what, according to the law, would be the right thing to do. Again, we end up with the paradoxical result that, once we abstract from motivation in the way the Externality Thesis demands, juridical laws, as such, cannot be prescriptive.

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

6. Some Further Arguments

Further support for the idea of the non-prescriptivity of juridical norms is offered by Willaschek through an investigation of what Kant says about coercion, necessitation and strict right. Moreover, support is also provided through a discussion of Kant’s dynamical model of right. I will briefly refer to these in this section and the next.

Concerning coercion, necessitation and right, Willaschek initially distinguishes with Kant between subjective and objective necessitation.

what Timmons confirms is that, for Kant, ethical duties require a certain motive, namely, the rightness of the norm.
The former “flows from those subjective impulses, which have, at a given time, the greatest causal power on a person’s will”; by contrast, objective necessitation “consists in there being reasons for an act that derive from its ‘goodness’”. (Willaschek 2002: 76) Such reasons can be instrumental, prudential or ethical corresponding to the types of imperative Kant identifies, and which I presented above. A second distinction presented here is between practical and pathological coercion. If an act is made necessary “by physiological or psychological factors (per stimulus)”, we deal with pathological coercion; if an act is made necessary “by rational considerations (per motiva)”, the coercion is practical. (Willaschek 2002: 76)

Interestingly, Willaschek notes that, on Kant’s account, “strictly speaking, all coercion of humans is practical coercion” and moreover, practical coercion “is not really coercion (necessitation) at all”. (Willaschek 2002: 77) Practical coercion is not really coercion, because, as defined, practical coercion makes the act necessary on rational considerations. But these can only play the causal role which is required in order for the person to act as coerced only if the agent will adopt them, in which case they are not really coercive. Pathological coercion is also practical coercion, because, although it induces physiological and psychological incentives, a person can withstand them in principle. Persons are free and can, at least in principle, act in a particular way, in spite of contrary (and strong) impulses induced, for instance, by fear of punishment.

True, on Kant’s account, pathological coercion is ultimately practical coercion, but Kant acknowledges that we can nevertheless still talk about comparative pathological coercion. In cases where the induced impulses are very strong (for instance, in the case of torture), exercising freedom becomes very difficult. Hence, a case where stronger incentives are induced is pathological when compared with cases where incentives are less forceful. And, yet, although strong physiological and psychological impulses are induced, we are still dealing with practical ‘coercion’.

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16 See Section 2 and n. 10.

17 This is an implication of the so-called Incorporation Thesis. This is the name given by Allison (1990: 189) to Kant’s claim, in R, that “freedom of the power of choice has the characteristic, entirely peculiar to it, that it cannot be determined to action through any incentive except insofar as the human being has incorporated it into his maxim”. (6: 23-3) As McCarty (2008) recently argued, Kant’s claim was noticed as important already 50 years ago by John Silber (1960). Ralws called it, approximately 40 years ago, the “Principle of Election”. (2000: 294) Very recently, Westphal (2009) suggests that the Incorporation Thesis is a particular case of a more general principle that he calls the “Principle of Autonomous Judgement”.
because acting on them or allowing oneself to act on them is still grounded in reasons that derive from the act’s ‘goodness’. For example, if the act helps one avoid being tortured, then there is in a sense something good about it. At the same time, by comparing torture with rightful punishment, we can say that, in the former case, we have comparative pathological coercion.

For the case of juridical norms, pathological coercion, insofar as we can be coerced pathologically, is exercised through inclinations and aversions. Willaschek regards this as further support for the view of juridical norms as non-prescriptive. Thus, he claims,

> since pathological coercion, qua ‘subjective’, is opposed to ‘objective’ or ‘practical’ coercion (coercion through imperative based on reasons of goodness), it becomes apparent that the kind of necessitation connected with the law cannot be prescriptive (per motive, ‘through reasons of goodness’), but only factual coercion (per stimulus). (Willaschek 2002: 77)

Further illustration of, and support for, the view of juridical norms as non-prescriptive start from Kant’s distinction between two elements of lawgiving: in lawgiving, there is first a norm, which represents an action which is to be done as objectively necessary, that is, as a duty; secondly, there is an incentive, which connects subjectively a ground for the determination of the will with the norm. (Willaschek 2002: 78)

The first element of lawgiving, Willaschek makes haste to add, is not regarded by Kant as guaranteeing a prescriptive element to all juridical norms, since Kant claims in the *Metaphysics of Morals* that the first element represents the action to be done as “a merely theoretical cognition of a possible determination of choice”. (6: 218) Hence, he thinks, for Kant, the first element of lawgiving stands only for a description of a possible action.

