Jus Cogens (2023) 5:255–275
https://doi.org/10.1007/s42439-023-00082-z

ORIGINAL ARTICLE

Enforceable Duties: Cicero and Kant on the Legal Nature of Political Order

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Accepted: 6 October 2023 / Published online: 24 October 2023

Abstract
This article seeks to show the importance of Cicero for Kant by pointing out the systematic relationship between their respective views on ethics and law. Cicero was important to Kant because Cicero had already elaborated an imperative, "quasi-jural" conception of duty or obligation. Cicero had also already prefigured the distinction between ethical duties and duties of justice. The article does not establish any direct historical influence, but points out interesting systematic overlaps. The most important in the realm of ethics are a universal rationalism; a rule-based normative framework of duty; and skepticism about (Cicero), or rejection of (Kant), eudaimonism. In the realm of political theory, it is the centrality of law and of property that unites both thinkers; both reject voluntarism in thinking that consensus flows from the right external laws, not the other way around, and thus creates a juridical community; and lastly, both Cicero and Kant believe that transparence, or publicity, is a key ideal that might be presupposed by both the ethical and the juridical domain. The article thus shows that both Cicero and Kant separate ethics from law, but there are indications that neither has given up the aspiration to bridge the two realms on a higher plane. This reading of Kant yields both a more Ciceronian Kant and allows us to perceive Kantian aspects of Cicero.

Keywords Kant · Cicero · Justice · Natural law · Eudaimonism · Deontological ethics

1 Introduction

There is broad consensus in the scholarly literature on Immanuel Kant's practical philosophy, especially the *Groundwork of the Metaphysics of Morals* (1785), that Kant's views were developed in critical dialogue with a book by Kant's contemporary Christian Garve, Garve's commentary on Cicero's *On Duties*, the

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Philosophische Anmerkungen und Abhandlungen zu Cicero's Büchern von den Pflichten (1783). Not only is there historical evidence for this indirect connection between Kant and Marcus Tullius Cicero (106-43 BCE), but there is also every reason to believe that Kant knew Cicero's *On Duties* (*De officiis*) fairly well, both in the original Latin and in German translation.[1]

A more direct influence of Cicero (or his Greek Stoic sources) on Kant was argued particularly forcefully and influentially by Klaus Reich in a 1939 article in *Mind*.[2] For Reich, various passages of Cicero's *On Duties* were behind the central and most important aspect of Kant's *Groundwork*, namely, the formulations of Kant's categorical imperative (CI) one encounters in the *Groundwork*. This line of argument has met with resistance, especially from scholars who believe that the differences between ancient and modern ethics are simply too vast for such an influence of Cicero on Kant to hold; or, regardless of historical influence, even for any doctrinal overlap to be convincing. According to J. B. Schneewind, Kant was dealing with "issues that Aristotle and Chrysippus and Cicero could not even have formulated," thus foreclosing the very possibility of any kind of overlap.[3]

The most important obstacle for a supposed influence, or doctrinal overlap, lies in the supposed divergence of the most fundamental assumptions of the ethical frameworks concerned. What is at stake with this divergence has been expressed with great lucidity by Henry Sidgwick. Sidgwick pointed out that the idea of rightness in moral conduct implies "the existence of a dictate or imperative of reason that *prescribes* certain actions." But, Sidgwick added, there is also a "possible view of virtuous action in which … this notion of rule or dictate is at most only latent or implicit, the moral ideal being presented as *attractive* rather than *imperative*." This view, where the moral ideal is presented as attractive rather than imperative, was according to Sidgwick the view taken by "the Greek schools of moral philosophy generally," while the idea of a "dictate or imperative of reason that *prescribes* certain actions" was in his view characteristic of the "quasi-jural notions of modern ethics."[4]

What I want to argue in this article is that Cicero was important to Kant precisely because he had introduced an "imperative," "quasi-jural" notion of duty or obligation into his ethical reasoning, and because Cicero prefigured the distinction between ethical duties and duties of justice. This must have appealed to Kant, and in what follows I should like to proceed by pointing out several overlaps in their respective

[1] In a letter to J.G. Herder, Johann Georg Hamann wrote on February 8, 1784: "Kant soll an einer Antikritik … über Garvens Cicero arbeiten." Cf. Garve (1783). For Kant's knowledge of Cicero, see Visnjic (2021), 105–109.

[2] Reich (1939) (the second of two articles on "Kant and Greek Ethics," with the first one, 1939a, focusing on Plato's influence on Kant). For arguments in favor of Stoic influence on Kant, or important similarities between various strands of Stoicism and Kant's ethics, see also Glei (1999), Annas (2017), Visnjic (2021), and Nussbaum (2022).

[3] Schneewind (2009), 295. For arguments against the closeness of Stoicism and Kant's ethics, see also Horn (2008), Wood (2006), and Kapust (2022).

[4] Sidgwick (1874), bk. 1, ch. 9. Sidgwick allowed, however, that the Stoics might be a special case, due to the prominence of natural law in their system of thought.

systems of ethics and politics. In general, I will not seek to establish any direct historical influence, but the systematic overlaps are striking enough, I believe, for us to suspect that Cicero did in fact have an impact on Kant. Quite apart from the question of historical influence, moreover, the structural similarities between Cicero and Kant might tell us something more general about any attempt to establish a political theory that is motivated by a kind of moral reasoning which is not eudaimonist, and these similarities may even tell us something about the relationship between the respective normative claims of ethics and law. Indeed, as I will try to show in this article, both Cicero and Kant separate ethics from law, but there are indications that neither has given up the aspiration to bridge the two realms on a higher plane.

I will proceed by discussing the most important systematic overlaps between Cicero and Kant. In the realm of *ethics*, there are three such overlaps, namely, a universal rationalism; a rule-based normative framework of duty; and skepticism about (Cicero), or rejection of (Kant), eudaimonism.[5] In the realm of *political theory*, it is the centrality of law and of property that unites both thinkers; both reject voluntarism in thinking that consensus flows from the right external laws, not the other way around; and lastly, both Cicero and Kant believe that transparence, or publicity, must be a key ideal.

