

MIND

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In the last paragraph of *Free Speech*, Haworth acknowledges that circumstances (especially power relationships) have changed considerably since Mill's time, and he wonders 'how long it will be before "the free speech issue" ... becomes anachronism ...' (p. 223). My own view is that such a development is long overdue and my hope is that Haworth's excellent book will hasten its arrival.

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Categorical Principles of Law: A Counterpoint to Modernity, by Ofried Höffe, trans. Mark Migotti. University Park, PA: Pennsylvania State University Press, 2002. Pp. xxx + 311. H/b \$75.00, P/b \$26.50.

Höffe's impressive, wide-ranging book offers an extended argument for the indispensability of categorical moral principles, à la Kant, in both the theory and practice of law. Höffe claims that we need to reaffirm such principles and to shore up their intellectual respectability, given the current excessive sway of 'empirical-pragmatic' approaches. This claim holds the book's thirteen chapters, many of which began life as journal articles, together.

We should be interested in Höffe's views. Less known in Anglo-American circles, he has been a leading moral and political theorist in Germany for many years, where he directs the Tübingen Research Centre for Political Philosophy. His confidence with a range of literatures, from historical philosophical texts to German social theory to Kant scholarship, make his assessment of a renewed need for categorical principles particularly worthwhile.

The book has three parts. The chapters in the first part present the core thesis, showing the necessity of categorical principles as 'counterpoints' to empiricizing projects. Höffe begins with what he sees as the Scylla and Charybdis of 'empirical-pragmatic' modern social theory: negative critique, associated by Höffe with the Frankfurt School (particularly Adorno), which limits itself to pointing out existing societal contradictions, and positive critique, associated by Höffe with Odo Marquard (*Farewell to Matters of Principle: Philosophical Studies*, trans. R. M. Wallace, Oxford: Oxford University Press, 1989; *In Defense of the Accidental: Philosophical Studies*, trans. R. M. Wallace, Oxford: Oxford University Press, 1991), which merely affirms the existing order. By rejecting categorical principles that transcend the 'immanent' or 'given', both deprive themselves of needed critical leverage. Höffe turns to defending categorical moral principles against sociologists, such as Niklas Luhmann (*Paradigm Lost: Über die ethische Reflexion der Moral*, Stuttgart: Suhrkamp Verlag, 1988), who declare morality dead in modern societies, and legal positivists, who find morality superfluous to an accurate understanding of law. The remaining

chapters in the first section are devoted to articulating and defending what Höffe hopes will be an inoffensive 'practical' metaphysics for categorical principles and to a sympathetic account of categorical principles in Kant's own legal and political theory.

The book's second section turns to case studies: Mill's utilitarianism, false promising, penal law, and world government are all shown to submit to more satisfying analysis, and these analyses to render more satisfying practical recommendations, when categorical principles are taken seriously. The third and final set of chapters engages contemporary political theorists who are working on projects close to Höffe's: chapters take up the views of Axelrod, Rawls, Apel, and Habermas. A very lucid preface by Kenneth Baynes provides a helpful overview of the book's scope and orients the reader to the debates in which Höffe is engaged; Baynes's preface also offers an extended discussion of Höffe's relationship to Habermas. The translation, by Mark Migotti, is elegant and philosophically attentive. (Migotti's choice of 'man' as a translation of the gender-neutral 'Mensch' (for example, pp. 61, 69, 74) is, however, unfortunately particularly given Höffe's claims that the universals he urges do not surprisingly prejudice matters in the direction of any one sort of person.)

There is a lot here, and amidst it all there is something for nearly everyone. Kant scholars will be interested in Höffe's interpretations of Kant's legal principles and of the categorical imperative itself; political theorists interested in the foundations of liberalism will find Höffe's insistence on a 'transcendental' foundation for basic principles provocative; those interested in diagnosing modernity's (and postmodernity's) intellectual discontents will find in Höffe the neat suggestion of an antinomy, akin to those identified by Kant in the first *Critique*, in which contemporary theorists seem forced to choose between empirical and a priori approaches to social phenomena (pp. 42–3). Höffe's good Kantian solution to this antinomy involves assigning determinate roles to the empirical and the a priori, and making sure neither oversteps its bounds: roughly, the empirical is assigned the role of matter while the a priori—via categorical principles—gets to prescribe form.

The issue I'll take up precisely concerns the basic terms of this antinomy, and so of Höffe's core thesis.