Furthermore, Kant regards juridical lawgiving as characterised by the fact that the incentive is not the idea of duty, but coercion. Hence, Willaschek concludes, in the juridical realm, “we abstract precisely from the prescriptive, or normative, force of practical laws”. (Willaschek 2002: 79).

Another illustration of, and further support for, the non-prescriptive character of juridical norms are offered in relation to Kant’s idea of strict
right. On Kant’s account (at least as far as Willaschek’s reading goes), “for some person A to be under juridical obligation to do F just means that others are juridically authorised to coerce A into doing F”. (Willaschek 2002: 80) Of course, Willaschek adds, people may feel obliged to do what is juridically right anyway, but, in a strictly juridical context, where ethical motivations do not have a place, such an obligation cannot exist.

Finally, as I have mentioned, Willaschek argues for the non-prescriptivity of juridical norms by presenting Kant’s dynamical model of right. It is in this context that he also presents his solution to the paradox. To these issues I turn in the next section.

7. Willaschek’s Solution

Willaschek’s solution to the paradox stems from his discussion of Kant’s analogy between strict right and Newton’s law of the equality of action and reaction. On Kant’s account, actions which limit rightful freedom can be coerced legitimately, since coercion in this case is a “hindering of a hindrance to freedom”. (6: 231) In other words, given a situation of freedom, where actions performed by individuals are rightful, any deviation from a juridical norm will be an infringement on the freedom of others. Stealing, for instance, implies a hindrance to the rightful owner’s freedom to make use of her property as she pleases (barring of course a situation in which she would interfere with the others’ rightful freedom). To enforce rightful juridical norms, although coercively, is legitimate on Kant’s account, since it only represents the hindering of the initial hindrance to freedom.

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

under a legal system in which coercion really equals the hindrance of rightful freedom, the idea of prescriptions or imperatives does not apply; just as, according to Kant, the idea of a moral ‘ought’ is not applicable to a holy will, since such a will necessarily conforms with the moral law, the idea of a juridical ‘ought’ would not be applicable to a people under a
perfect legal system, since they are forced to obey its laws anyway. (Willaschek 2002: 84-5)

The suggestion is that a perfect legal system can do without prescriptivity. Hence, in spite of the Prescriptivity Thesis, juridical norms do not necessarily presuppose prescriptivity. If, in the perfect legal system, prescriptivity is superfluous, why would one think it essentially characterises juridical norms? The starting point of Willaschek’s solution is the observation that a juridical system in which coercion is calculated to match exactly the inclination people have to break the law is an idealisation, in the strong sense of an endeavour which is “humanly impossible”\(^\text{18}\). As Willaschek acknowledges, “all actual juridical systems leave much room for juridical deliberation and free choice as to whether one wants to obey the law or not”, yet, Kant would regard these as “empirical imperfections that do not concern the concept of strict Right”. (Willaschek 2002: 85)

It is precisely in these empirical imperfections that a partial solution to the paradox of juridical imperative can be found. They make room for ethical considerations, which are always mingled with juridical considerations in real life. (Willaschek 2002: 86) Insofar as punishment cannot exactly match the degree of strength with which persons may be inclined to break the law, persons are actually free to decide whether they want to engage in criminal activities or not. At this point, ethical considerations may come in and may tip the balance in favour of observing the law. At this point as well, prescriptivity becomes present.

Hence, although juridical norms become prescriptive, their prescriptivity is given by ethical motivations. Therefore, Willaschek’s solution takes us back to Habermas’s solution, but, in contrast with Habermas, Willaschek claims we can regard juridical norms as prescriptive only from the ethical perspective; from the strictly juridical one, they are non-prescriptive: “juridical laws indeed are prescriptive, but only when considered from an ethical perspective. [...] The law as such, considered as strict Right, would still not be prescriptive”. (Willaschek 2002: 86)

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\(^{18}\) If we take Willaschek to be talking about idealisation in the sense he suggests, namely, as something which it is humanly impossible to realise, then Kant’s suggestion that the problem is related to empirical imperfections seems much weaker. On this sense of idealisation and the distinction from abstraction, see Onora O’Neill (1989).
From the ethical perspective, people can ask for ethical reasons to obey a juridical norm. Since the juridical norm is unconditionally valid, there is a reason to obey the norm for its own sake. Without this motive, if the Externality Thesis is applied, the prescriptive character of the juridical norm will become invisible. There remain authorisations to coerce others into rightful behaviour, but no prescription. (Willaschek 2002: 87) Hence, through Willaschek’s solution, the paradox does not go away, but it is tamed. The tension between the three Theses remains. The implication of all this, however, takes us back to the dispute between Kant and Constant I introduced at the beginning and to the latter’s objection to unconditionality:

*We can* have both externality and prescriptivity of the law, but [...] unless we give up the idea that the law must be valid unconditionally, we cannot have them at once from one and the same perspective. (Willaschek 2002: 87)

Giving up the unconditionality of the law is precisely what Constant suggests.