In what follows, I will discuss these systematic relationships in turn. Before that I should like to point out however briefly, however, that there is one absolutely crucial issue at the heart of Kant's philosophy where we can find direct historical influence of Cicero, namely, Kant's views on the metaphysics of freedom. This has been amply recognized, of course, but given its foundational character it bears mentioning. Kant in his discussion of the "idle argument" against determinism in the *Critique of Pure Reason* (A 689/B 717, n. *) explicitly refers to Cicero's *On Fate* (*De fato*), and it is common and in my view correct to argue that Carneades's libertarian doctrine of the freedom of the will (*libera voluntas*) as elaborated in Cicero's *On Fate* (23–25) anticipated Kant's conception of freedom and his doctrine of the noumenal self.[6] For now, however, let us return to practical philosophy and discuss the systematic relationships between Cicero and Kant at hand.

2 Ethics

2.1 Cicero's Universal Rationalism and Kant's Categorical Imperative

Cicero's rationalism departs from the rationalism of some of the Greek Hellenistic schools of philosophy in that it does not merely explain how we can know the

[5] Note that I will not in this article venture into a discussion of Kant's conception of eudaimonism as put forward in the *Critique of Practical Reason*. I believe that in the second *Critique*, no less than in the *Groundwork*, Kant remains consistent in subordinating happiness to morality, but I cannot substantiate this here. For a different attempt at combining Kant's deontological outlook with his later views on eudaimonism, see Grenberg (2022). Many thanks to Tat-Fung Lam for help with this issue.

[6] See Platz (1973) and Cicero (2019), 66, n. 83. On Carneades's *libera voluntas*, see Schallenberg (2008). For an argument against ascribing Carneades a theory of free will, see Frede (2011).

normative demands of ethics and political theory, but it also draws the line between those without and those within the reach of those normative demands and therefore subject to them very inclusively: *everyone* can know the law of nature, Cicero thinks, and everyone is therefore subject to its demands:

> We are invested by nature with two roles (*personae*), as it were: one is universal (*communis*), arising from the fact that we all share in reason (*omnes participes sumus rationis*) and in that superiority which lifts us above the beasts. From this all morality (*honestum*) and propriety are derived, and from it is developed the rational method (*ratio*) of finding our duty (*officium*). The other is that, which is assigned to every single one of us.[7]

Unlike the Greek Stoics, Cicero does not confine his ethics to the sage but makes it explicit that all human beings, by virtue of sharing in reason, are the addressees of natural law.[8] The universal reach and the juridical, law-like quality of what our duty demands from us has led the Kant scholar Klaus Reich to claim that Cicero's *On Duties* was in fact a major source for Kant's main formulas of the CI as put forward in a systematic way in the *Groundwork*.[9] Let us look at Kant's first formulation of the CI (4:421):

> Act only in accordance with that maxim through which you at the same time can will that it become a universal law.[10]

Shortly thereafter Kant gives a slightly different, perhaps more intuitive,[11] version of the first formulation:

> So act, as if the maxim of your action were to become through your will a universal law of nature.

Now let us compare this with Cicero. One of the central claims Cicero develops in his *On Duties* is that:

> No man shall be allowed for the sake of his own advantage to injure his neighbor (*nocere alteri*). … this principle follows much more directly from the reason which is in nature, which is the law of gods and men. … there are interests that all men have in common. And if this is true, we are all subject to one and the same law of nature (*lex naturae*).[12]

The universality of what reason demands as well as the insistence on reason as the correct and only way of finding out about our duties are the two aspects where

[7] Cicero, *On Duties* 1.107. Trans. mine.

[8] Cf. also Cicero, *On the Laws* 1.28-30/Cicero (2017).

[9] For a similar recent argument, paying particular attention to the special role of humanity's rational nature, the notion of a natural law, and the overlap in terminology between Cicero's *formula* and Kant's *Formeln*, see Baum (2020).

[10] In what follows, the *Groundwork* is quoted from Kant (2011) and everything else from Kant (1996). For the German, see Kant (1999), Kant (2018) and the editions indicated in the References below.

[11] 4:436: "dem Gefühle näher."

[12] Cicero, *On Duties* 3.23, 27. Translation is from Cicero (1913).

Kant and Cicero seem to show a strong affinity. In the second formula of the categorical imperative, Kant writes (4:429):

> So act that you use humanity, as much in your own person as in the person of every other, always at the same time as an end and never merely as a means.

This second formula corresponds very closely with Cicero's view that someone who "wrongs his fellow-men … takes away from man all that makes him man (*omnino hominem ex homine tollat*),"[13] or, in the translation of Margaret Atkins, "he takes all the 'human' out of a human."[14] Indeed, while the formulation just given might in context refer to the wrongdoer herself not being fully human in the sense that she is not partaking in reason and cannot therefore be convinced by being given reasons, there is a formulation in the following paragraph that makes it clear that Cicero has indeed something like the intrinsic value of human beings as dictated by the law of nature in mind: "nature prescribes that one man should want to consider the interests of another, whoever he may be, for the very reason that he is a man."[15]

The intuitive version of the third formulation of the CI reads (4:439):

> Act in accordance with maxims of a universally legislative member for a merely possible realm of ends.

And again, this seems to track closely the obligations that derive from Cicero's cosmopolitanism, namely, the idea that those who disregard foreigners "destroy the universal partnership (*communis societas*) of humankind (*humanum genus*)."[16]

In an article critical of Reich's claims, Allen Wood has expressed doubts as to the philosophical fruitfulness of claiming an influence of Cicero's *On Duties* on Kant's formulations of the categorical imperative.[17] Wood's doubts stem from his own interpretation of Kant as giving us a theory that is teleological at bottom: humanity as the carrier of rational agency is the value that grounds everything in Kant's ethics according to this view.[18] But if we take seriously Kant's claim that it is the moral law itself that directly provides practical reasons, and not any supposed underlying value of humanity as the carrier of rational agency, then we might agree with Reich that Cicero's universal rational law of nature might have served Kant as a model for his own CI, derived as a synthetic a priori claim from reason.[19] As in Kant, Cicero derives the other-regarding concern, concern for "whoever he may be, for the very

[13] Cicero, *On Duties* 3.26. Trans. Cicero (1913).

[14] Cicero (1991). Garve (1801), 183 translates that the wrongdoer does not deserve a refutation, "da er im Menschen die Menschlichkeit aufhebt."

[15] Cicero, *On Duties* 3.27. Trans. Cicero (1991). Garve (1801), 183f. has a "natürliche Empfindung im Menschen, welche ihn antreibt, einen andern Menschen, wer er auch sey, – bloß weil er ein Mensch ist, – in der Noth beyzuspringen."

