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On Kant, Infanticide, and Finding Oneself in a State of Nature

Introduction

This paper is about Kant, infanticide, and the peculiar idea of a temporary or local state of nature.[1] In the *Metaphysics of Morals*, Kant famously – or perhaps infamously – entertains the idea that an unwed mother who kills her newborn occupies a 'state of nature' and may therefore be exempt from punishment.[2] Annette Baier has called this "a pretty shocking and cruel bit of Kantian reasoning;" others have been equally distressed.[3]

1 I want to thank John Kleinig and Margaret Leland Smith, each of whom, in different ways, provided an impetus for this paper. I am also grateful to Gertrude Ezorsky and members of the New York Society for Philosophy and Public Affairs who heard and commented on an earlier version. An audience at Swarthmore College offered useful discussion. Stephanie Camp, Paul Guyer, Robert Myers, Thomas Pogge, Sally Sedgwick, Elizabeth Wells, Ken Westphal, and Joanne Wood all offered helpful thoughts and comments (to which, alas, not all have been done justice).

2 Kant's reasoning about infanticide is in the *Rechtslehre* (or 'Doctrine of Right') in the *Metaphysics of Morals*, at Akademie 336-7. (Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge, 1991)). Citations to passages from the *Metaphysics of Morals* will hereinafter be given in the text, using initials from the German title (MS=*Die Metaphysik der Sitten*), and giving Akademie volume and page number. Other works of Kant's cited here, also by initials and Akademie volume and page number, are: *The Critique of Practical Reason* (KpV), trans. Lewis White Beck (Macmillan, 1956); *Groundwork of the Metaphysic of Morals* (G), trans. H. J. Paton (Harper & Row, 1964); *Lectures on Ethics* (LE), trans. Louis Infield (Hackett, 1963) (page numbers given are to Hackett edition, not Akademie); and Kant's essays, "On the Proverb: That May be True in Theory But Is of No Practical Use" (TP), and "To Perpetual Peace: A Philosophical Sketch," (ZeF) both in *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Hackett, 1983), pp. 61-92 and 107-143, respectively.

3 Annette C. Baier, "Moralism and Cruelty: Reflections on Hume and Kant," *Ethics* 103 (April 1993: 436-457), p. 446. In a 1962 *Philosophical Review* attack on Kant's philosophy of law, Stuart M. Brown, Jr., writes,
...the logical absurdity of Kant's defense of [*lex talionis*] is *ad hoc* and morally repulsive. And when Kant employs additional *ad hoc* principles to justify infanticide as an exception to *lex talionis*, he makes it difficult to take him seriously even as a moral philosopher.

My first aim is to defend Kant's reasoning about infanticide against charges that it is cruel. It is rather, I will argue, surprisingly compassionate. My second aim is to explore Kant's employment, in his reasoning, of the figure of a state of nature. Kant employs this figure, I will argue, in order to conceive a space where legal and social norms conflict. The conflict is an interesting one, and of a sort Kant's practical theory rarely tackles as such, focused as it mostly is on the conflict between the moral dictates of pure reason and the sensuous dictates of our 'animal' nature. Legal and social norms are the dictates of neither – or are the dictates of both reason and nature, impurely mixed together. Legal norms – laws – though they ideally originate in pure reason, in actual cases (even good ones) express reason along with political and historical considerations and legacies. Social norms express and regulate the structure of, well, society, which for Kant is the world informed and organized by mixed and imperfect human beings with all our mixed and imperfect interests. The case of infanticide takes Kant into territory where these 'messy' norms conflict.

To see how Kant resolves this conflict, and to defend the compassion and interest of Kant's reasoning, we will need to do several things. First, we need a sketch of Kant's reasoning about infanticide. Second, we need to look at some important pieces of background: the problem of infanticide in eighteenth-century Europe, Kant's views about honor, and Kant on the nature and scope of law. We will then return to discuss Kant's reasoning and his final position itself.

Kant's Reasoning

Punishment, Honor, and the State of Nature

Kant's reasoning about infanticide comes in a section of the *Metaphysics of Morals* on the right to punish (MS 6:331-37). The right to punish is "the right a ruler has against a subject to inflict pain upon him because of his having committed a crime" (MS 6:331). As is well known, Kant argues that this pain or punishment must be inflicted retributively.[4] The discussion

(Brown, Stuart M., Jr., "Has Kant a Philosophy of Law?", *Philosophical Review* (71) Jan '62, 33-48, p. 38.)

4 Aims such as general deterrence, incapacitation, and rehabilitation treat the criminal as a means to some further end, and not as a rational being, responsible for the act and 'due' retaliatory punishment (MS 6:331; KpV 5:60-61).

shifts to the question of how to discover the punishment fitting (or properly retributive) for each crime. Murder deserves death; this is the easy case. Kant discusses several harder cases, and then comes to our point:

> There are, however, two crimes deserving of death, with regard to which it still remains doubtful whether *legislation* is also authorized to impose the death penalty. (MS 6:335-6; emphasis in original)

These crimes are the killing of a fellow military officer in a duel and the killing of an illegitimate child by its mother (MS 6:336).

These cases are similar, Kant tells us, because in each, the offender's *honor* is at stake. The unmarried woman and the officer are each constrained by norms governing their stations to avoid a certain species of besmirched honor, upholding respectively 'the honor of one's sex' and 'military honor.'[5] The officer's only way to avert "the stain of suspicion of cowardice" is to participate in a duel, in which he risks death and must at least try to kill the officer who has affronted him (MS 6:336); the unmarried pregnant woman's only chance to avoid "the disgrace of an illegitimate birth" is in destroying proof of her transgression, her infant child (MS 6:336).

But honor is one thing; murder quite another. Why shouldn't the law sentence the (infanticidal) mother and the (homicidal) duelist to death – honor seekers though they be? "In these two cases," Kant writes, "people find themselves in the state of nature" (MS 6:336). And if they are in a state of nature, the laws of the commonwealth – "legislation" – will not reach them. A court cannot impose the death penalty.

But how a state of nature? Surely if I am in a state of nature the laws of the commonwealth do not apply to me, but how did the mother and the duelist come to find themselves in a state of nature? In the passage under discussion, which is just over one page long, Kant offers three related arguments for his surprising suggestion. I sketch them briefly here.