8. The Perfect Legal System

As I have mentioned, one way in which Willaschek grounds his position is by reference to Kant’s dynamical model of right. We have seen that, on Willaschek’s account, in a legal system in which coercion equals the hindrance of rightful freedom, the idea of prescription or of an ‘ought’ does not apply. As he puts it,

a law that not only adequately describes the actual behaviour of human beings, but even supports predictions and counterfactuals (and therefore cannot possibly be violated), is not a prescriptive law (a norm) at all, but a descriptive law on a par with the laws of nature. (Willaschek 2002: 85)

The laws derived from juridical norms are supposed to describe and predict accurately the behaviour of individuals, because they cannot be broken. They cannot be broken, because, in a perfect legal system, whenever rightful freedom is hindered by someone, a hindrance equivalent to this hindrance is applied through punishment. In this way, rightful freedom is allowed to manifest itself unhindered under the laws
of the system, and its manifestation will be accurately described by juridical norms. This is why, as we have seen, the conclusion seems to be that, “just as, according to Kant, the idea of a moral ‘ought’ is not applicable to a holy will, [...] the idea of a juridical ‘ought’ would not be applicable to a people under a perfect legal system”. (Willaschek 2002: 84-5)

However, the analogy drawn here between a holy will and the will of the members of the perfect legal community is only apt up to certain point. A holy will is not forced to observe moral laws, but observes them spontaneously without any incentive which would make it prone to act contrary to these laws. The situation is the same for us, persons with imperfect wills, insofar as the laws of nature are concerned. I find no inclination in me to act against the laws of nature and the thought itself makes no sense. At the most, I might try to use the laws of nature to my advantage, but I cannot try to escape them.

Contrast this with the perfect legal system. As Willaschek acknowledges, in this system we do have authorisations to coerce others into rightful behaviour. But, if I am inclined to do X and then I am coerced to do non-X, then I am going to perceive X as wrong or at least I am going to be aware that those who coerce me think it is wrong in some sense and, hence, I am going to be aware that I am not allowed to act in that way, but, on the contrary, I ought to act otherwise. Hence, we end up with a marked difference between the case of the holy will under moral laws and the case of the imperfect law under the juridical norms of the perfect legal system.

Here is how the analogy could be made to work. First, under the perfect legal system, what we consider are only non-ethical incentives to act in one way or another. Hence, we cannot claim that a person under this system is determined to act by the motive provided by the norm’s rightness. Secondly, we regard a person’s action as simply the result of a balance of powers related to incentives. Finally, we regard norms as coercing pathologically. Since, on Willaschek’s account of Kant, pathological coercion is co-extensional with subjective necessitation, which refers to “those subjective impulses, which have, at a given time, the greatest causal power on a person’s will” (Willaschek 2002: 76), the person will not break the law and, moreover, it will be impossible for her to break it.
But, we have seen that Kant considers all coercion of human beings to be practical coercion and all practical coercion to be in fact a process of gaining the consent of the person coerced. Hence, even pathological coercion is not really coercion. Kant thinks that people are free, at least in the sense of the Incorporation Thesis, so, even when they act or refrain from acting on sensible incentives, they have to adopt this determining principle as principle of their will. There might be an incentive for a person to break the law, but this does not mean that automatically that person will break the law. There might be no incentive for a person to break the law, when the initial incentive to break it is evened out, under the perfect legal system, by (the threat of) punishment; still, the person does not automatically refrain from breaking the law; she might go on and break the law anyway, for instance, because she thinks the law or wrong or because she is evil.

Furthermore, since existing incentives are not sufficient to make the person act under the perfect legal system, it is not clear why we must exclude ethical incentives. All this shows is that, in a perfect legal system, even when persons eventually act as the juridical norms prescribe, they act against their initial incentives as a result of being (comparatively) pathologically coerced according to juridical norms. Hence, insofar as we can talk about coercion, norms do not simply describe the behaviour of the members of the perfect legal community, but also prescribe how they ought to act. Consider now the distinction between prescription and coercion, according to Willaschek: a norm has a prescriptive character, when the agent follows it with the appropriate motivation, namely, because it is right; by contrast, a norm has a coercive character, when the agent follows it with an external, non-ethical motivation, for instance, out of fear of punishment.