Höffe's distinction between the empirical and the a priori has clear Kantian roots. The 'empirical' is 'what is' (p. 2), 'sheer positivity' (p. 22), including nature, experience (p. 69), the facts of anthropology (p. 69), and human 'needs and interests' (p. 70). The 'a priori', in contrast, is whatever can be affirmed independently of empirical investigation, and is synonymous, for Höffe, with the 'metaphysical' (p. 80) and the 'purely rational' (p. 67). Höffe's categorical principles are, again, indebted to Kant: categorical principles are grounded in an unconditioned good and direct us to respect that good, come what may. Because an unconditioned good is the sort of thing that cannot be discovered empirically, but can only be posited a priori, in 'a moment that goes beyond all experience' (p. 69)—principles defending it are also a priori. Höffe does not

tell us what his unconditioned good might be, though human rights are often mentioned (for example, p. 80); we are also told that the 'criterion' of the unconditioned good is 'universal legislation as such' or 'universalizability *tout court*' (p. 54).

But why should we buy this schema, this way of conceptualizing the terrain to be covered by law, politics, and morality? Its broad outlines have the backing of Kant's systematic metaphysics, but in the eyes of Höffe's opponents, this is hardly a recommendation. Höffe himself is nervous about adopting Kant's nomenclature grounding for a priori principles, self-consciously offering his 'practical' metaphysics as a palatable alternative source (Ch. 4). The 'empirical' is no less problematic. To see why, we need to look at the role the empirical is supposed to play in Höffe's account.

Roughly, again, Höffe's basic picture involves virtuously thin categorical principles—principles whose 'high degree of formality makes possible an almost boundless wealth of determination regarding content' (p. 3)—which are to be applied to the empirical in a way that will yield useful, fleshed-out practical principles.

How is this supposed to go? We know that adverting to the abstract demands of 'universalizability' (p. 54) or even 'benefiting people' (p. 48) is of little help in policy debates about whether, for instance, to encourage arranged marriages, or the privatization of water supplies, or single-payer health care. People on all sides of these and many other legal and policy debates earnestly believe that their proposals best satisfy such demands. This, presumably, is where the empirical is supposed to come in. The thought seems to be that if we call on complete and accurate psychological, sociological, economic, and political data, we will be able to determine, definitively, which laws and policies best satisfy the demand of universalizability.

But it is of course naive to think that data capable of such determination do, or even in principle could, exist. Whether arranged marriages, for instance, are agreeable or oppressive is in part a function of socially mediated hopes and expectations; people with different historical social, economic, and cultural relationships to water, or to health care, will be satisfied with different sorts of access to these goods. These facts cannot simply be counted among the 'boundless wealth' of the empirical, as they are themselves results of—and properly subject to—critical moral debate: What is the nature and purpose of marriage? How ought human beings to relate to and distribute natural resources? What is health, and what is adequate health care, and in what might a right to it consist? In general, universalizability assessments depend at every turn on substantive moral judgements about people's real needs and about the value of things they hold dear. The whole project of offering abstract, formal categorical principles and assuming a sufficiently rich and also morally agnostic bank of empirical information with which they may be filled in starts to look problematic. (For an account of Kant's *Rechtslehre* or Doctrine of Right project that is sensitive to these concerns, see my 'External Freedom in Kant's

Rechtstheorie: Political, Metaphysical, Philosophy and Phenomenological Research, forthcoming.)

What then is a defender of categorical principles, like Höffe, to do? Loosen, I think, the grip of the empirical/a priori schema. Acknowledge that psychological, sociological, cultural, economic, and political facts are already shot through with value. (Kant knew this. Property, for instance, is a fact, but it is also 'intelligible', *possessio noumenoni* (*Metaphysics of Morals*, trans. Mary Gregor, Cambridge and New York: Cambridge University Press, 1991, p. 71, [Ak. 6:249]).) Then take to the trenches and defend one's categorical commitments substantively, rather than transcendentially. Höffe tells us that 'the criterion of universal morality is universalizability *tout court*' (p. 54). But why should this be so? Presumably, this criterion is derived from Kant's commitment to the unconditional value of each person's autonomy. What motivates *this* commitment? Answering these questions substantively, and not merely formally, begins to give one the sort of moral compass that is actually useful in assessing which practices preserve and promote one's unconditional good, and which don't.

Kant himself substantively defended the unconditioned good of autonomy as freedom from the degradations of natural determination and as awe-inspiring power to set one's own ends. When faced with the task of building a system of law or settling a policy issue, Kant combined attention to this good with sensitive, often persuasive, but by no means unassailable readings of given conditions—which he recognized as complex combinations of the natural and the moral. In the *Metaphysics of Morals*, for instance, Kant negotiates the difficult question of how to punish duellists and infanticides in a way that is at once guided by respect for human autonomy (the unconditioned good), responsive to the aims and limits of law (as built around this good), and keenly aware of the fact that, for better or worse, social and peer pressure had created the powerful motive of 'honour'. (See my 'On Kant, Infanticide, and Finding Oneself in a State of Nature', *Zeitschrift für philosophische Forschung*, 54 (2), 2000, pp. 173–95.)

Höffe is absolutely correct that we need critical leverage, and is perhaps correct that such leverage is best conceived in terms of categorical principles. I am less confident, however, that the empirical/a priori framework he offers for critical leverage is the best one for the job.

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