Three Arguments

1. The formality argument

First, Kant seems to suggest that in each of our cases, parties find themselves in an arrangement, vis-à-vis each other, that is outside the law due

5 Kant: "the feeling of honor leads to both, in one case the *honor of one's sex*, in the other *military honor*, and indeed true honor, which is incumbent as duty on each of the two classes of people" (MS 6:336).

to what I'll call a 'formality.' "A child," Kant writes, "that comes into the world apart from marriage is born outside the law (for the law is marriage) and therefore outside the protection of the law" (MS 6:336). Without the formality that is marriage, mother and child are in a state of nature. Dueling officers consent ("though reluctantly," Kant writes) to subject themselves to possible death in a public fight, and "the killing that occurs in this fight ... cannot strictly be called *murder* (*homicidium dolosum*)" (MS 6:336). The formality that is consent changes the nature of the act, placing it and the duelists outside the reach of law.

2. The protection argument

Second, Kant suggests that the mother and the officer are each in a state of nature because "legislation cannot remove the disgrace [or] wipe away the stain" of illegitimate birth or suspected cowardice, respectively (MS 6:336).[6] Here, the law's *inability to protect* what is at stake for the agents – namely honor – leaves them in a state of nature, entitled to do what they must.[7]

3. The competing demands argument

Finally, Kant seems to have in mind that the mother and the duelist are in a state of nature because the demands placed on them by the codes of honor to which they are subject *compete with* the demands of law.

> Either [penal justice] must declare by law that the concept of honor (which is here no illusion) counts for nothing and so punish with death, or else it must remove from the crime the capital punishment appropriate to it, and so be either cruel or indulgent.[8] (MS 6:336)

Penal justice, if it does not 'count honor for nothing,' will soften the punishment meted out to those who act for honor's sake. Granted, softening punishment is not the same as disregarding an act altogether –

[6] And later: "no decree can remove the mother's shame when it becomes known that she gave birth without being married" (MS 6:336).

[7] Kant here echoes Cesare Beccaria. In his influential 1764 *On Crimes and Punishments*, Beccaria writes that we must acquit the duelist, who, "through no fault of his own, has been constrained to defend something that laws on the books do not assure to him [namely his honor or reputation]." (Cesare Beccaria, *On Crimes and Punisments*, trans. David Young (Hackett, 1986) p. 21.)

[8] Law will be "cruel" if it fails to execute the person who strives to be law-abiding and respects 'just deserts,' and it will be "indulgent" if it fails to execute the person who is morally lax, and happy of release (MS 6:336) – and the last thing the law should be is cruel to the law – respecting and indulgent to the morally lax. See Kant's discussion of the problem with substituting convict labor for the death penalty at MS 6:334 for this point.

Kant is not entirely clear on which he advocates. But this passage suggests that the demands of honor in some way present a legitimate and compelling alternative to the demands of law, such that one steps significantly out of the reach of law in being subject to them.

The Law in a Quandary

For Kant, the mother and duelist present cases where "penal justice finds itself very much in a quandary" (MS 6:336). What is the quandary? It is not a quandary about whether infanticide or killing in a duel is morally *right*, or even *permissible* – each clearly is not,[9] and whether they are is not in any case a question for *penal* justice. The quandary is about whether what Kant calls 'juridical' law – the laws of a commonwealth, legislation (cf. MS 6:219) – should be applied or withdrawn in these cases. It is about whether the parties should be understood to be in a 'state of nature,' exempting them from, or at least somehow mitigating the force of, state punishment.

Kant in fact concludes that society must take a hard line with duelists and infanticides, and punish them with death (MS 6:336-7). His argument that mother and child (and dueling officers) are in a state of nature is nonetheless worth a longer look. As a next step, we turn to the infanticide Kant had in mind.

Background I: Infanticide and the 'Honor of One's Sex'

Infanticide in Eighteenth-Century Europe

Infanticide was a significant problem throughout Europe from the Middle Ages at least until the beginning of the nineteenth century.[10] The topic of numerous state and church laws, it accounted for upwards of

[9] This point should be absolutely clear. Kant is explicit that under just law parents cannot take the lives of their children: though children are dependent beings, and parents have legal rights to them 'akin to rights in property' (e.g., rights to retrieve them if they run away) (MS 6:282), parents do *not* have a right to kill or abandon them as they are "being[s] endowed with freedom" (MS 6:280).

[10] Information on infanticide is drawn primarily from Maria W. Piers, *Infanticide: Past and Present* (Norton, 1978). Her account of the period on which I focus draws heavily on Oscar Helmuth Werner, *The Unmarried Mother in German Literature* (Columbia, 1917). I also use Keith Wrightson, "Infanticide in European History," *Criminal Justice*

25% of murder convictions (and executions) in many European countries in the late eighteenth century.[11] Despite this high rate, many believed infanticide a crime that went largely undetected and unpunished; it was seen as a problem of virtually epidemic proportions.[12]

The infanticide at issue was infanticide committed by unmarried women. Why would an unmarried woman kill her infant? Essentially, as Kant understood, in order to make it go away: considerable shame and sanction were attached to unmarried pregnancy and motherhood. Women concealed illegitimate pregnancies; those who were discovered were flogged by parents and employers.[13] In Germany and in other countries unwed pregnant women were excommunicated, and could return to the church only after performing penance.[14] If an unmarried woman kept her child, she might be whipped or jailed by authorities for the crime of bastardy.[15] Thereafter, she could expect a life of poverty and social ostracism for herself and her child.[16] So unhappy was the plight of unwed mothers, and so well-known was this plight, that infanticide was virtually *expected* of unmarried women.[17]

Convicted infanticides were executed, often in gruesome ways.[18] The

History 3:1-20 (1982), and Peter C. Hoffer and N.E.H. Null, *Murdering Mothers: Infanticide in England and New England, 1558-1803* (New York University Press, 1981). There are many additional excellent sources.

11 Wrightson reports that in eighteenth century Staffordshire, infanticide accounted for 25% of extant homicide indictments. In Sweden between 1759 and 1778, it accounted for 35% of all executions (of which there were 617). "Frederick the Great," Wrightson reports, "informed Voltaire in 1777 that in the Kingdom of Prussia infanticide was the most common single cause of executions, some 14 or 15 a year." (Wrightson, p. 9.)