[16] Cicero, *On Duties* 3.28. Trans. mine.

[17] Wood (2006).

[18] Wood (1999), 130.

[19] Kant, *Critique of Practical Reason*, 5:71.28-30: "What is essential to any moral worth of actions is *that the moral law (das moralische Gesetz) determine the will immediately*." One might say, with Sensen (2018), that autonomy for Kant is not a value but the source of principles.

reason that he is a man," from the law of nature which can be perceived and known by every rational being.

When Wood writes that *On Duties* "does little or nothing to illuminate … the thought that humanity, in the sense of rational nature, is an end in itself, and the fundamental value motivating obedience to all moral laws," it is not obvious to me that this is true when it comes to the passage from Cicero just quoted. And when Wood goes on to say that there is missing in Cicero the "crucial Kantian idea that the laws governing [humanity] should be seen as proceeding from the idea of the will of each and every one of its members, so that in obeying them, each is really obeying only himself,"[20] one is tempted to agree—except that Cicero, too, believes that the natural law prescribes that every man "should *want*" (*natura praescribit, ut homo … velit*) to consult the interests of every other, and that those who do not will this are "fleeing themselves" qua human being.[21]

2.2 Rule-Based Duty

Kant's conception of duty is usually taken to be an expression of his deontological stance. Indeed, any ethical framework built on a strong conception of duty with a corresponding conception of (subjective) right gives off a strong deontological flavor. This is all the more so since Kant develops a conception of duty that is dependent on the idea of a law, a juridical norm: "duty is the necessity of an action from respect for the law," Kant writes in the *Groundwork* (4:400), and this means that, objectively speaking, "nothing remains for the will that could determine it except … the *law*." This is where the buck stops; Kant's law is not something instrumental designed to promote a further value, but a prescription without a justification in terms of a higher good. As Terence Irwin writes, if "laws essentially prescribe in their own right, and not because of some end that they promote, they have to express a deontological outlook." If, on the other hand, they "are principles directed towards individual and common good, they are not purely deontological."[22] This seems to fit Kant's conception of law and the conception of duty he derived from it well:[23] "But what kind of law," Kant asks (4:402), "can that possibly be, the representation of which—even without regard for the effect expected from it—must determine the will for it to be called good absolutely and without limitation?" It is "the universal conformity of actions with law" or "mere conformity with law as such," without

[20] Wood (2006), 363.

[21] Cicero, *On Duties* 3.27/Cicero (1991); *On the Commonwealth* 3.33 (my trans.): whoever does not abide by the law of nature will flee himself (*ipse se fugiet*), having denied human nature. It is true that the emphasis is on a natural law external to human beings but accessible to reason, but it is not always clear in Kant that his concept of the law is any less realist—as the lively scholarly debates as to whether Kant is really a realist or rather a constructivist go to show (and here Wood might actually agree, given his otherwise realist interpretation of the objective authority of reason operating independent of the exercise of our wills).

[22] Irwin (2010), 105f.

[23] But see, for attempts at interpreting Kant in a teleological way, the important contributions by Herman (1993), Guyer (2007), and Wood (1999).

"a view to certain actions," that serves the will as its principle, "and must so serve it if duty is not to be as such an empty delusion." Respect for other persons, too, is (4:401) in the last resort "only respect for the law."

This is strikingly Ciceronian. First, note that Cicero called his treatise on ethics and politics *On Duties*, *De officiis*—he did not call it *De beatitudine*, or *De summo bono*.[24] A year before the *On Duties*, Cicero had of course already written an important work on the ancient conceptions of the highest good and the various value theories the Hellenistic schools of philosophy had on offer, namely, his *On Ends* (*De finibus*). But that work, after discussing the pros and cons of the Epicurean, the Stoic and then a kind of ecumenical, eclectic view of the highest good reaches an impasse, leaving the reader with a skeptical sense that a final decision between the conceptions of the good life on offer may well be impossible. This is an outcome that could be expected from an adherent of the skeptical new academy such as Cicero; but in his last philosophical work from 44 BCE, the *On Duties*, this skeptical indecision seems to give way to a far more dogmatic approach. Now Cicero makes it clear that he believes that some claims in the domain of ethics and politics do indeed admit of a kind of certainty and knowledge, and he goes on to put these claims forward without any of the academic pro and contra applied to the Hellenistic conceptions of the good life.

The reason seems to have been a Kantian one: his topic, Cicero makes clear immediately, is duty (*officium*). He had previously defended the term *officium* as a translation of the Stoic term *kathekon* and had made it clear that by *officium* he meant something with connotations of Roman (public) law, a kind of obligation.[25] Although Cicero was ostensibly following the Stoic thinker Panaetius when writing his *De officiis*, it looks as if his choice of translating Panaetius's title *Peri tou kathekontos* represented a self-conscious turn away from a teleological framework and towards a deontological one. While the term *kathekon* had far less normative connotations and could in fact be used to apply to plants and animals and their correct development and behavior,[26] *officium* seems to have been chosen by Cicero deliberately to narrow the scope of inquiry to human beings and to indicate that he intended to do something rather different than Panaetius. Panaetius, Cicero claims, had not bothered to define *kathekon*/*officium*, and he then goes on to say that there are two kinds of *officia*: one pertains to the highest good (*pertinet ad finem bonorum*) and the other depends on rules (*praecepta*).[27] It is the latter, Cicero says, he is interested in explaining in his *On Duties*: duties that are rule-based.

This replacement by Cicero of a primarily virtue-based situational ethics tailored to the wisdom and insight of someone like the Stoic sage with a rule-based ethics could be said to lie at the origin of a whole tradition of thought and certainly

[24] See Schofield (2021), 185.

[25] In his correspondence with Atticus: Cicero, *Letters to Atticus* 16.11.4; 16.14.3/Cicero (1999).

[26] *kathekon* is therefore usually rendered as "appropriate action": Dyck (1996), 8. See also Lorenz (2020) and Visnjic (2021).