So, the supporter of the non-prescriptive character of juridical norms can claim that the normativity I identified for juridical norms under the perfect legal system is not really prescriptivity, unless I make reference to ethical motivation. Recall also that Willaschek introduces ethical motivation when he presents his solution by moving the perspective from perfect to real legal systems. We must acknowledge that our legal systems are far from perfect and they always allow “much room for rational deliberation and free choice as to whether one wants to obey the law or not”. (Willaschek 2002: 85)
I have shown that we do not really need this change to reintroduce prescriptivity. We can have prescriptivity also under the perfect legal system. This implies that the taming of the paradox need not take the route Willaschek takes.\textsuperscript{19} Nevertheless, the defender of the non-prescriptive character of juridical norms has a further, stronger reply. Recall the previous argument concerning the conceptual impossibility of obeying a juridical norm. The conclusion was that we can obey a categorical imperative, since to obey presupposes to follow the norm out of ethical incentives. But, then, it follows that a juridical norm cannot be obeyed, since this would require for it to be followed with an ethical incentive, and this cannot be required for juridical norms.

The defender of the non-prescriptive character of juridical norms would further claim that, on this argument, prescriptivity is still not a feature of juridical norms and this is why prescriptivity is only introduced by ethical incentives.

\section*{9. Obeying a Juridical Norm}

The claim that juridical norms cannot obligate persons to obey is made and defended by Willaschek early on in his article. Recall his distinction between obeying an imperative and acting in accordance with one. Acting in accordance with an imperative simply means acting as the imperative prescribes, even when the action is performed in this way accidentally. By contrast, obeying an imperative means that one acts in accordance with the imperative, because this is what the imperative demands.\textsuperscript{20} In other words, acting in accordance with an imperative only requires that a certain action be performed, no matter how, even accidentally. By contrast, obeying an imperative excludes an accidental performance of an action which happens to be in accordance with the imperative, since obeying the imperative means precisely acting in a particular way, because this is demanded by the imperative.

\textsuperscript{19} In all fairness, it must be said, however, that, in a real legal system, ethical motivation seems to be more often required, since the incentives provided through punishment are not perfect matches for the initial incentives to break the law. Nevertheless, insofar as prescriptivity is concerned, this can be found also in the perfect legal system. Normativity is certainly there, and juridical norms are definitely not merely descriptive.

\textsuperscript{20} See Section 3 above.
This does not exclude a situation where one acts in a particular way, because this is what the imperative demands, but one acts with a non-ethical motive, say, out of fear of punishment. The only thing which is required is that, when non-ethical motives are not present, the imperative suffice to provide a motive of compliance. In the case of a hypothetical imperative, the end which stands for the condition which constitutes the hypothetical imperative provides the motive for the performance of the action. This action, with its own purpose, is the means to the realisation of the imperative’s end or motive. The further implication is that categorical imperatives can only be obeyed unconditionally, that is, without being motivated by some end one may happen to have.

Now, recall again that, for Willaschek, to obey a categorical imperative for some non-ethical reason is a conceptual impossibility. This is because to obey an imperative implies to obey it for its own sake even when no other motive is present. Hence, obeying an imperative exclusively from a non-ethical motive is impossible. To obey means precisely to be able to comply for the sake of the imperative. To comply only from non-ethical motives is not to obey an imperative. The implication is that juridical norms cannot find expression in categorical imperative:

Juridical laws [or norms] do not require obedience for their own sake. According to the Externality Thesis, the juridical rightness of an act does not depend on whether it has been done out of respect for the law or for some other reason. But neither can juridical laws issue in merely hypothetical imperatives, perhaps of the general form: ‘If you want to avoid (the risk of) coercion and punishment, do X’, since in this case they would bind only those who in fact want to avoid coercion and punishment.
(Willaschek 2002: 70-1)

I do not think, however, that the conclusion concerning the conceptual impossibility of obeying a categorical imperative for some non-ethical reasons follows from this argument. This is important, because the categorical imperative which would be obeyed for non-ethical reasons would be precisely the juridical norm. So the conclusion would be that it makes no sense to say that juridical norms are obeyed or disobeyed. Now, this is why I think the conclusion does not follow. Recall the definition of obeying an imperative: to obey an imperative is to follow it even when no other motive, apart from the motive of duty, is present. An imperative which can provide on its own motivation for compliance is a categorical
imperative. If a juridical norm is prescriptive and unconditional, then it should be possible to express it in the form of a categorical imperative.