12 Cf. Wrightson, pp. 9-10.

13 Piers, pp. 72-73.

14 Wrightson, p. 7. Maria Piers reports that penance was a harrowing ritual. After sitting through quoting of scripture on the vice of fornication as well as a fiery sermon written specifically for the occasion, the offending woman would have to stand and confess before the church congregation that she was a harlot and her partner a fornicator (Piers, pp. 77-78). In 1756, Frederick the Great abolished penance for illegitimacy, calling it "an occasion for infanticide" rather than the deterrent it was supposed to be (Piers, p. 77).

15 Hoffer, pp. 13ff.

16 Cf. Wrightson, pp. 6-8.

17 Indeed, because all were potential infanticides, unmarried women in most countries in Europe during the second half of the eighteenth century were required to register pregnancies with local authorities (Piers, p. 63). In 1723, Frederick Wilhelm I, King of Prussia and father of Frederick the Great, issued an edict declaring that in an unwed woman "concealment of pregnancy is a certain sign of intentional murder," shifting

practice continued nevertheless.[19] By the end of the eighteenth century, there was growing dissatisfaction with the way infanticide was handled.

the burden of proof from investigating authorities to the unwed mother whose child was discovered dead (Piers, p. 71). Many other European countries had similar statutes. The English Act of 1624, for instance, established a presumption of guilt for unwed mothers of dead infants (Hoffer, p. 20).

It is important to note, and here is as good a place as any, that while unmarried women were under abiding suspicion of and would receive severe punishment for infanticide, punishments for *married* women found to have killed their infants were rarely more serious than a diet of bread and water for a year, sometimes accompanied by sexual abstinence. In most cases, however, married women were simply acquitted in suspicious infant deaths. They were presumed to have no motive. (Piers, p. 68)

18 The prescribed method in Germany was sacking, in which the offender was tied inside a sack with a dog, a cat, and a viper – or monkey, or rooster, depending on local custom and availability – and held under water until all were drowned; other methods included impalement, burial alive, and burning at the stake (Piers, p. 69). Hanging and decapitation, considered milder, were also practiced; by the end of the eighteenth century, as penal reforms swept Europe, they were probably the most common forms of execution. (In the early 18th century, when reforms were just beginning, a jurist named Leyser suggested that these milder punishments be reserved for those infanticides who "had been innocently seduced," leaving sacking for prostitutes (Piers, p. 71).)

19 What about alternatives? Abortions were available, but were generally more dangerous than carrying a child to term and killing it at birth (Piers, p. 63). Some women, indeed many, abandoned unwanted children at churches or local offices, or at the new public 'foundling homes' (Wrightson, p. 12: "It has been estimated that perhaps 40,000 children were abandoned each year in France as a whole during the 1780s"). Records from the 1780s indicate first-year mortality rates of 90% for French foundlings, due to the extreme neglect with which foundlings were treated. Wrightson (pp. 13-14) reports:

> Bastards or not, the foundlings were treated in the manner usually reserved for illegitimate children; which is to say, they were not encouraged to live. The ghastly racket in which abandoned children were transported from the French provinces to the Paris foundling hospital prior to 1779, up to nine-tenths of infants dying on the way, was only the most blatant example of such neglect. Foundlings were generally distributed as soon as possible to the cheapest rural nurses, with minimal supervision by the authorities. [...]
>
> The mortality of foundlings, not surprisingly, was disproportionately high as compared with legitimate children placed with nurses. Of the 3,558 children abandoned in Rouen in the years 1782-9, as many as 3,076 died young. Nine-tenths of those abandoned at birth failed to survive one year – and this in a city where the normal rate of infant mortality was only 18-20% in the same period. The same depressing story could be told of the children maintained by the workhouses of eighteenth century London (many of whom were illegitimate), and of the infants admitted by the foundling hospitals of Imperial Russia (which were popularly known as "angel factories").

To many mothers, the abandonment 'solution' must have seemed more appalling (and riskier) than drowning and burying her child herself, in the first hours of its life.

Voltaire and Pestalozzi voiced opinions,[20] as did two thinkers who certainly influenced Kant: Italian legal reformer Cesare Beccaria,[21] and Frederick the Great, ruler of Prussia from 1740-1786.[22]

Beccaria and Frederick both focussed attention on the bind in which an unmarried mother finds herself, caught between conflicting social and legal demands and effectively 'cornered' into infanticide. Beccaria, for instance, wrote that:

> Infanticide is...the effect of an inevitable contradiction, one in which a woman is placed when she has either submitted out of weakness or been overpowered by violence. Faced with a choice between disgrace and the death of a creature incapable of feeling pain, who would not prefer the latter to the unavoidable misery to which the woman and her unfortunate offspring would be exposed?[23]

Infanticidal women make an understandable choice to avoid "disgrace" and the "unavoidable misery" that accompanies it. Frederick links infanticide to the fact that law "attaches infamy to clandestine children."[24]

> A girl, only too easily fooled by the presence of a seducer, does she not find herself compelled by the very force of circumstances to choose between the loss of her honor and the elimination of the unhappy fruit that she has conceived? Is it not the fault of the laws to place a girl in such a desperate situation?[25]

Infanticide results from "force of circumstances," exacerbated by law.[26]

[20] Piers, p. 73 and p. 74.

[21] Beccaria's comments on infanticide appear in his *On Crimes and Punishments*, in chapter 31, "Crimes Difficult to Prove," which mainly treats adultery and pederasty (Beccaria, p. 60.) At MS 6:334-5, Kant writes against Beccaria's opposition to the death penalty.

[22] Piers, p. 72.

[23] Beccaria, p. 60.

[24] Quoted in Piers, p. 72.

[25] Quoted in Piers, p. 72, from Frederick's 1756 *Dissertation sur les raisons d'établir ou d'abroger les lois* ('Essay on the reasons for establishing or abrogating laws'). The passage Piers quotes continues, condemning execution:

> And does not the severity of the judges deprive the state of two subjects, the child which it forces the mother to kill, and then the mother herself in expiation of her crime, a mother who may have intended to make it possible to repair her loss by becoming a legal mother and then to propagate legally?

[26] In a 1756 edict, Frederick abolished registration and 'denunciation' (third party reporting requirements) of pregnancies, and outlawed the flogging of pregnant girls by parents or employers (Piers, p. 73).

Before we leave the subject, one final eighteenth century treatment of infanticide deserves mention.