[27] Cicero, *On Duties* 1.7.

contains very early traces of a deontological approach to practical reason.[28] It is striking that Cicero not only makes it clear that the "perfect duties" (*perfecta officia*) of the sage are not his subject matter, but also that the "middle duties" (*media officia*) that are his subject matter are rule-based and ultimately defined by being rational: middle duties are common to all human beings and are "that for which a persuasive reason can be given as to why it has been done."[29]

It is not entirely clear to me but I am tempted to try and map this distinction between middle and perfect duties in Cicero onto Kant's subtle discussion of moral motivation in the *Groundwork*: whereas Cicero's perfect duties are those characteristic of the Stoic sage and thus performed with perfect virtue and the correct intention, his middle duties are those that can be performed by rational beings at large, universally, merely by reference to their underlying rules. In Cicero, this move seems to shift the emphasis from moral motivation to the issue of whether we can give reasons in terms of rules we can all recognize. This is reminiscent of the interesting problem Kant experiences with moral motivation: for Kant, the right kind of motivation plays a far more prominent role than it does for Cicero, but since Kant believes that we can never really know whether we act for reasons of duty or out of secret drives to do with self-love—we are opaque to ourselves and cannot know whether we merely fulfill Cicero's middle duties or the perfect duties of the sage.[30]

2.3 Skepticism About and Rejection of Eudaimonism

Compared to other ancient writers on ethics, Cicero is highly unusual in that he does not seem interested in connecting his ethical and political theory with a eudaimonist account of the highest good. Albeit there are occasional remarks that show that eudaimonism must have held some appeal for Cicero,[31] nowhere does he attempt to

[28] For the origins of rule-based natural law, as opposed to natural justice, see Striker (1986). I agree with Striker about the significance of this shift, but believe that our evidence does not justify ascribing this shift to the Greek Stoics, but that it should be ascribed to Cicero. For an argument that the Stoics did already develop a deontological ethics, albeit not a rule-based one, see Visnjic (2021), esp. 34–39. Many have denied that Stoic *kathekonta* should be interpreted as rules, or as rule-based: see Vander Waerdt (1994), Inwood (1999), and Vogt (2008). Scholars how argued for an interpretation as rules include Striker (1986), Mitsis (1994), and Sedley (1999). I am agnostic as to whether the Greek Stoics conceptualized the *kathekonta* as rules or rule-based, but Cicero certainly did.

[29] Cicero, *On Duties* 1.8. Trans. Cicero (1999).

[30] See *Groundwork* 4:407: "For at times it is indeed the case that with the acutest self-examination we find nothing whatsoever that – besides the moral ground of duty – could have been powerful enough to move us to this or that good action and so great a sacrifice; but from this it cannot be inferred with certainty that the real determining cause of the will was not actually a covert impulse of self-love under the mere pretence of that idea; for which we then gladly flatter ourselves with the false presumption of a nobler motive, whereas in fact we can never, even by the most strenuous examination, get entirely behind our covert incentives, because when moral worth is at issue what counts is not the actions, which one sees, but their inner principles, which one does not see." Might this not jeopardize Kant's attempt at keeping ethics and politics apart? Cf. the more optimistic Cicero, *On Duties* 3.31.

[31] See, e.g., Cicero, *On the Laws* 1.58-63/Cicero (2017), where we encounter a kind of legally inflected eudaimonism: the *doctrina vitae* comes out of the law. See also Cicero, *On the Commonwealth* 5.8/Cicero (2017), where however the goods thought to make the citizens happy are unusual, to put it mildly: namely, resources, property, glory, and then virtue. Cf. also Cicero, *On Duties* 3.29.

use a concept of the end as the motivation and underlying reason for his normative claims. Rather, what steps into the place usually occupied by the good is now the law (*lex*), which, importantly, is *itself* said to constitute a good (*bonum*).[32]

Cicero bases this new juridical normativity on an original conception of natural law, one demonstrably based on Stoic sources, but there are important differences between Cicero and the Greek Stoics. What Cicero retained from the Stoic conception of natural law was its rationalist moral epistemology. Yet Cicero elaborated this conception in his *Republic* and his later treatise *On the Laws* to give it a specifically Roman and juridical content.[33] Natural law serves now to articulate and spell out a very Roman conception of justice as law, where justice requires expression in legal form and is accordingly no longer primarily understood as virtue or character disposition to act in a certain way.[34] Cicero's natural law is normative qua law; it is not an ethical disposition one would want to adhere to in order to achieve virtue and happiness.

The reason for this lies probably in certain epistemic constraints: reason can tell us what the natural law demands, Cicero thinks, yet cannot tell us what the good life consists in. We can know the content of natural law, but we must remain in the dark about the *summum bonum*. Jacob Klein explains how this transformation came about: if "the eudaimonist framework of earlier Stoicism is neglected, it becomes easier to regard the prescriptions of natural law not simply as principles to which one must adhere in order to live a life that is happy because rational, but as a source of obligation in their own right."[35] Another reason is that Cicero's main emphasis is on justice; conflicts between justice on the one hand and the requirements or *officia* of the other virtues on the other are front and center in the *On Duties*. These conflicts, which are all dissolved in favor of a very juridical notion of strict justice, tend to bring out and favor a deontological stance.

This break with eudaimonism as well as the corresponding demarcation between justice strictly speaking and ethical behavior more generally might account for the attraction and overlaps between Cicero and Kant. Kant's own vehement rejection of eudaimonism in the *Groundwork* is well known (4:442):

> [T]he principle of *one's own happiness* is the most objectionable, not merely because it is false, and experience contradicts the pretense that being well always tallies with behaving well, nor merely because it contributes nothing whatsoever to the grounding of morality …: but because it underpins morality with incentives that rather undermine it and annihilate all its sublimity, since

[32] Cicero, *On the Laws* 2.12/Cicero (2017).

[33] It obviously matters a great deal that Roman law already in the *Republic* became a specialized discipline independent from religion or politics, which resulted in a very unique autonomy of jurisprudence and law, quite unlike in any other pre-modern society; see Schiavone (2012), 3–4.

[34] See Vander Waerdt (1994), 287: Greek Stoic natural law is "constituted by the sage's rational disposition, not by a code of rules or legislation." Therefore, it is "a dispositional rather than rule-following model of natural law."

[35] Klein (2012), 80. This is why it is best to let the history of the idea of a rule-based natural law begin with Cicero rather than with the Greek Stoics.

> they put motives to virtue and those to vice in the same class and only teach us to improve our calculations.