Imagine now that a categorical imperative, such as to not lie, is in a certain instance accompanied by a non-ethical motive, let’s say fear of punishment. According to the definition of obeying an imperative, the presence of such a motive is not excluded as long as the imperative can provide on its own a motive of compliance, which the imperative of not lying can clearly do (at least according to Kant). The imperative is unconditionally valid, since it can be justified to all rational agents, independently of whether they share any material ends (again, at least according to Kant). Yet, any of these agents may have non-ethical motives to comply with it. For instance, one may be afraid to lie in court, because the punishment would be harsh. And, yet, because the imperative could provide a motive of compliance on its own in the absence of any non-ethical motive, according to the definition of obeying an imperative, one could obey this categorical imperative out of fear of punishment and even exclusively out of fear of punishment.

Consider now the following claim by Willaschek:

By insisting that imperatives are meant to ‘necessitate’ the will of those who may possibly be tempted to violate the laws, Kant makes it clear that the whole point of imperatives, as opposed to their corresponding practical laws, is to be obeyed. (Willaschek 2002: 70)

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

At this point, the defender of the non-prescriptive character of juridical norms can go back to Willaschek’s reply to Habermas. Recall that Willaschek acknowledges that there is indeed an available perspective from which it is possible to obey juridical norms out of respect for the norm’s validity. But this is the ethical perspective.

I am going to address this objection in the next two sections.
10. Ends and Motives

The differences between ethical and juridical norms stem from the requirement that the latter be enforceable. Enforceability requires externality and, hence, legality. We cannot enforce norms the observance of which is not public or capable of being publicly monitored. Hence, nor can we enforce norms which require that they be observed from a particular motivation. What can publicly be monitored is the action, not the motivation with which I perform the action.

Here I disagree with Willaschek’s claim that “we often can tell what kind of action has been done only by considering its motivation”. (Willaschek 2002: 68) He illustrates this with the following example: “whether something is a successful murder or a mistaken attempt at cooking a nice mushroom dinner depends, among other things, on what the agent wanted to achieve”. (Willaschek 2002: 68 n. 6) I agree that “what the agent wanted to achieve” is necessary in order for us to understand which action has been performed by the agent, but I think it refers to the purpose or end of the action, not to its motive. I take the motive of the action to be the reason with which the agent tries to achieve her purpose, and I think it reveals a goal an agent finds attractive for its own sake.21 In Willaschek’s example, what the agent wanted to achieve by cooking a mushroom dinner was to kill or treat the guest. Either of these will be a motive, if the agent finds killing or treating guests as valuable for its own sake. Some may do, but some may also want to kill or treat because they hate/love the guest or for some other motives.

Motives make a difference in the understanding of actions only when they also reveal the ends of actions. Otherwise motives are relevant ethically and make a difference in the understanding of the actions’ and agents’

21 In MM, Kant distinguishes between maxims of actions and maxims of ends. (6: 395) For him, every action has an end (6: 385) and maxims can be formulated either by specifying the action or the end. Obviously, since several actions can have the same end, specifying a maxim by the end of the actions under it will lead to a principle of action which contains more rules of action under it than a maxim of action. I agree with Timmons’s account of motives as “revealing some goal or end that the agent finds attractive or desirable for its own sake and in terms of which the agent’s interest in or attraction to some course of action can be explained”. (Timmons 2002: 264) It might be worth noting that, although I generally subscribe to Timmons’s analysis of motives, I do not subscribe to the conclusions of his discussion.
moral worth. Whether I give the right change to my customer because I think this is the right thing to do or because I am risk-adverse and I am too scared I would be caught will make no difference to the police officer who is in the shop (unless she is also happens to be the moralist in that neighbourhood). Similarly, whether I commit murder, because I (mistakenly or not) think this to be (in some sense) for the good of the person will not make a difference to the prosecution. To be sure, if I dispute that it was my intention to commit murder, then, of course, it does make a difference for the prosecution, but then what I dispute is my end or purpose, not my motive. To put it differently: what is juridically important to establish is the end or purpose of the action, because this is what shows which kind of action has been performed. But whether or not this reveals anything about the motive with which the action has been performed is not juridically relevant.

And this is how it should be. The motive with which I perform my action cannot in principle be publicly monitored. My intention of killing a person can be doubted, if, for example, the person who sold me mushrooms can testify that I asked her twice whether mushrooms were tested against toxic content and only then bought them (and also took them home and cooked them, rather than going to another shop to buy mushrooms which had not been tested). But my motive is much more difficult, perhaps even impossible, to ascertain with sufficient degree of confidence.22

So enforceability of a norm implies externality and legality. Juridical norms have to be enforceable, hence, they cannot require a particular motive. By contrast, ethical norms necessarily require that they be performed for the sake of the norm’s rightness, otherwise actions performed on them have no moral worth. Since, for an ethical norm, being acted upon requires a specific motive (I call this ‘ethical motive’ and I refer by this to the fact that my reason for acting is that this is the right thing to do), I take acting for the sake of the norm’s rightness as an essential part of ethical norms. By contrast, I take as an essential part of juridical norms the fact that they can be acted upon either for the sake of their rightness or out of empirical incentives (for example, fear of punishment).