Gretchen

Recall the plot outlines of Goethe's *Faust, Part I* (the first version of which was written between 1773 and 1775). With Mephistopheles' diabolical aid, Faust seduces Gretchen, and unwittingly leaves her pregnant. In Faust's absence and in her own desperation, Gretchen drowns their child, and is put in prison to await execution. Faust, returning to discover Gretchen's plight, seeks Mephistopheles' help in freeing Gretchen. She refuses, preferring to stay and die, "for hope is mine no more."[27]

Some lines warrant recounting. Midway through the play, Gretchen's brother, Valentine, comes upon Mephistopheles in the street, singing a seducer's song. Valentine has just learned from his companions of his sister's recent seduction. Angered by Mephistopheles' song, Valentine fights Mephistopheles and Faust, and loses. His dying words to his sister, who has rushed from the house to his side, include these:

> And confidentially, what's more,
> I tell you that you are a whore.
> ...
> You've started secretly with one,
> But others soon will scent the fun;
> You intrigue with a dozen men,
> And all the town can have you then.
> ...
> I tell you, let your weeping be!
> For when you cut yourself apart
> From honour, then you stabbed my heart.[28]

Later, when Faust returns and discovers Gretchen imprisoned for infanticide, he exclaims:

> Cast into prison, she, that lovely creature, unhappiest of souls, in fearful torment, a felon! Is it come to this?

Mephistopheles replies: "She is not the first." Faust:

> Not the first! Misery and woe, deeper than a human soul can fathom, that more than one

[27] Goethe, Johann Wolfgang, *Faust, Part I*, trans. Philip Wayne (Penguin, 1949), p. 194 ("Prison"). Gretchen continues: "How shall flight help me? Still they lie in wait. / A wretched life, to beg one's bread, / And worse when conscience bears an evil dread."

[28] Goethe, pp. 163-64 ("Night").

poor being should be whelmed in this swamp of wretchedness; that one first victim could not atone for the guilt of all others by its agony of suffering, in the sight of the Eternal Forgiver! The anguish of this one soul strikes me to the very heart, while you grin coolly at the fate of thousands![29]

This fate of thousands, and the circumstances leading to it, are the infanticide Kant has in mind.

Let us turn now, eighteenth-century infanticide in place,[30] to a second piece of background, namely Kant's take on honor.

Background II: The Status of Honor

Honor, as we have seen, plays an important role in the arguments about infanticide offered by Kant as well as in those offered by his contemporaries. But what is its status for Kant? What is its value? To point the question: is an obligation to preserve honor moral or, as Kant would put it, 'sensuous'?

Honor as Moral Obligation

If there is, for Kant, a general moral demand to defend one's honor, then we have in the mother's (and in the duelist's) case conflicting moral obligations: defend honor vs. preserve life/obey law.[31] Does Kant intend for us to understand the situation thus? Kant lauds honor elsewhere in the *Metaphysics of Morals*, writing that a man of honor is "less deserving

29 Goethe, p. 187 ("Desolate Day").

30 We will not discuss the military officer's case in anything like this detail. This is perhaps therefore a good place to note that, for an officer, the consequences of failing to defend his honor in a duel could be quite severe. Not only would he be subject to insults and ostracism, as Beccaria reported, but he could also expect to lose his military post (Beccaria, p. 21). Russell Hardin notes:

> [A] duelist in Scotland in 1822 was acquitted of a murder charge. The justification of his acquittal, in the tutored opinion of the celebrated Judge Cockburn, was "the necessity, according to the existing law of society, of acting as he did."

(Russell Hardin, in *One for All: The Logic of Group Conflict* (Princeton, 1995), p. 94, quoting V. G. Kiernan, *The Duel in European History: Honour and the Reign of Aristocracy* (Oxford, 1986), p. 208. Thanks to my father, James S. Uleman, for bringing Hardin's discussion of dueling to my attention.)

31 That we have, for Kant, a general moral obligation to refrain from killing people I take as uncontroversial. For Kant's view that we have a moral obligation to obey law inside a functioning commonwealth, see e.g. MS 6:306-8.

of punishment" than a scoundrel (even though, being honorable, the man of honor will insist on receiving his punishment) (MS 6:334). And, as we have seen, Kant tells us that "the honor of one's sex" and "military honor" are "indeed true honor, which is incumbent as duty on each of these two classes of people" (MS 6:336).[32]

Do we then have a case in which law is not only unable to protect a moral good but threatens to punish those who seek to realize it? This would indeed present Kant with a quandary! But the pursuit of honor is not itself moral for Kant. Honor is a good thing, just as good temperament and talents are, but it – like anything – is only *morally good* insofar as it partly constitutes, preserves, or otherwise serves a good will.[33] A good will is one that wills according to the categorical imperative. Infanticide and dueling, construed as killing for the sake of preserving a reputation, can never pass the categorical imperative test; whatever 'honor' they might preserve cannot have moral value.[34]

Honor as a Sensuous Demand

If being animated by a demand to preserve honor is not strictly speaking moral, is it 'sensuous'? It seems so: the material consequences of lost honor can easily be seen capable of driving women, however reluctantly, to dispose of illegitimate infants (and officers, however reluctantly, to duel).

Importantly, however, the motive to preserve honor is not 'directly' sensuous. The, as it were, 'natural consequences' of the action that fails

32 For these reasons, Annette Baier reads Kant as morally endorsing the infanticide's and the duelist's drive to protect honor, if not the actions they undertake to protect it (Baier, p. 446).

33 See the opening paragraph of chapter 1 of Kant's *Groundwork of the Metaphysic of Morals*, which includes this line:

> Power, wealth, **honour**, even health and that complete well-being and contentment with one's state which goes by the name of '*happiness*', produce boldness, and as a consequence often over-boldness as well, unless a good will is present by which their influence on the mind – and so too the whole principle of action – may be corrected and adjusted to universal ends;... (G 4:393; bold added)

34 Kant did believe, at least for those outside marriage, that the preservation of personal integrity, or dignity, and so ultimately of moral self-respect, required what 'honor' called for, *viz.*, chastity (MS 6:277-79; LE 162-68). And as I hope my discussion has made clear, the deleterious effects of premarital sex on a woman's chances of leading a life conducive to self-respect could not have been lost on Kant.

honor – having a child outside marriage or absorbing an insult – are not themselves life-threatening or otherwise capable of providing a sensuous motive adequate to drive ordinary people to kill. In each case, it is the social censure that illegitimate children or perceived cowardice occasion that creates the motive. The unbearable consequences facing the unwed mother (and the unwilling duelist) are not natural but are social; their 'sensuous' motives, accordingly, are socially created.[35]

Honor as Expressing Social Norms

The demand to uphold honor is then a sensuous demand, but one that depends on social norms. I want to underscore this point. An infanticide is motivated as she is, a duelist likewise, because social life is organized a certain way, and because the norms regulating this organization are what they are. If social norms were otherwise – and they could be without violating natural laws – unmarried women and military officers would not be motivated as they so understandably are to kill.