The charge here is ultimately one of egoism; prudence and morality are for eudaimonists driven by the same motivational drives.[36] Now the question is: is Kant's well-known rejection of eudaimonism owed to this charge of egoism alone, or are there further reasons for the rejection? There are, of course, and they turn out to be as epistemically motivated as Cicero's own. Kant formulates them eloquently as follows (4:417f.):

> The imperatives of prudence would totally and entirely coincide with those of skill, and be equally analytic, if only it were so easy to provide a determinate concept of happiness. For here as well as there it would be said: whoever wills the end also wills (in conformity with reason necessarily) the only means to it that are in his control. But, unfortunately, the concept of happiness is so indeterminate a concept that, even though every human being wishes to achieve it, yet he can never say determinately and in agreement with himself what he actually wishes and wants. The cause of this is: that the elements that belong to the concept of happiness are one and all empirical, i.e. must be borrowed from experience and that, even so, for the idea of happiness an absolute whole is required, a maximum of well-being, in my present and every future condition. Now, it is impossible that the most insightful and at the same time singularly able, but still finite being should make for himself a determinate concept of what he actually wants here.

Cicero's skepticism as to the availability and knowledge of a concept of happiness (*eudaimonia*) is equally pronounced as Kant's; at least it is very hard to get away from a reading of his *On Ends* with a sense of resolve as to which of the Hellenistic schools' concept of the highest good is to be preferred. But at least, one might say, there is in Cicero as opposed to Kant a sense that such knowledge of a determinate concept of happiness may well be attainable *in principle*.[37] But it is clear that the current inability to decide between the various concepts on offer makes Cicero think that there are no rules (*praecepta* or *leges*) sponsored by reason to be had when it comes to rivaling conceptions of happiness and the highest good. Cicero, however, does put forward an original argument that makes room for an individualized perfectionism, an individualized achievement of every individual's good; but this is not something that seems to be underwritten by reason, but rather by a kind of individual intuition into one's individual nature and her demands.[38]

[36] For the view that eudaimonist ethics may escape the charge, see Annas (2017).

[37] I am leaving aside Kant's views on the highest good as developed in the *Critique of Practical Reason* (5:113–125).

[38] See Cicero, *On Duties* 1.107, 110–114, where he puts forward his idea of the various *personae* we inhabit: it is only the first, universal *persona* which generates universal duties that can be found out by universal reason, whereas the second, individual nature of each seeks fulfillment as well but this kind of perfectionism is individualized, along lines reminiscent of J.S. Mill, and it is emphatically not part of universal rational human nature. See on this Hawley (2022), 37–40.

I would like to leave behind for now the comparison between Cicero's and Kant's *ethical* doctrines and move on to a discussion of their respective *political* theories. This raises, however, immediately an interesting question about the demarcation between ethics and law, a demarcation that is of the greatest importance for Kant and for which, I think, Cicero may well also have served as a model.

3 Political Theory

3.1 A Duty of Justice to Leave the State of Nature

In a shift that deserves to be called revolutionary within the framework of ancient ethics, Cicero in the *On Duties* seeks to give a clear boundary to the realm of justice, narrowly conceived. Although perhaps still committed, on the surface, to the Greek theory of the unity of virtue, according to which having one of the virtues means having all the other ones as well, Cicero goes on to work out an account of justice that is not only rather free-standing, but also, as we have already seen, far more reliant on general rules than on character dispositions or virtue.[39]

What are the duties generated by justice according to Cicero? They are, first, "that no man should harm another unless he had been provoked by injustice"; second, "that one should treat common goods as common and private ones as one's own."[40] The first duty spells out the criterion of harm, while the second seeks to give precision to what constitutes harm: the violation of rightful property claims. This presupposes an account of property. Cicero writes that "no property is private by nature, but rather by long occupation …, or by victory (… in war), or by law, by settlement, by agreement, or by lot."[41] Notice that property here is nothing natural, but crucially, as we shall see, it still might be pre-political. The normative criteria for original acquisition are very slim, but they are not inexistent; "long occupation" seems to amount to a combination of effective control of previously unowned empty land ("occupation") plus prescription ("long"), or justified expectations that long-standing investments be respected. Victory in war presumably means victory in just war. Apart from justice in the narrow sense, Cicero thinks, there is also a wider sense, which he calls "beneficence," or "kindness or liberality."

The crucial point is that when the two conflict, justice in the narrow sense wins out.[42] Justice in the narrow sense generates duties and corresponding rights which can be legally required and which are not in principle confined to one's own state, but owed to anyone. The universality is brought out with the juridical language of partnership (*societas*); the obligations and rights of justice are those of the partners

[39] For the Greek views on the unity of virtue, see, e.g., Cooper (1998). For Cicero's worries regarding the reliability of virtue as a constraint, see Cicero, *On the Commonwealth* 2.43/Cicero (2017) (rule based on virtue is liable to be arbitrary and unfair) and ibid. 1.44 (rule based on virtue is unstable); see also Edelstein and Straumann (2022) and Straumann (2016), ch. 4.

[40] Cicero, *On Duties* 1.20. Trans. Cicero (1999).

[41] Cicero, *On Duties* 1.21. Trans. Cicero (1999).

[42] Cicero, *On Duties* 1.42-44.

in the partnership of humanity at large (*societas humani generis*).[43] Not the exercise of virtue of the partners is the focus, but their rights and duties.[44] Beneficence, on the other hand, closely resembles the virtue of distributive justice described by Aristotle, a virtue that takes into account degrees of merit[45] and seeks to calculate how much beneficence is due to whom. Cicero, as opposed to the traditional view, now bolsters justice in the narrow sense and points out that beneficence can only come into play as long as it does not violate rights and duties under justice, narrowly conceived. Jed Atkins has put the difference between the distributive virtue and justice as a duty of not harming anyone succinctly as follows: while rights and duties on Cicero's account "are no longer strictly rendered according to merit, they can enter into the calculation of how to distribute goods according to justice at a different point. Whereas for Aristotle 'rights' are the product or result of distributive justice, for [Cicero] rights are factors that one must take into account as one performs the calculations. They are trumps or limitations on how the goods may be distributed."[46]

3.2 Private Property: *facto* or *lege*?

So private property serves as the yardstick for justice and the criterion of harm; but Cicero says that "nothing is private by nature." Is property therefore entirely political? That cannot be either, for Cicero makes it very clear indeed—in a passage shocking to anyone steeped in Greek perfectionism—that property must in a sense be pre-political:

> For political communities (*res publicae*) and cities (*civitates*) were constituted especially so that men could hold on to what was theirs. It may be true that nature first guided men to gather in groups; but it was in the hope of safeguarding their possessions (*spe custodiae rerum suarum*) that they sought protection in cities.[47]

Now this rings eminently familiar of course to anyone who has ever read the following:

> The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property.[48]

But John Locke, whose *Second Treatise* I have quoted here, gives us a far more demanding account than Cicero of how property in the state of nature comes to be, and how it can have the normative weight he attributes to it. Cicero, on the other

[43] Cicero, *On the Laws* 1.49; *On Duties* 3.28. Partners (*socii*) in a *societas* might be characterized by their "reflective recognition of their obligations of justice towards one another," to use Katrin Flikschuh's characterization of Kant's solution to the problem of right. See Flikschuh (2000), 117.