22 As is well known, Kant suggests this impossibility in the Groundwork.
11. Juridical Imperatives

At this point, however, the following implication seems to me to go against some of Willaschek’s claims. The implication is derivable from the fact that juridical norms consist essentially of principles of actions on which we can act either for the sake of their rightness or for some empirical incentive. If we act on a juridical norm with an ethical motive (the norm is right and doing what is right is valuable for its own sake), then the norm does not thereby become an ethical norm. My action has indeed both legality and ethical worth, just like an action performed on an ethical norm, but actions performed on a juridical norm can also have both of these, given the way in which juridical norms are defined.

Recall that juridical and ethical norms are in fact maxims which have proved to have objective validity. Maxims are policies of action.\(^23\) Hence, while the action which I perform now may turn out to be an action with legality and ethical worth, since my policy is a juridical norm, the next action I may perform on the same juridical norm may have mere legality and no ethical worth; still both actions are the result of acting on the same juridical norm. Hence, when I am acting on a juridical norm from the motive of duty, this does not transform my norm into an ethical norm; I can still say that I successfully acted on my juridical norm. By contrast, if my policy of action is given by an ethical norm, then, if one of my future actions has only legality, it means that I did not act on the ethical norm, for to act on an ethical norm means to act from the motive of duty.

Consider Willaschek’s evaluation of Habermas’s solution:

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

\(^{23}\) The literature on maxims is fortunately growing. Here are some good examples: Höffe 1977; O’Neill 1989b; Herman 1993; Moore 2006. Disagreements exist on various issues, but the fact that maxims are policies of action on which the agent will act in various (appropriate) situations has not been disputed, as far as I am aware. It is this claim on which I am relying here. For Kant’s discussion on maxims, see CPrR 5:19-20.
the thought that the legitimacy of a given law might motivate someone to obey is not available. (Willaschek 2002: 74)

What Willaschek needs to show in order to reject Habermas’s solution is that a juridical norm which is acted upon from an ethical motive is not different from an ethical norm. Given the definition of juridical norms, there are two changes one would need to make in order to turn a juridical norm into an ethical one. First, one would need to separate the juridical norm on which one acts from the action’s motivation. Secondly, one would need to require that the remaining principle be performed with an ethical motivation. Willaschek makes the first change when he says that “when we come to law, strictly speaking, however, we must abstract from people’s motivation”. He makes the second change when he says that a juridical norm performed with an ethical motive introduces a perspective from which “we do not only require that people in fact obey the law, but also require a specific motive”, this being the ethical motive.

But I think both moves are unwarranted. To begin with the second, as we have seen, a juridical norm performed with an ethical motive is still a juridical norm and it does not require that we obey it with a specific, ethical motive. Concerning the first, it is true that juridical norms do not require a specific motive. But this does not imply that we can abstract from motivation. Let me elaborate further on this. The process of abstraction, unlike that of idealisation, presupposes that we put aside certain features when we talk about something, because for the purpose of our talk those features are not essential. Say, in talking about the laws of friction, I abstract from the colour of the objects which are in contact, because they are contingent features as far as friction between objects is concerned. In the case of juridical norms, actions can be performed either with ethical or non-ethical motives. Hence, as far as the issue of observing the juridical norms is concerned, it does not matter with which motive I acted. But it does matter that I acted with a motive. As Willaschek acknowledges, “juridical norms have to come with an incentive, too”. (Willaschek 2002: 68)

So, in a sense, what we abstract from when we talk about juridical norms is not motive as such, but the content of the motive or the type of motive. This is important to clarify and emphasise, because it blocks the second move mentioned above (associating an ethical motive necessarily with the performance of an action). If I acknowledge that acting on a juridical norm requires a motive, although it does not require a specific motive, then,
when I act on a juridical norm with an ethical motive, I cannot take this to place me in the ethical perspective from which a specific motive (the ethical one) is required. Even when I act on a juridical norm with an ethical motive, the norm and perspective are still juridical. The action may be both legal and with ethical worth, but it is an action performed on a juridical motive and with one of the motives juridical norms presuppose (although do not require).

12. Conclusion

In this paper, I have started from Kant’s claim concerning the unconditional character of moral norms, and I have investigated Willaschek’s argument, according to which we have to abandon unconditionality, if we are to be able to preserve juridical norms as prescriptive and external. I have also shown how his argument introduces further support for the recent challenges to the standard view of the relationship, in Kant, between ethics and justice.