A Note on Honor and Law

It is now worth noticing two important things about the social norms that constitute codes of honor, and how they compare with legal norms. First, social norms generally are rules and expectations that comprise a loose system, one Kant would understand as expressing a mish-mash of human interests, moral, amoral, and immoral, rational and natural. These 'rules' are informal, encoded and transmitted by religion, education, 'tradition', and other social institutions. They may serve to enforce or reinforce actions and attitudes that accord with Kantian morality (e.g., premarital chastity, dignified pride), but they may equally support vices (e.g., submissiveness, over-boldness); they are inherently capable of either.

In this respect, social norms differ from legal norms, or law. Law, as Kant here conceives it, has or ought to have its foundation in pure reason. It will take anthropological facts into account, of course, but it will

[35] And in fact served clear social needs: dueling gave a fading aristocracy an identity (it was, after all, forbidden those in other classes); strictures against unwed motherhood helped ensure social provision for children and helped regulate women's sexual and reproductive behavior generally.

express – or embody the form of – rational principles of justice, and will promote rational (moral, just) action. Legal and social norms thus differ in that the former can and do exhibit rationality in a way the latter can't and don't.[36]

Second, we should notice a similarity. Social norms and juridical law are both followed for many reasons – mostly out of habit, sometimes out of allegiance – but both have compliance insurance policies based in penalties and coercion.[37] In facing a conflict between a social honor code and legal prohibitions on homicide, the mother and officer face a conflict between alternate sets of ultimately coercive norms.

Let us turn now to the last piece of background, *viz.* Kant's take on the state of nature and the scope of juridical law.

Background III: The State of Nature and Other 'Extra-Legal' Circumstances

The State of Nature

What is a state of nature and how does one get there? The first part of the answer is familiar. A state of nature for Kant is the imagined state (MS 6:339) from which we agree to transfer some of our innate right to freedom to a formal legal system in exchange for protection and social order (cf. MS 6:237-8, 312, 315-16; TP 8:289). A state of nature is a state in which juridical law is not (yet) adequately set up to perform these tasks.

Apart from the infanticide and duelist, the only parties Kant anywhere describes as being in a state of nature, *post*-establishment of juridical law, are independent commonwealths themselves, which stand to each other in a state of nature. They so stand because between them there is no higher authority, able to make and enforce laws (as an international tribunal would be) (MS 6:344; ZcF 8:354).

What does this tell us? It looks like a state of nature opens up when a system of juridical law is not generally effective. For Kant, law's having

[36] At least not until society and all the people in it reach a state of moral perfection.

[37] It is nonetheless true that juridical law *should* be followed because following it is moral. For Kant it should, but he wisely avoids building a legal system that *depends* on people's acting on moral grounds.

jurisdiction depends on its being a certain way, and that way is public, effective, and actually protective of us.[38]

Other 'Extra-Legal' Circumstances

Where there *is* established law, are there restrictions on its reach? Particularly, are there any that can help us in understanding Kant's invocation of a temporary or local state of nature for the mother and the officer?

Law *is* fundamentally restricted to governing actions that admit of coercion (e.g., MS 6:214, 219, 220). As noted earlier, juridical law for Kant depends ultimately on coercive state power to motivate compliance (e.g., MS 6:219, 229ff., 331ff.). Because law depends on coercion, it cannot govern things unamenable to coercion, such as attitudes, motives, religious beliefs, opinions, feelings, and other 'states of mind.'[39] Over these, law has no jurisdiction.

There is another important case where coercion won't work, and where law therefore loses jurisdiction, at least de facto. It is in circumstances calling for the traditional 'right of necessity.' Citing the paradigmatic case – "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" (MS 6:235) – Kant explains that while on his view no *right*, properly speaking, is exercised here, still,

> ... there can be no *penal law* that would assign the death penalty to [this person]. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an evil that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an evil that is *certain* (drowning). (MS 6:235-6; emphasis in original)

A penal law providing for the death penalty cannot be *effective* here, its deterrent power cannot reach the shipwreck; it therefore loses jurisdiction, de facto if not de jure.[40]

[38] See generally MS 6:257. Kant's full view of the source(s) and nature(s) of law's jurisdiction – of our obligation to obey juridical law – is complicated and has been much discussed. A place to start is Kenneth Westphal, "Kant on the State, Law, and Obedience to Authority in the Alleged 'Anti-Revolutionary' Writings," *Journal of Philosophical Research*, 1992, 17:383-426.

[39] We can force (via threat) people to act but not to think in certain ways. This at least is Kant's idea.

[40] In his 1793 essay, "On the Proverb: That May be True in Theory But Is of No Practical Use," Kant makes essentially the same point. He emphasizes again that there are no 'rights' of necessity (TP 8:300), no 'emergency' rights that arise under conditions of extreme duress. "Yet," he continues

> ... teachers of universal civil right justifiably authorize such measures as are required in emergencies. For the authorities cannot attach any *punishment* to the prohibition since that punishment would have to be death. It would have to be an absurd law that threatened anyone with death if he did not freely give in to death in dangerous circumstances. (TP 8:300n)

Kant will never elevate desperate measures to the status of rights (moral or legal) – but he emphasizes again law's *practical inability* to be effective in desperate straits, and the 'absurdity' of laws that try to reach into such straits.

(One might reasonably ask whether this emphasis on deterrence undermines Kant's retributivism. I think it does not, but it shows that labeling Kant a simple retributivist is too simple. Kant's retributivism is part of his moral justification for punishment – but Kant was no stranger to understanding punishment also as an arm of effective public policy. That a law won't work is, for Kant, a good argument against it.)