[44] Cf. Sorabji (1993), 145.

[45] Interestingly, Cicero considers need as well as merit: Cicero, *On Duties* 1.49, 52, 59.

[46] Atkins (2013), 147.

[47] Cicero, *On Duties* 2.73. Trans. Cicero (1999), slightly adapted.

[48] Locke (1988), *Second Treatise*, sec. 124.

hand, seems content with prior occupation, as we have seen above, or even with a completely factual account of possession shorn of any normative connotations. Explaining the distribution of private property, Cicero writes that "since what becomes each man's own comes from what had in nature been common, each man should hold on to whatever has fallen to him. If anyone else should seek any of it for himself, he will be violating the law of human fellowship (*ius humanae societatis*)."[49] The emerging picture is ambiguous: Cicero, like Locke, sees the very purpose of the state in the guarantee of private property, in the enforcement of pre-political rights. But for Cicero, these pre-political rights at times look so indeterminate and so normatively unassuming, that the Lockean picture is always in danger of giving way to a far more Hobbesian one where it was "murder and bloodshed" that had enabled men in the state of nature (*natura rerum*) to hold on to those few goods that they could "seize or retain through physical force."[50]

Depending on the work one is looking at—the more Epicurean *On invention* and *On Behalf of Sestius*, or the more Stoic *Commonwealth* and *On Duties*—Cicero occupies a position that sees the state merely ratifying pre-political Lockean rights, or gives the state a larger Hobbesian role in shaping the content and extent of those rights. But it is fairly clear that in his mature thought, Cicero wants to establish a kind of pre-political right to property that can already serve as a pre-political yardstick of justice in the state of nature: "It is permitted to us—nature does not oppose it," Cicero writes, "that each man should prefer to secure for himself rather than for another anything connected with the necessities of life. However, nature does not allow us to increase our means, our resources and our wealth by despoiling others."[51] It is the very purpose of the state to track this natural law system and give it expression, but there is a sense in which the legal order of the state is not simply instrumental in guaranteeing natural law, but justice is actually an intrinsically legal condition.

When we turn to Kant, we can see that two of the issues at the heart of Cicero's thought—the centrality of property to justice, and the interpretative spectrum of how to conceptualize the relationship between the state and pre-political property—that these are both issues that are very much at the heart of the scholarly literature on Kant. Perhaps by drawing on Cicero, some of the issues in Kant can be elucidated, and vice versa.[52] Kant, no less than Cicero, in the *Doctrine of Right* sees the purpose of the state in guaranteeing property rights (6:237): "(If you cannot help associating

[49] Cicero, *On Duties* 1.21. Trans. Cicero (1999). Note, once again, the legal language of *societas* or partnership. Garve's translation reads (1801), 16: "Nachdem also einmal, die Dinge, die von Natur allen gemein waren, in mehrere Portionen getheilt worden sind, wovon jede einem Einzigen zugehört: so ist jeder verbunden, mit dem, was auf seinen Antheil gefallen ist, zufrieden zu seyn; und kann von dem Antheile des andern nichts begehren oder sich zueignen, ohne die Rechte der menschlichen Gesellschaft zu verletzen."

[50] Cicero, *Speech on Behalf of Publius Sestius* 91. Trans. Cicero (2006).

[51] Cicero, *On Duties* 3.22. Trans. Cicero (1999). Note the Kantian overtones of Cicero's permissive law.

[52] For an attempt at the first (albeit not specifically with regard to the issue of property), see Visnjic (2021). Glei (1999) seeks to understand Cicero better (especially his *formula*) by looking at Kant's formulations of the CI.

with others), *enter* into a society [*Gesellschaft*] with them in which each can keep what is his (*suum cuique tribue*)." But, pointing out that "keeping what is already his" seems redundant, he explicates the phrase as the moral duty to enter civil society as a condition of mutual assurance (ibid.): "'*Enter* a condition in which what belongs to each can be secured to him against everyone else' (*Lex iustitiae*)."

That rightful condition, it turns out, "cannot be conceived apart from a public legal order," as Arthur Ripstein puts it,[53] because what this legal order wants to achieve is not something that can be specified apart from legal rules and institutions and the idea of universal law: "A rightful condition is that relation of human beings among one another that contains the conditions under which alone everyone is able to *enjoy* his rights, and the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone (*eines allgemein gesetzgebenden Willens*) is called public justice."[54] Property in the state of nature has only provisional status, for Kant, but creates the normative pull to leave the state of nature and enter the state. Property and its original acquisition in the state of nature is exactly as normatively unassuming as it is for Cicero[55]—prior occupation is all it takes—but it generates normative duties to enter a rightful condition that are everything but unassuming and can even be enforced: "From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature... ." This, Kant writes, can be "developed analytically from the concept of *right* in external relations, in contrast with *violence* (*violentia*)."

The provisional status of property rights in the state of nature corresponds closely with the kind of halfway house we encounter in Cicero: property is not natural, but pre-political. Its acquisition is permitted to us, so for Cicero no less than for Kant, unilateral acquisition results in a change of the normative status of everyone else—without consent, the occupier places everyone else under an obligation to refrain from trespassing. But is this right as provisional for Cicero as it is for Kant?

I think that there are traces of this view in Cicero, a fact that was exploited by Hobbes who sought to enlist Cicero as a fellow property-conventionalist, quoting from the speech *For Caecina*, where Cicero claimed that we inherit property more from our system of justice and the law than from whoever mentions us in her will.[56]

[53] Ripstein (2009), 9.

[54] *Doctrine of Right*, 6:306. Kant goes on (6:307) to formulate the postulate of public right: "From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature..." this can be "developed analytically from the concept of *right* in external relations, in contrast with *violence* (*violentia*)."