After introducing these issues in Section 1, in Section 2, I started to present Willaschek argument. This has been formulated as a paradox between the imperatival character of juridical norms (as given by the Prescriptivity Thesis) and the impossibility of juridical imperatives to be expressed either as categorical imperatives (given the Externality Thesis) or as hypothetical imperatives (given the Unconditionality Thesis). So Section 2 provided the conceptual background for the argument, whereas Section 3 actually showed why there is a paradox between the three Theses.

Section 4 presented a possible solution to this paradox, a solution put forward by Habermas, and discussed the way Willaschek rejects it as a satisfactory way of dissolving the tension between the Theses. Sections 5 and 6 introduce further arguments in support of the paradox starting from Kant’s discussion on coercion, necessitation and the dynamical model of strict right.

On Willaschek’s interpretation, Kant’s dynamical model of strict right implies that, under a perfect legal system, juridical norms are no longer prescriptive or normative, but are descriptive, since they account for the way people necessarily behave. Also, Willaschek claims that, on Kant’s account of imperatives, juridical norms cannot be obeyed and, since by their vary nature imperatives are obeyed, juridical norms are not
imperatival and, hence, prescriptive. Finally, on Willaschek’s account, although we can act on juridical norms out of ethical motives, this is only made possible by the ethical perspective. Hence, only ethical norms are prescriptive. If we want, therefore, to maintain prescriptivity, we need to abandon unconditionality, since juridical norms are by definition external.

In Section 7, I presented Willaschek’s solution to the paradox. Although his solution does not really dissolve the tensions between externality, prescriptivity and unconditionality, he claims that it tames them. His strategy is to introduce prescriptivity through ethical norms, which are made necessary, he claims, because our legal systems are not perfect. Precisely because we do not receive from the law incentives which can match the already existing incentives to break the law, we must compensate with ethical motives. This, however, still leaves juridical norms non-prescriptive, unless we abandon their unconditionality and turn them into hypothetical imperatives.

In Sections 8, I argued that Willaschek is wrong to regard juridical imperatives under the perfect legal system as descriptive. I argued that they are normative and can even be prescriptive, given that all the perfect legal system can do is to match the persons’ initial incentives to break the law with incentives to observe the law. Yet, persons need to adopt the result of this balancing process as the principle of their action, if they are to refrain from breaking the law. And for this reason, ethical motives may well be considered as sufficient reasons for action. Still, I noted that defenders of the paradox may still claim that whatever prescriptivity is obtained in this way emerges from ethical motives and, although these are essential in order to obey categorical imperatives, obeying juridical norms is impossible.

In Section 9, I argued that Willaschek is wrong to claim that there is a conceptual impossibility in the idea of obeying a juridical norm. I showed that obeying such a norm is possible, since to obey a norm only implies to act as the norm demands, because the norm demands it, even if the norm is followed from non-ethical reasons. The only condition is that the norm be a sufficient incentive, if other, non-ethical incentives are not available. Although I demonstrated how juridical norms fit the conditions specified by this description of what it means to obey a norm, I conceded that even in this case the juridical norm can be obeyed because it can be acted upon from an ethical motive. This, on Willaschek’s account means that juridical
norms are only prescriptive from an ethical perspective, which is sufficient to support the tension of the paradox.

In Sections 10 and 11, I challenged this final argument of Willaschek’s and concluded that juridical norms can be prescriptive and there is no tension between unconditionality, prescriptivity and externality and, hence, no paradox of juridical imperatives. One implication of all this is that the paradox of juridical imperatives does not raise a problem for Kant’s claim concerning the unconditionality of juridical norms, such as the norm of truthfulness. A second implication is that the paradox does not raise a problem for the standard view of the relationship between ethics and justice in Kant, although I regard it as very helpful, insofar as it suggests the need for qualification and refinement of too simplistic accounts.

Two final points are worth mentioning. First, recall the discussion of Willaschek’s objection to Habermas’s solution, in the previous section. I have argued that the objection is successful, if it can be shown that, when a person acts on a juridical norm out of an ethical motive, she is actually placing herself in an ethical perspective and, hence, obtains prescriptivity and unconditionality, but at the expense of externality. I have also argued that, to show this, two moves must be justified. To begin with, it must be demonstrated that a juridical norm does not require motivation. Consequently, it must be shown that, once a juridical norm is performed with an ethical motive, this is not simply a contingent association of the norm with that specific motive, but the norm actually requires that the action be performed with that motive.