Kant does not describe this sort of emergency as a 'state of nature,' but three features of the emergency situation are present in a classic state of nature as well as in the situations faced by mother and officer.

First, the incentive structure furnished the agent by the situation is such that law is unable to affect motivation as it normally does – law's coercive force is not *reliably effective*. Second, in emergency cases (as in the classic state of nature), the law is *unable to protect* that which is at stake for the agent – it cannot effectively be appealed to for help in protecting or restoring the goods at stake, whatever they be (life, property, honor). Finally, the subjective incentives that move actors are ones with which an ordinary or reasonable person can sympathize – of course he wanted to save his own life (protect his property, salvage his honor)!

It thus seems reasonable to suppose that Kant is sympathetic to the ideas that law in some sense loses jurisdiction first, where it is not reliably effective; second, where it is unable to meet legitimate protection claims; and finally, where we extend if not full-blown moral approval, at least a "who can blame her?" attitude toward the actor for her actions. In cases that meet some or all of these conditions, it seems law ought at least to step aside and not penalize those who try to fend for themselves. We might further speculate that Kant, like many, is sympathetic to the idea that where the situation itself (shipwreck, unwed pregnancy, military honor codes) exacts a predictable and severe toll, additional legal penalty is unreasonable, even unfair. "Natural" justice has already penalized those who now come before the law. In any event, it starts to sound at least reasonable to talk about states of nature.

Finding Oneself in a State of Nature: The Reasoning Revisited

We return now to the arguments about infanticide and dueling sketched earlier, and see how they look given the territory we have covered.

The Formality Argument, Take 2

Kant's first argument pointed to relationships (between duelists, between mother and child) exempt from law on the basis of some formality (agreement, marriage). First, a word about the duelists, and then onto the mother and child.

1. The duelist

In the duelist's case, the formal exemption from law seems to be effected through mutual consent – each party to the duel agrees to forego the protection of the law. It is, however, not clear that consenting to forego the law's protection always releases others from liability – particularly of criminal acts.[41] There is surely no general right, for Kant, to agree to enter a state of nature, neither subject to nor protected by law. While consent helps – we all recognize that, ordinarily, agreeing to something diminishes one's legal claim to have been harmed by it – consent alone should not be adequate to effect the radical exemption from law Kant has in mind.

Duelists agree to duel because they seek to demonstrate that honor is more precious to them than life. This demonstration cannot be performed lawfully. Officers are nonetheless bound to perform it by their stations. *Consenting* to duel, symbolically foregoing the law's protection, is part of the ritual which will make the officer a duelist. But consent here does not effect or accomplish an officer's entry into the state of nature. It is really, for Kant, the law's inability to protect and inability to adequately motivate the officer, given the substantial demands of military honor, that place the officer in a state of nature. In these circumstances, consent just signals the officer's own perception and avowal of the fact that, for him, the law is moot.

41 And when it does, such releases are usually understood to be legal contracts, not reversions to a state of nature.

2. The unwed mother

The formal ground for exempting the mother/child relationship is that it is outside marriage – and marriage is the law, so it is outside the law. But many things are outside marriage without being thereby outside the law. To deny a child protection because it was conceived 'unlawfully' indeed seems, as Baier charged, "shocking and cruel."[42] But, as in the duelist's case, a reading that emphasizes Kant's reliance on formality and legality misses the point. The formality – in this case, being outside marriage – does not effect entry into the state of nature so much as signal it, *given what marriage substantially means.*

Marriage means respectability, legitimacy, and viable life chances for both mother and child. Within marriage, mother and child have legal rights to the father's protection and resources, as well as to the social benefits of married family life.[43]

For a woman and child outside of marriage, the situation is different. From a legal point of view, they lack access to the father's wealth and, of course, to the social benefits of marriage. (Hence the popularity of shot-

42 Baier, p. 446.

43 This according to Kant's own sketch of family law, which may not have been reflected entirely in the existing law. See generally MS 6:277-83.
The child inside marriage has rights to the father's resources in virtue of its "innate" right against both parents to provisions for survival, as well as to education and moral training (MS 6:280-81). The woman inside marriage likewise has a right to her husband's resources. Indeed, she must be thought of as an equal owner and partner in possession. Kant writes that the equality of marriage partners must be

> ... both in their possession of each other as persons (hence only in *monogamy* [...]), and also equality in their possessions of material goods. (MS 6:278; emphasis in original)

Kant specifically objects to so-called morganatic marriages, in which a woman of a lower class marries a man of a higher class, with stipulations agreed to beforehand barring her from inheriting his wealth. This, Kant writes, "is not different...from concubinage and is no true marriage" (MS 6:279). In marriage, for Kant, partners become a single unit in which all things must be shared, including social status and material possessions.
(Kant's generally conservative comments on sex and marriage (he forbade premarital sex, e.g.) are less quaint than they at first appear, especially if taken in eighteenth-century context – the costs of sex for women were high, even within marriage, and the importance of a permanent and 'non-compromising' partnership within which to have children cannot be overstated. Kant's remarks on sex and marriage can be found at MS 6:276-280, MS 6:359-60, and LE 162-68. A sympathetic discussion of Kant on marriage can be found in Barbara Herman, "Could It Be Worth Thinking About Kant on Sex and Marriage?", in *A Mind of One's Own: Feminist Essays on Reason and Creativity*, ed. Louise Antony and Charlotte Witt (Westview, 1993), pp. 49 – 67.)

gun marriages, or as they are called in German, *Mußehen* or 'must-weddings'.) Outside marriage, mother and child face the absence of effective legal entitlements to economic necessities, the absence of a relationship with society that would provide a family with at least moral and probably other forms of support, and the absence of any legal protections against the effects of social ostracism (employment and housing discrimination, withdrawal of the social safety net). In writing that the mother and child outside marriage are outside the law, Kant must have had these facts in mind. The mother and child outside marriage are outside the law because marriage is the only circumstance in which they could enjoy substantial legal protections, qua mother and child.