[55] It is not fanciful to point out the parallel between Kant's *lex permissiva* and Cicero's own permissive norm, quoted above, at *On Duties* 3.22; and note the parallel between Kant's division of title to things (6:260: *facto, pacto, lege*) and the account quoted above from Cicero, *On Duties* 1.21 (*occupatione*, … *lege*, *pactione*). For Kant's theory of property acquisition, see Brandt (1982) and Ripstein (2009), ch. 4; for a different emphasis, Byrd and Hruschka (2006).

[56] Cicero, *For Caecina* 74: "Believe me, every one of you has received a greater inheritance in respect of his property, from justice and from the laws than from those from whom he received the property itself." Trans. C. D. Yonge. Hobbes seized upon this remark by Cicero, adducing it as proof that even Cicero was convinced that there could be no property rights in the absence of sovereignty: Hobbes (2012), vol. 2, 388: "[E]ven *Cicero*, (a passionate defender of Liberty,) in a publique pleading, attributeth all Propriety to the Law Civil." Cf. Kant, *Rechtslehre* 6:261 on property law (*ius reale*), which encompasses not only the right to a thing (*ius in re*), but "der Inbegriff aller Gesetze, die das dingliche Mein und Dein betreffen."

The idea that property rights are somewhat malleable in the hands of public authority in a legal order is not foreign to Cicero, caricatures of him as a proto-libertarian notwithstanding. He defends the compensation of justified expectation from public funds as a matter of justice.[57] Nor is Cicero as adamantly opposed to taxation as is commonly assumed—he objects to arbitrary takings in the name of beneficence and liberality, but has in mind Sulla's and Caesar's proscriptions and the killing of their enemies and subsequent confiscation of their funds. Taxation done along non-arbitrary lines and in accordance with the principles of legality Cicero does accept, and the support of those in need by the state is something he seems to accept as a matter of course.[58] So it does seem as if Cicero could be a congenial thinker for Kant with regard to the provisional status of property rights in the state of nature, for Cicero agrees with Kant original acquisition is inescapable in the state of nature; that we need to escape the state of nature and make property rights part of the *societas* that is the state, with the mutual recognition of rights under law that this entails; and he agrees further, I think, that this need to escape the state of nature is not purely prudential and instrumental.

For Cicero no less than for Kant, the rightful condition of the state cannot be specified without reference to legal institutions; even bandits cannot escape the pull of legality and might inadvertently *nolens volens* slip into a condition of legality,[59] and it was for the purpose of establishing equal justice (*aequitas*) for the highest and lowest alike that kings were invented and later laws.[60] This rightful condition has to secure equality of right; otherwise, it does not deserve the name.[61] The obligations of justice, unlike those of beneficence, can in principle be *enforced*.[62] For Cicero, that is, all obligations he deals with in *On Duties* are *media officia* and can be expressed as rules, but only the duties of justice are enforceable. This shows that the demarcation between justice and the duties generated by ethics is drawn exactly where Kant draws it: what is right according to external laws is just (*iustum*); what is not, unjust (*iniustum*). Some of these *leges externae* may however well be

[57] Cicero, *On Duties* 2.81-84.

[58] Cicero, *On Duties* 2.74. For Cicero's views on taxation, see Neumann (2015). Cicero's downgrading of beneficence in favor of justice is congenial to Kant's biting criticism of private charity as demeaning (27:455).

[59] Cicero, *On Duties* 2.40.

[60] Cicero, *On Duties* 2.41: *iustitiae fruendae causa*.

[61] Cicero, *On Duties* 2.42: *ius enim semper est quaesitum aequabile; neque enim aliter esset ius*.

[62] Cicero, *On Duties* 3.23. See also the contrast between the philosopher Xenocrates's motivation by virtue and Roman legal institutions and *imperium* at Cicero, *On the Commonwealth* 1.3/Cicero (2017). Note that a Ciceronian Kant would thus not allow for O'Neill's (1996) enforceable imperfect duties; but he does make room for a cosmopolitan account of perfect duties of justice. Note also that Kant's differentiation between perfect and imperfect duties of justice recognizes Cicero's enforceability criterion, but for Kant, as for Cicero, enforceability is not part of the definition of perfect obligation, but follows from its definition (AA 19, 1335).

recognized in their obligatory nature a priori by reason, they are natural external laws.[63]

Given the difference in motivation between ethics and law, there have always been strands of Kant interpretation which emphasized the independence of the ethics and law, but usually this carries a cost: Kant's *Doctrine of Right* is then often interpreted along Hobbesian, merely prudential lines.[64] There is of course textual evidence that supports this view,[65] and the attempt at uniting ethics and law under the banner of autonomy and the appeal to the CI as the overarching principle also comes at a cost, perhaps an even heavier one: that of collapsing law and politics into ethics, something Kant explicitly seeks to avoid.[66] Cicero may also offer suggestions here for how we can seek to avoid the twin challenges of a purely prudential political theory, on the one hand, and a completely ethicized political theory, on the other.[67] The Ciceronian way out points in the direction of a specifically legal political theory, one that provides a legal warrant for coercion where external harm as a matter of justice has to be warded off; yet the legal order this kind of justice presupposes is not justified on purely prudential grounds, but imposes itself as the only way of establishing a non-arbitrary order that survives public justification. Nor is it justified on purely ethical grounds, because it does acknowledge strategic assurance problems as problems of justice and thus cannot rely on individual moral motivation but requires legal order. Cicero thought that problems of motivation could be met by institutions justified in light of the natural law; whether or not everyone is properly motivated by those legal institutions seems of little interest to him; he might think that this is simply a contingent socio-psychological issue.[68]

[63] 6:224.

[64] See, e.g., Höffe (1992). Whether this is fair to Hobbes is a different question; for a good argument that it is not, see Dyzenhaus (2022), ch. 2.

[65] This passage from *Perpetual Peace* is probably the most obvious (8:366): "The problem of establishing a state, no matter how hard it may sound, is *soluble* even for a nation of devils (if only they have understanding) … ."

[66] For an ethicized view, see Korsgaard (1997).

[67] This strikes me as at least consistent with the way out of the dilemma offered by Flikschuh (2000), ch. 3. Flikschuh seeks to save autonomy in the realm of the *Doctrine of Right* by ascribing to Kant (99) a conception of economic desiring that meets "the requirements of autonomous willing and choosing." This avoids both the purely prudential and the purely ethical horn of the dilemma. Note that Cicero can certainly be read as putting forward an ideal of autonomy that encompasses economic desiring; such an ideal might be seen to follow from the skeptical impasse reached in *On Ends* read in combination with *On Duties* 1.110, 113, 115, and 118f.