I have argued that both moves are unwarranted and, hence, Willaschek’s objection is not successful. I would briefly like now to mention that there is one way in which the two moves and the objection can be substantiated. Paradoxically, this way out for Willaschek is Habermas’s conception of juridical norms. Thus, it is true that Habermas’s starting point is Kant’s notion of legality. In particular, he points out that, for Kant, juridical norms can be both coercive and expressive of freedom, depending on the perspective from which they are looked at. But Habermas criticises

24 It is important to note at this point that, strictly speaking, Habermas’s paradox is that between freedom and coercion. It might be that a reformulation of this paradox will also yield the paradox of juridical imperatives, but, as it stands, Habermas’s emphasis is on the fact that a juridical norm is both coercive and expressive of freedom, since a legitimate juridical norm is nothing but a hindrance on a hindrance of legitimate freedom. (Habermas 1996: 28-29) He thinks this dissolves the “paradox of rules of

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Kant’s notion of legality and in particular Kant’s view of the relationship between ethical and juridical norms. On his account, Kant starts from the ethical norms and obtains juridical norms through the limitation of the ethical norms. (Habermas 1996: 105)

This limitation is given by the condition that juridical norms are those ethical norms which can be enforced coercively; hence, juridical norms are those ethical norms which pertain to external relations between persons; therefore, juridical norms are ethical norms which refer primarily to prudent, not autonomous behaviour. (Habermas 1996: 105-6) It follows, on Habermas’s account, that juridical norms reflect ethical norms in the way in which objects in our world reflect Platonic Forms or the noumenal world of a Kingdom of Ends. This Kantian account implies that ethical norms are ranked above juridical norms. (Habermas 1996: 106)

By contrast, on Habermas’s view, juridical and ethical norms are in a complementary relationship. They represent answers to the practical normative questions concerning how we ought to act, but they are the result of a branching out of norms of action. (Habermas 1996: 107) Juridical norms are no longer normatively dependent on ethical norms (or, in Habermas’s terms, ranked under ethical norms). Ethical norms require that actions performed on them be performed with ethical motives. One way to regard juridical norms as independent from ethical norms is to see them as not requiring any motive. For Kant, juridical norms have to lead to actions which are performed with some motivation, but this can be either ethical or prudent. One way to challenge this Kantian account is to say that juridical norms abstract from motivation. This is the first move mentioned above.

Now, juridical norms may perhaps abstract from people’s motivation, but actions performed on juridical norms will be performed with some motivation. On Kant’s account, a juridical norm can be performed with an ethical motivation and this makes juridical norms a subset of ethical norms. One way to challenge this view is to say that actions which are performed with ethical motives cannot be juridical, but must be ethical. This is the second move mentioned above.

action”: norms must at the same time connect with a person’s particular interests and be justified without reference to a person’s particular interests. (Habermas 1996: 27)
Interestingly, the result can be put in a paradoxical form. Thus, it seems that one way in which Willaschek’s objection can work and the paradox of juridical imperatives can be defended against Habermas’s solution is precisely by adopting Habermas’s view of juridical norms. There is also a simpler way of presenting this result: Habermas’s adopts initially Kant’s strategy in the attempt to solve the conflict between coercion and freedom; Willaschek interprets this strategy as an answer to the paradox of juridical imperatives; subsequently, however, Habermas criticises Kant’s view of juridical norms and of the relationship between juridical and ethical norms. So it is perfectly understandable that one way in which Willaschek can challenge Kant’s solution to the paradox of juridical imperatives is from the perspective of Habermas’s account of juridical norms, a view which is opposed to Kant’s.

I make this point not only because of the interesting result it yields about the Habermasian background of Willaschek’s argument; in addition, the point shows that the argument in this paper does not simply aim to reinforce in an unqualified way a Habermasian position. Rather, it tries to defend a particular interpretation of Kant, one which makes Kant’s account of juridical and ethical norms free from Willaschek’s paradox.

The second point I would like to make at this point concerns the issue of normative pluralism. At the beginning of this paper, I have mentioned that Willaschek’s criticism of an internal inconsistency in Kant suggests that we have to abandon one of the three features which seem to be in conflict in Kant’s account of juridical norms (externality, prescriptivity and unconditionality). I have said that, since externality is the distinguishing feature of juridical norms, if Willaschek’s paradox proves to have force, we should renounce either unconditionality or prescriptivity. Whether we abandon one or the other, we end up with a gap between the domain of ethics and that of justice. But a view of the relationship between the domains of ethics and justice as independent would ground also a view of normativity as radically plural and always potentially in tension. My argument in this paper shows that the paradox of juridical imperatives is no able to support this type of pluralism. I must mention that, of course, my solution to the paradox is compatible with a less radical pluralism, which allows various standards of rightness to be reconciled in difficult cases.
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