This background also informs Kant's description of the illegitimate child (which description has perhaps most upset commentators):

> [The illegitimate child] has, as it were, stolen into the commonwealth (like contraband merchandise), so that the commonwealth can ignore its existence (since it rightly [*billig*] should not have come to exist in this way), and can therefore also ignore its annihilation. (MS 6:336)[44]

The child should not have come to exist outside marriage. By this Kant means not that the child is at fault, or is otherwise bad and undeserving of life, but just that it indeed appears on the scene outside the sanctioned channels. It appears without the celebration, expectations, rights, or social support that attends lawful childbirth, and so the state in which the mother decides her child's fate is a state in which whatever happens – including an infant's annihilation – is between the mother and the child, and must be ignored by the authorities.[45]

3. The formality arguments taken together

In each 'formality' argument, we see that exemption from law substantially rests on what the formality – agreeing to duel, being unwed – *means, in our parties' circumstances: these* formalities, embedded as they are in systems of social norms, expectations, and realities alter one's relation to the social contract so substantially in fact as to place one outside it.

[44] Gregor translates '*billig*' as 'rightly' (and includes the bracketed German) – '*billig*' might also be translated as 'fairly' or 'equitably.'

[45] 'Whatever happens' is perhaps an overstatement. The mother is presumably still barred from sale and any forms of abuse against which children were generally protected – just as the duelist is not licensed to do *anything* during a duel. The proposed 'states of nature' encompass very particular parties engaged in very particular acts.

Kant's other arguments support this reading. Let us turn to them now.

The Protection Argument, Take 2

Echoing Beccaria,[46] Kant writes,

> Legislation cannot remove the disgrace of an illegitimate birth any more than it can wipe away the stain of suspicion of cowardice from a subordinate officer who fails to respond to a humiliating affront with a force of his own rising above fear of death. So, it seems that in these two cases people find themselves in the state of nature ... (MS 6:336)

The law cannot remove disgrace. Is the argument here that wherever the law is unable to protect what is ours, we revert to a state of nature, and so cannot be punished for taking protective action of our own?[47] One could add that there is nothing peculiar in regarding honor, or a reputation for it, as a thing to be protected: Kant elsewhere discusses personal reputation as a kind of property, one which our survivors have a right to protect even after our death (MS 6:295).

But this won't really work, not as just formulated. The law cannot protect my reputation in many ways; it is unable to wipe away all sorts of stains, particularly those I bring upon myself or have otherwise earned. It is implausible to suggest that the social contract dissolves, that I am warranted in taking things into my own hands, anytime this happens.

What then can Kant mean? Given what we have seen thus far, it must be that the law's inability to protect honor is grounds for seeing the actors as if they were in a state of nature because honor itself systematically protects something law does not, something that *is* significant enough to legitimate taking matters into my own hands. This is of course

[46] Beccaria, p. 20:

> ... "honor" is a condition that a great many men place on their very existence. Since it was born after the establishment of society, it could not be placed in the common deposit of surrendered liberty that forms the sovereignty of a nation. It is, rather, a temporary return to the state of nature, a momentary withdrawal of one's person from those laws, that, in this case, do not provide a citizen with adequate protection.

Kant's complicated debt to this passage of Beccaria's deserves more attention than I can give it here.

[47] Beccaria on dueling: "It is not useless to repeat what others have written: namely, that the best method of preventing this crime is to punish the aggressor – that is, the person who has committed the offense that leads to a duel – and to declare innocent the man who, *through no fault of his own, has been constrained to defend something that laws on the books do not assure to him, that is, the opinion which others hold of him* ..." (Beccaria, p. 21; emphasis added).

just what our discussion of honor suggested – and the thing honor protects, given the prevailing social climate, is something close to life. If law cannot protect this, for whole classes of people in predictable circumstances, its jurisdiction wanes and state-of-nature pockets open up.

The Competing Demands Argument, Take 2

Kant's third argument was that the law must take account of – not 'count for nothing' – the demands placed on an agent by honor. Recall Kant's language:

> Either it must declare by law that the concept of honor (which is here no illusion) counts for nothing and so punish with death, or else it must remove from the crime the capital punishment appropriate to it ... (MS 6:336)

We said that Kant is best read here as suggesting that honor constitutes an alternate system of values and motives, in competition with those provided by juridical law. This is different from saying that law should protect honor (or what honor protects). It points less to what is at stake for the agents, and to what obligations these stakes generate or dissolve, and more to the fact of competing systems, each of which compellingly offer to structure the webs of relationships and social meanings within which a person acts. We are willing to forgive those who feel compelled by honor, or by necessity, insofar as we understand them to be constrained by a compelling alternate regime – we are willing to see them in a state of nature.

Competing Norms and Cruelty

It is because I believe Kant recognized the possibility of profound competition between social and legal norms that I think his reasoning about infanticide was compassionate. He understood that the mother faced a terrible conflict, and that, as he repeatedly points out, the law can do nothing to help her resolve it. The law cannot help her if she lets her child live, and it must execute her if she kills it.

This, as we have seen, is the import of Kant's otherwise hollow-seeming point that the law cannot remove disgrace. His point is not that disgrace-removal is something law should be able to do, or that anyone disgraced can claim exemption from the law. Rather, Kant is saying that

where an actor is subject to two powerful and competing sets of norms, the law might take the other demands into account (in this case, demands to avoid disgrace), exercise some humility, and not rush to execute. This is not cruel, but is precisely compassionate.

Of course, Baier and others are focused on Kant's cruelty and seeming indifference toward the child. But their perception of cruelty must fade when the fate of an illegitimate child, with its utter dependence on either its mother or an inadequate foundling system, are duly considered.

Kant's Solution

The argument Kant entertains is that being subject to a set of norms such as those described by "the honor of one's sex" can place a person in a state of nature: two systems of powerful, coercive norms govern a single subject and make conflicting demands; one system must back off. In entertaining the suggestion that law back off, Kant pictures a temporary state of nature.

The state of nature is indeed an apt metaphor for the place where powerful social and legal norms conflict – or at least for how it feels to be in this place. People are in fields, in private rooms, amidst peers but not authorities, confronting themselves, their consciences, their immediate communities, facing real and life-course determining decisions – and choosing a course of action without regard to law, the demands of which here feel hollow, artificial, misplaced. The mother and the duelist are in this place: Kant could have done no better than to describe the feel of their position thus.[48]

[48] The Wooster Group's recent New York performance of "House/Lights" brought to my attention the following passage from Act I, Scene II of Gertrude Stein's "Dr. Faustus Lights the Lights." In it, the Gretchen character (called 'Marguerite Ida/Helena Anaabel') speaks:

> ... I wish if I had a wish that when I sat down it would not be here but there there where I could have a chair there where I would not have to look around fearfully everywhere there where a chair and a carpet underneath the chair would make me know that there is there, but here here everywhere there is nothing nothing like a carpet nothing like a chair, here it is wild everywhere I hear I hear everywhere that the woods are wild and I am here and here is here and here I am sitting without a chair without a carpet, oh help me to a carpet with a chair save me from the woods the wild woods everywhere where everything is wild wild and I I am not there I am here oh dear I am not there.