[68] Cicero might be, that is, an externalist about moral motivation. My evidence for this is that he is not keen on meeting natural law skepticism on the plane of moral psychology, but prefers to move on to epistemic issues (cf. Cicero (2017), *On the Commonwealth*, bk. 3). He probably also thinks that the free-rider poses no problem of justification: the free-rider must, in order to effectively freeride, acknowledge her obligation to the legal order and makes herself thus subject to coercion.

4 Conclusion: a Juridical Community

Perhaps this is the most interesting parallel between Kant and Cicero: the way both thinkers cordon off concerns of justice and law, on the one hand, from broader ethical issues on the other. It is this delineation which might be Cicero's most influential legacy, and it can be seen as the origin of all views which, like Kant's, seek to give an account of why justice must at the very least require a kind of formal legality yielding universal rights and duties of justice.[69] I would like to conclude with a few observations on how the consequences of this delineation make themselves felt in the very definition of the state Kant offers us in the *Doctrine of Right* (6:313):

> A state (*civitas*) is a union of a multitude of human beings under laws of right.

This is probably a case where direct historical influence should be assumed. The definition reads like a tightened paraphrase of Cicero's own definition of the state as put forward in his *Republic* or *On the Commonwealth*:

> The state (*res publica*) is the concern of the people (*res populi*), but a people is not every union of men assembled in any way, but a union of a multitude (*coetus multitudinis*) associated with one another through agreement on law (*iuris consensu*) … .[70]

What Cicero has in mind here is a qualification of popular sovereignty. Far from conceiving the people as a constituent power, Cicero puts forward the radical claim that there could not be a people in the relevant sense without there being first a core of constitutional norms—natural external laws accessible a priori, as Kant might say—to agree upon. For Cicero, this kind of law has ultimate authority. It can be recognized and agreed upon by rational beings, which gives us the people. This makes the state dependent on "laws of right" and puts it firmly on the law side of the law-ethics divide.

These laws of right, if we read Kant through our Ciceronian lens, are not however the voluntarist result of the people's agreement—rather, the agreement is the result of the insight of the multitude, which has now been transformed by this agreement into a people (*populus*), a juridical community.[71] Note how once again the people is said to constitute a partnership (the people is *sociatus*), with all the rights and duties implied by this characterization. The underlying laws of the partnership are the laws of right, but these cannot themselves be construed on a contractarian basis. The Ciceronian reading of Kant, then, might lend support to those who read Kant as a natural lawyer, rather than a contractarian.

However, if Kant is indeed read as this kind of Ciceronian natural lawyer, it is important not to impute the wrong concept of natural law: Ciceronian natural law

[69] See, for this consequential distinction between justice and beneficence and its enormously influential legacy, Fleischacker (2004).

[70] Cicero (2017), *On the Commonwealth* 1.39. Kant could not have possibly known this work apart from the fragments available until the rediscovery of a bigger chunk of the text in the early nineteenth century, but the quoted definition was part of all reconstructions of the *Republic* and very widely known and cited indeed.

[71] Cf. Schofield (2021), 67f.

does indeed claim that "laws are not mere conventions, but are reasonable principles" in the sense that they are discoverable by reason; but it need not claim that these principles "depend in part on human nature," as one commentator who reads Kant as a natural law thinker has suggested.[72] Ciceronian natural law would simply insist that the "laws of right" in the state embody duties and rights that are prior to, and independent of, the consensus they breed. Their validity does not depend on agreement, and in this sense our Ciceronian Kant is no contractarian. This leaves intact, and is consistent with, Katrin Flikschuh's cosmopolitan reading that the "essential claim" here "is that subjects are under obligations of Right [to realise cosmopolitan Right] in virtue of their capacity to acknowledge and discharge these obligations within the unavoidable constraints of the earth's spherical surface." But the source of this obligation to exit a condition that is not rightful is now Ciceronian natural law.

I would like to close with one final suggestion. It seems to me that we might make progress on the thorny issue of the relationship between Kant's universal principle of right, on the one hand, and the CI, on the other, if we think along the lines suggested by Kant in the *Perpetual Peace* (1795). In that essay, Kant formulates what is to my mind a compelling idea that seeks to bridge the otherwise independent realms of right and ethics. He puts forward what he calls the "transcendental formula of public right" (8:381):

> The *transcendental formula* of public right: 'All actions relating to the rights of others are wrong if their maxim is incompatible with publicity.' This principle is not to be regarded as *ethical* only (belonging to the doctrine of virtue) but also as *juridical* (bearing upon the right of human beings)." A maxim that must be kept secret threatens everyone with injustice.

Kant is explicit that this is presupposed by both domains, the ethical and the juridical, and it strikes me as an elegant bridge. But this might—again!—be a lopsided, overly Ciceronian view, for it represents an ideal of transparence Cicero shared: Cicero wonders, on the ethical level, whether Epicureans can openly live their Epicureanism; claims that the good person would "not dare to think, let alone do, anything that they would not dare to proclaim"; and elsewhere he defends, on the juridical level of justice in the narrow sense, the obligation to disclose material defects in commercial dealings.[73] While Cicero on the ethical level charges with inconsistency those who show themselves opaque, he is prepared to justify, on the juridical level, coercion against those who act in a way that is incompatible with publicity.

Acknowledgements I would like to thank Francis Cheneval, Claudio Corradetti, Jeff Dymond, Katrin Flikschuh, Signy Gutnick Allen, Andreas Gyr, Nikolas Hächler, Christoph Horn, Felix Koch, Ana Kotarcic, Tat-Fung Lam, and Simon Weber for their valuable advice, help and comments and audiences at the London School of Economics, the University of Zurich Political Philosophy Colloquium and the University of Bonn for discussion and criticism.

[72] Mulholland (1990), 267.

[73] Cicero, *On Ends* 2.74, 76 (Epicureans); 3.77 (the good person is transparent); *On Duties* 3.61 (fraud, defects). See Woolf (2015), 147–150; 195–197.

Funding Open access funding provided by University of Zurich My work on this article received funding from the European Research Council under the European Union's Horizon 2020 research and innovation programme (grant agreement No. 864309).

Data Availability The author certifies that data sharing is not applicable to this article as no datasets were generated or analyzed during the current study, as the work proceeds within a theoretical approach.

Declarations

Conflict of Interest The author declares no competing interests.

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