– Gertrude Stein, "Dr. Faustus Lights the Lights," in *Last Operas and Plays* (Johns Hopkins University Press, 1995), pp. 95-96.

As we have noted, Kant in the end rejects arguments for leniency or dismissal in infanticide and dueling cases: the mother and officer must be put to death (MS 6:336-37). But he does so in a way that makes full sense only if we recognize that he is struggling to address the power of social norms. Kant writes:

> The categorical imperative of penal justice remains (unlawful killing of another must be punished by death); but the legislation itself (and consequently also the civil constitution), as long as it remains barbarous and undeveloped, is responsible for the discrepancy between the incentives of honor in the people (subjectively) and the measures that are (objectively) suitable for its purpose. So, the public justice arising from the state becomes an *injustice* from the perspective of the justice arising from the people. (MS 6:336-7; emphasis in original)

Kant's comments here address two problems. The first is conceptual. How can justice seem both to demand and not demand the death penalty? Administer the death penalty we should, says Kant; we still need to understand how this can at the same time seem an injustice. 'The people,' whose norms the norms of honor are, will regard the demands honor places as understandable, and as *as* exonerating as the 'natural' demand of self-preservation that causes the shipwrecked man to sacrifice another. The people, 'subjectively,' will find the death penalty an injustice, due, in these cases, to a clash between competing norms.

The second is practical. What are we to do generally, beyond executing all homicides, which we are bound to do by the 'categorical imperative of penal justice'? Kant writes that it is the law, or the legal undergirding of social life ("the legislation itself (and consequently also the civil constitution)") which is to be held responsible for the clash or "discrepancy" felt by "the people." Kant is making the claim that it is up to law, law as a whole – a structure that is or should be designed to train and discipline a society in ways that bring it closer to a moral ideal – to close gaps between social and legal norms. This is, for Kant, an eminently reasonable thing to say. What *other* than law could be expected to do this? Law can find grounding in pure practical reason; it can express rational moral vision. Society, and its norms, must always be the hybrid result of natural and moral forces colliding, cooperating, transforming, and frustrating each other.

In urging legal reforms even as he insists on execution, Kant again exercises compassion, not this time the compassion of a judge, deciding mercifully in a single case, but the compassion of a law-maker, seeking general rules that do not place people in untenable situations. Kant recognizes the reality of social norms, and places the burden of altering their effects on law.

This idea was echoed at a recent talk by noted legal scholar Sanford Kadish.[49] Reviewing the last 50 years of U.S. criminal law, Kadish remarked that claims of upbringing in 'criminogenic' environments had been an important development in criminal defense strategies. He called the strategy a 'natural-born loser' but, unwilling to dismiss its significance, noted that as long as society continues to recreate criminogenic environments, to sustain the institutional racism that supports many of these environments, and to allocate resources mainly for enforcement and not prevention in such environments, the law has a burden to face. This seems to me very much like Kant's claim.

The law, for good or ill, must do its job – it can recognize no local states of nature in deciding when and how to punish (at least so Kant concludes). But it can – and we as members of a law-making polity can – take up the burden of reform so that those currently caught between conflicting legal and social norms can be released, the payoff matrices altered so that none need face overwhelming socially enforced penalties for allegiance to the law.

[49] New York University School of Law, Fortunoff Lecture, April 20, 1998.

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Alfred North Whiteheads naturphilosophische Konzeption der Symbolisierung

Zu den bemerkenswerten Entwicklungen der Philosophie des 20. Jahrhunderts gehört, daß ganz unterschiedliche Konzeptionen darin konvergieren, dem Symbolbegriff eine systematisch zentrale Stellung einzuräumen. Sicherlich, solange nicht die inhaltliche Nähe der dadurch bezeichneten Positionen geprüft ist, ist dies allerdings ein ganz äußerliches Zeichen, das noch keine tatsächliche Konvergenz beweist.

Zur Prüfung der inhaltlichen Nähe kann man zunächst einmal danach fragen, worin für die verschiedenen symboltheoretischen Konzeptionen die Hauptstoßrichtungen ihrer Kritik bestehen. Hier kann man zwei Hauptrichtungen: einen idealismuskritischen und einen empirismuskritischen Strang unterscheiden. Der Symbolbegriff dient zum einen als Zentralbegriff für die Erweiterung der Kantischen Erkenntnistheorie zu einer umfangreichen Theorie aller menschlichen Verstehensformen. Zu nennen ist besonders Ernst Cassirer, der eine Philosophie der symbolischen Formen entwickelt, um den Nachweis zu führen, daß der Umfang menschlichen Verstehens nicht auf mathematische und naturwissenschaftliche Erkenntnis begrenzt ist. Auch die Sprache, der Mythos und die Kunst seien geistige Grundformen des Verstehens der Welt. An die Stelle von Kants Kritik der Vernunft müsse daher eine „Kritik der Kultur"[1] treten. In dieser Linie ist der Symbolbegriff die Formel für die Überwindung von Kants erkenntnistheoretischer Begrenzung auf die mathematischen Naturwissenschaften. Der Symbolbegriff dient zum anderen als Grundbegriff für eine neue Theorie der Wahrnehmung. Besonders zu nennen ist hier Maurice Merleau-Pontys Kritik an der Wahrnehmungstheorie des englischen Empirismus. An die Stelle dessen unberechtigter Konstruktionen sollen genaue Beschreibungen treten. Diese belegen, daß unsere Wahrnehmung sehr viel komplexer und beziehungsreicher ist, als die empiristischen Theorien behauptet haben. In dieser Argumentationslinie ist der Symbolbegriff die Formel für die Überwindung der empiristischen Wahrnehmungstheorie.

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1 E. Cassirer *Philosophie der symbolischen Formen. Erster Teil. Die Sprache.* Darmstadt: Wissenschaftliche Buchgesellschaft, 1988. S. 11.